(vii) The certificate holder ensures the time spent conducting boarding duties applies towards daily duty time limits and is considered when determining crewmember rest requirements.

(viii) The certificate holder does not permit the substitution of a flightcrew member for a flight attendant to interfere with the safe operation of the flight. If all flightcrew members are required to perform preflight duties, passenger boarding must not commence until the flight attendants required by § 121.391(a) are on board the airplane.

(ix) The airplane engines are shut down.

(x) At least one floor-level exit remains open for the deplaning of passengers.

(b) During passenger deplaning, on each airplane for which more than one flight attendant is required by § 121.391(a), the certificate holder may reduce the number of flight attendants required by that paragraph provided:

(1) The airplane engines are shut down;

(2) At least one floor level exit remains open to provide for the deplaning of passengers;

(3) The number of flight attendants on board is at least half the number required by § 121.391(a), rounded down to the next lower number in the case of fractions, but never fewer than one.

(c) If only one flight attendant is on the airplane during passenger boarding or deplaning, that flight attendant must be located in accordance with the certificate holder's FAA-approved operating procedures. If more than one flight attendant is on the airplane during passenger boarding or deplaning, the flight attendants must be evenly distributed throughout the airplane cabin, in the vicinity of the floor-level exits, to provide the most effective assistance in the event of an emergency.

Issued in Washington, DC, on January 14, 2009.

John M. Allen,

Director, Flight Standards Service.

[FR Doc. E9–1140 Filed 1–16–09; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 38

RIN 3038–AC28

Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations

AGENCY: Commodity Futures Trading Commission (''Commission'').

ACTION: Proposed rule; withdrawal of previous proposed rule.

SUMMARY: On January 31, 2007, the Commission adopted its first acceptable practices for Section 5(d)(15) (''Core Principle 15'') of the Commodity Exchange Act (''Act'').[1] As with all other acceptable practices, those for Core Principle 15 are a safe harbor that designated contract markets (''DCMs'') can use to demonstrate core principle compliance. The acceptable practices contain four provisions—three are ''operational provisions'' and one provides necessary definitions, including a definition of ''public director.'' All four provisions were published simultaneously in the **Federal Register** on February 14, 2007, and became effective on March 16, 2007.[2] Existing DCMs were given a two-year phase-in period to implement the acceptable practices or otherwise demonstrate full compliance with Core Principle 15.

On March 26, 2007, the Commission published certain proposed amendments to the definition of public director in the acceptable practices.[3] The Commission received six comment letters, but did not act upon the proposed amendments.[4] Subsequently, on November 23, 2007, the Commission published a stay of the entire acceptable practices for Core Principle 15 in the **Federal Register**.[5] The Commission noted that absent a clear and settled definition of public director, the acceptable practices' three operational provisions were difficult to implement. To bring further clarity to this term and move to finalize the underlying acceptable practices, the Commission hereby withdraws the proposed amendments to the definition of public director published on March 26, 2007, and proposes and seeks public comment on updated proposed amendments to the definition of public director, as described below. This proposal does not amend the other provisions contained in the adopted acceptable practices, including the DCM requirement for a regulatory oversight committee (''ROC'') consisting of all public directors and a board of directors with at least 35% public directors. The November 23, 2007 stay remains in effect until further notice by the Commission.

DATES: Comments on the new proposed amendments should be submitted on or before February 20, 2009.

ADDRESSES: Comments should be sent to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be submitted via e-mail at *secretary@cftc.gov.* ''Regulatory Governance'' must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. Comments may also be submitted at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Rachel F. Berdansky, Deputy Director for Market Compliance, 202–418–5429, or Sebastian Pujol Schott, Special Counsel, 202–418–5641, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, Washington, DC 20581.

SUPPLEMENTARY INFORMATION:

I. Background

A. Procedural History

As noted above, the Commission adopted its first acceptable practices for Core Principle 15 on January 31, 2007. In order to receive the benefit of the safe harbor provided by the acceptable practices, a DCM is required to satisfy all four of the included provisions. The acceptable practices include three operational provisions pertaining to DCM boards of directors, the insulation and oversight of self-regulatory functions, and the composition of disciplinary panels. In particular, the acceptable practices require that a DCM's board be composed of at least 35% public directors. They also require that a DCM's regulatory programs fall under the authority and oversight of a board-level ROC consisting exclusively of public directors. Finally, the acceptable practices require that a DCM's disciplinary panels include at least one public person. These provisions remain unchanged by this proposed rule.

[1] The Act is codified at 7 U.S.C. 1 *et seq.* (2000). The acceptable practices for the DCM core principles reside in Appendix B to Part 38 of the Commission's Regulations, 17 CFR Part 38, App. B. Core Principle 15 states: ''CONFLICTS OF INTEREST—The board of trade shall establish and enforce rules to minimize conflicts of interest in the decision making process of the contract market and establish a process for resolving such conflicts of interest.'' CEA section 5(d)(15). 7 U.S.C. 7(d)(15).

[2] 72 FR 6936 (February 14, 2007).

[3] 72 FR 14051 (March 26, 2007). Under the acceptable practices, the definition of ''public director'' is also relevant to members of DCM regulatory oversight committees (all of whom must be public directors) and to members of DCM disciplinary panels (panelists need not be directors, but panels must include at least one member who meets certain elements of the public director definition).

[4] The comment letters are available on the Commission's Web site, at: *http://www.cftc.gov/lawandregulation/federalregister/federalregistercomments/2007/07-001.html.*

[5] 72 FR 65658 (November 23, 2007).

All three operational provisions are dependent on the presence of one or more ''public'' persons, either public directors serving on the board, public directors serving on the ROC, or public disciplinary panel members serving on adjudicatory bodies. Thus, the acceptable practices include an important fourth provision that defines ''public director'' and also impacts disciplinary panel members. The definition of public director includes two separate elements.[6] The first and most important element is an overarching materiality test, which provides that to qualify as a public director, the director must first be found ''to have no material relationship with the contract market.'' The second element consists of a series of bright-line tests that outline specific relationships that are *per se* material and automatically disqualify a director from service as a public director.

The acceptable practices were published in the **Federal Register** on February 14, 2007, with an effective date of March 16, 2007. Shortly thereafter, the Commission proposed certain clarifying and other amendments to the definition of public director.[7] However, those amendments were limited to the bright-line tests. In proposing those amendments, the Commission emphasized that they should not be read as a diminution of the public representation, conflict-of-interest mitigation, and self-regulatory insulation intended by the acceptable practices. To that end, all three operational provisions in the acceptable practices remained as originally adopted. The Commission received six comment letters in response to the March 26, 2007, proposed amendments, including letters from the National Futures Association (''NFA''); the Futures Industry Association (''FIA''); the CBOE Futures Exchange (''CFE''); the Chicago Board of Trade (''CBOT''); the Chicago Mercantile Exchange (''CME'') and Kansas City Board of Trade (''KCBT'') writing jointly; and Mr. Dennis Gartman (''Gartman'').

The six comment letters included general observations on the merits of the entire acceptable practices for Core Principle 15. They also included comments on specific provisions of the acceptable practices and on the proposed amendments to the definition of public director itself. CFE, for example, stated its belief that the acceptable practices will ''serve to enhance the self regulatory process'' and ''have a positive impact'' on exchange governance and conflicts of interest.[8] At the same time, CFE requested amendments or clarifications with respect to the payments permitted to public directors; allowing overlapping public directors between a DCM and its affiliates; and compensation for director services.

The joint comment letter from CME and KCBT repeated prior arguments against the acceptable practices. Among other things, the two exchanges stated that ''the CEA does not grant the Commission authority to require an arbitrary minimum percentage of 'public' directors on publicly-traded DCM boards.'' [9] They also stated that ''the Act does not grant the Commission power to dictate the formation or conduct of a ROC.'' [10] The Commission has considered these arguments before and addressed them at length in the public record.[11]

The CBOT's comment letter noted that CBOT ''continues to question the need for the acceptable practices in general'' and that it ''believes that the Commission's definition of a public director is overbroad.'' [12] CBOT also elaborated on its specific concerns regarding the definition of public director. The FIA stated that ''FIA is supportive of the acceptable practices adopted by the Commission * * * and compliments the Commission and its staff for their extensive work in this important area.'' [13] However, FIA also asked the Commission to reconsider elements of the bright-line tests for public director. In particular, FIA argued that ''the Commission's $100,000 professional service payment criterion sweeps too broadly insofar as it equates service to a DCM with service to a DCM member.'' [14]

Additional comment letters were received from NFA and from Gartman. NFA noted that the acceptable practices for Core Principle 15 ''do not apply to NFA's governance and NFA again applauds the Commission's decision not to include registered futures association's [sic]'' under these acceptable practices.[15] NFA then provided examples of how the acceptable practices might impact NFA if they were applicable to it. NFA also proposed changes to the definition of public director, including that the Commission ''eliminate * * * criteria based upon payments to 'firms' by 'members'.'' [16] Finally, Gartman summarized his experience in the futures industry and noted that he served as a director of the KCBT. Gartman was concerned that the limitation on payments to public directors would preclude him from serving as a director of the exchange. Gartman stated that he ''clearly earn[s] more than $100,000/year from business directly related to the futures industry, and it is because of that relationship that your new rules will preclude me from remaining as a Director of the KC Board of Trade.'' [17]

The Commission carefully considered the six comment letters noted above. After due deliberation, however, it determined not to act on the proposed amendments or the comments received. Instead, on November 23, 2007, the Commission gave notice via the **Federal Register** that the acceptable practices for Core Principle 15 were stayed indefinitely and in their entirety. Likewise, the two-year compliance period for existing DCMs also was stayed. With the definition of public director in flux, the Commission, with its two new members, concluded that a stay was an appropriate response to the resulting regulatory uncertainty while it considered ways to move forward on the proposal.

In issuing the stay, the Commission explained that it would ''carefully consider its next steps'' with respect to the acceptable practices.[18] It is noteworthy, however, that the Commission did not repeal or in any way diminish the acceptable practices, nor did it abandon its commitment to the principles that they embody. Now, returning again to those principles, the Commission fully reasserts the fundamental philosophy underpinning the acceptable practices for Core Principle 15: that potential conflicts of

[6] While not required under these acceptable practices, the Commission believes DCMs benefit from endeavoring to recruit their public directors from a broad and culturally diverse pool of qualified candidates.

[7] In addition to the clarifying amendments, the Commission also proposed to correct a technical drafting error.

[8] CFE Comment Letter at 1.

[9] CME and KCBT Comment Letter at 2.

[10] *Id.*

[11] The Commission carefully reviewed and addressed challenges to its authority when it originally adopted the acceptable practices for Core Principle 15. *See* 72 FR 6936, 6940–6943 (providing an overview of the Commission's authority to issue the acceptable practices and explaining that the acceptable practices for Core Principle 15: (a) Do not conflict with Core Principle 16; (b) are not contrary to the text of the Act; (c) are not contrary to Congressional intent in enacting the Commodity Futures Modernization Act; (d) no not impermissibly shift the burden to DCMs for demonstrating compliance; (e) do not conflict with the guidance to Core Principle 14; and (f) are justified as a prophylactic measure).

[12] CBOT Comment Letter at 1.

[13] FIA Comment Letter at 1–2.

[14] *Id.* at 2.

[15] NFA Comment Letter at 1.

[16] *Id* at 2.

[17] Gartman Comment Letter at 1.

[18] 72 FR 65658, 65659 (November 23, 2007).

interest in self-regulation by for-profit and publicly-traded DCMs—structural conflicts of interest—can be addressed successfully through appropriate measures embedded in DCMs' governance structures.

B. The Commission Remains Committed to the Acceptable Practices for Core Principle 15

Through this release, and the proposed amendments to the bright-line tests for public director contained herein, the Commission reaffirms its support for public representation on DCM boards of directors and disciplinary panels, including the 35% public board standard first enunciated in the acceptable practices. Likewise, the Commission reaffirms its strong commitment to ROCs, consisting exclusively of public directors, to oversee all facets of DCMs' self-regulatory programs and staff. In short, while the definition of public director is subject to refinement, the importance of public directors' purpose and placement at the center of effective self-regulation remains intact, as do the acceptable practices for Core Principle 15 that provide secure safe harbors for compliance.

Equally important, the Commission remains committed to a definition of public director that is both meaningful and effective. To that end, the Commission hereby withdraws its previous proposal to amend the bright-line tests for public director and seeks public comment on new bright-lines that simplify and clarify the definition of ''public director'' while maintaining its integrity and effectiveness.

The Commission believes that, while the changes summarized below are material, they are fundamentally consistent with the design and purposes of the acceptable practices as originally conceived. Most importantly, the new proposed amendments touch only on the bright-line tests. Thus, the single most important element of the definition of public director—the overarching ''material relationship'' test in section (2)(i)—remains unchanged. As before, ''[t]o qualify as a public director of a contract market, an individual must first be found, by the board of directors, on the record, to have no material relationship with the contract market.'' [19] And, as before, ''[a] material relationship is one that reasonably could affect the independent judgment or decision making of the director.'' [20]

[19] Acceptable practices for Core Principle 15 at (b)(2)(i).

[20] *Id.*

The practical consequence of the amended bright-line tests for public director is that certain relationships that were once automatically disqualifying now must be analyzed under the material relationship test recited above. This in no way diminishes the importance of such relationships. Instead, it makes it incumbent upon DCMs to conduct the necessary facts and circumstances analysis to determine whether a potential public director's relationship with his or her DCM in fact rises to the level of a material relationship. The Commission believes that requiring the DCM to conduct this analysis is consistent with the spirit and intent of the acceptable practices.

Fundamentally, the proposed amendments to the bright-line tests restate the proposition that while certain director-DCM relationships are so clearly material that the Commission must automatically preclude them in public directors, the materiality of all other relationships is best determined by the DCM, as the need arises and the specific facts present themselves. This is especially true with respect to the complex business, social, and other relationships that exist at the highest levels of corporate management and directorship in the financial services industry. In addition, the proposed amendments also serve to streamline and clarify the definition of public director in certain areas, with the understanding that, in those areas, the overarching material relationship test will continue to give the necessary protection to the integrity of the ''public director'' designation.

Finally, while reemphasizing the importance of the material relationship test in the definition of public director, the Commission also notes its continued commitment to specific bright-line tests for director-DCM relationships that, as explained above, are so clearly material that they must automatically preclude service as a public director. Accordingly, the proposed amendments to the bright-line tests retain most of the original substantive content of the tests. As with the original bright-line tests, those now proposed touch on a potential public director's (A) Employment relationships with the contract market; (B) direct and indirect membership relationships with the contract market; (C) direct and indirect compensation relationships with the contract market; and (D) familial relationships with the contract market. The one-year look back period also remains intact, as does the requirement that a DCM disclose to the Commission those members of its board that are public directors and the basis for those determinations. The Commission will also closely scrutinize the implementation of the materiality and bright-line tests when conducting its routine rule enforcement reviews of the exchanges, to ensure that the independence of these public directors is upheld. The proposed amendments are summarized below.

C. The Proposed Amendments

First, in subsection (2)(ii), the Commission proposes to make its vocabulary more consistent with that in subsection (2)(i), but without altering its meaning. As adopted, the provision states that ''* * * a director shall not be considered public if [the bright-line tests are not met].'' The Commission proposes that subsection (2)(ii) should instead read ''* * * a director shall be considered to have a 'material relationship' with the contract market if [the bright-line tests are not met].'' Because the overarching material relationship test in subsection (2)(i) precludes a person with a material relationship from serving as a public director, the purpose and effect of the provision remains unchanged.

Second, in subsections (2)(ii)(A) and (2)(iv), the Commission proposes amendments that will free a DCM's public directors from bright-line tests that they would have failed if they also served as directors of the DCM's affiliates. For this purpose, ''affiliate'' is proposed to be defined in subsection (2)(ii)(A) to include ''parents or subsidiaries of the contract market or entities that share a common parent with the contract market.'' Previously, a DCM's public directors could also serve as directors of its parent company, but not as directors of its subsidiary or sister companies. With this amendment, the latter two relationships no longer suffer automatic exclusion. Thus, for example, an exchange holding company owning two DCMs could place the same public director on the boards of all three entities without falling afoul of the acceptable practices and voluntary safe harbor for Core Principle 15 if the director separately qualified as a public director for each entity.

The Commission cautions, however, that any affiliate relationships must still be scrutinized carefully under the material relationship test in subsection (2)(i). As stated previously, the fact that an interlocking director relationship is no longer automatically precluded under the bright-line tests does not signal that the Commission is no longer concerned with this type of relationship. Instead, the point of analysis is simply shifted from a preemptive, bright-line determination

by the Commission to an overarching material relationship test applied by the DCM and its board of directors. In this context, the Commission notes that certain affiliate relationships could certainly be material. For example, a DCM affiliate that is also subject to the DCM's regulatory authority (*e.g.*, as a member of the DCM or as a participant in its markets) raises obvious concerns.

Third, the Commission proposes to amend subsection (2)(ii)(B) of the definition of public director. As adopted, this subsection precludes DCM members, employees of members, and persons affiliated with members from service as public directors. Currently, the acceptable practices define ''affiliated with a member'' as being an officer or director of a member, or having ''*any other relationship with the member such that his or her impartiality could be called into question in matters concerning the member*'' (emphasis added). As is obvious from the statutory text, subsection (2)(ii)(B) effectively inserts another material relationship determination in what is an otherwise bright-line test. Thus, not only are members and their employees, officers, and directors excluded as public directors, but another category of potential directors—those having any relationship with a member such that his or her impartiality could be called into question in matters concerning the member—is also excluded.

The Commission believes that subsection (2)(ii)(B) should be streamlined in three ways. First, any material relationship determinations made pursuant to section (2) should take place under the overarching material relationship test of subsection (2)(i), and not under the bright-line tests of subsection (2)(ii). Second, subsection (2)(ii)(B) should set forth the exact membership relationships that are automatically precluded. Finally, the subsection should allow the DCM to conduct the necessary analysis of the facts and circumstances to determine whether employment by a member—or, more likely, employment of his or her spouse, parent, child, or sibling—should prove fatal to an otherwise qualified public director.

Each of these changes is reflected in the proposed amendments to subsection (2)(ii)(B). The proposed amendments eliminate the material relationship test embedded in the original subsection and restructure it as a strict bright-line test. The amended subsection also states with precision which membership relationships are automatically considered material relationships: Neither a DCM member nor its officers or directors may serve as public directors of the DCM. Finally, a DCM member's employees are no longer automatically precluded (unless they are employed as officers or directors). As with other amendments proposed herein, however, the Commission again reiterates that the amendments merely shift the point of analysis from the bright-lines of subsection (2)(ii) to the overarching material relationship test of subsection (2)(i). As before, the Commission remains concerned about any relationship between potential public directors and DCM members that could ''affect the independent judgment or decision making of the director.''

Finally, the Commission proposes to amend subsection (2)(ii)(C) of the bright-line tests. Here again, the Commission seeks to simplify and clarify the provision, and to ensure that the bright-line tests are clearly articulated. As adopted, subsection (2)(ii)(C) creates a $100,000 combined annual payments test for potential public directors and the firms with which they may be affiliated (''payment recipients''). A particular payment's relevance to the $100,000 bright-line test depends upon the source (''payment provider'') and nature of the payment. In this regard, the subsection does not specify which payments should count towards the $100,000 annual cap—-all payments or only those for certain types of services. In addition, the subsection also contains potential ambiguity with respect to the universe of potential payment providers and payment recipients.

The first proposed amendment to subsection (2)(ii)(C) defines the nature of ''payment,'' specifying that it is payment for ''legal, accounting, or consulting services.'' The second proposed amendment clarifies that the relevant payment recipients include the potential public director and any firm in which the director is an officer, partner, or director. The third proposed amendment to subsection (2)(ii)(C) clarifies that the relevant payment providers include the DCM and any parent, sister, or subsidiary company of the DCM. Notably, the proposed new payment providers provision no longer captures DCM members or persons or entities affiliated with members, although such relationships should still be analyzed under the overarching materiality test of subsection (2)(i). Finally, the Commission proposes to amend subsection (2)(ii)(C) to take into account payments to a public director in excess of $100,000 by sister and subsidiary companies of the DCM. This is consistent with the Commission's intent, previously articulated, not to automatically prohibit overlapping public directors between DCMs and their affiliates.

II. Related Matters

A. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its actions before issuing a new regulation or order under the Act.[21] By its terms, Section 15(a) requires the Commission to ''consider the costs and benefits'' of a subject rule or order, without requiring it to quantify the costs and benefits of its action or to determine whether the benefits of the action outweigh its costs. Section 15(a) requires that the costs and benefits of proposed rules be evaluated in light of 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 interests considerations. In conducting its analysis, the Commission may, in its discretion, give greater weight to any one of the five enumerated areas of concerns and may determine that notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the CEA.[22]

On February 14, 2007, the Commission published final acceptable practices for Core Principle 15 that included prophylactic measures designed to minimize conflicts of interest in DCMs' decision making processes. The final rulemaking thoroughly considered the costs and benefits of the acceptable practices and responded to comments relating to the costs of adhering to their requirements.

The new amendments herein to the definition of public director are proposed to bring further clarity and finality to the acceptable practices for Core Principle 15. The Commission believes that the proposed amendments are fully consistent with the design and purpose of the acceptable practices as originally conceived. Furthermore, through more consistent, streamlined, and precise articulations, the proposed amendments will facilitate DCMs' implementation of the acceptable practices and thereby further important public interest considerations with

[21] 7 U.S.C. 19(a).

[22] E.g., *Fishermen's Dock Co-op., Inc.* v. *Brown,* 75 F3d 164 (4th Cir. 1996); *Center for Auto Safety* v. *Peck,* 751 F.2d 1336 (D.C. Cir. 1985) (agency has discretion to weigh factors in undertaking cost benefit analyses).

respect to conflicts of interest in DCM self-regulation. In particular, the acceptable practices offer all DCMs a safe harbor for compliance with Core Principle 15, which requires them to ''establish and enforce rules to minimize conflicts of interest in the decision making process of the contract market. * * *'' [23] The acceptable practices' safe harbor is based on the inclusion of public directors on their boards; the creation and empowerment of ROCs consisting exclusively of public directors; and the presence of public persons on DCM disciplinary panels. Thus, each of these provisions depends heavily on a clear and settled definition of public director. The Commission believes that the proposed amendments will not impose any additional costs upon DCMs. To the contrary, they may reduce the costs of compliance through improvements in the bright-line tests for public director, such that the tests truly operate as bright-lines and the definition of public director is well-settled.

After considering the above mentioned factors and issues, the Commission has determined to propose these amendments to the acceptable practices for Core Principle 15. The Commission specifically invites public comment on its application of the criteria contained in Section 15(a) of the Act and further invites interested parties to submit any quantifiable data that they may have concerning the costs and benefits of the proposed amendments to the acceptable practices for Core Principle 15.

B. Paperwork Reduction Act of 1995

These proposed amendments to the acceptable practices for Core Principle 15 will 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 44 U.S.C. 3501, *et seq.* Accordingly, the Paperwork Reduction Act does not apply. We solicit comments on the accuracy of our estimate that no additional recordkeeping or information collection requirements or changes to existing collection requirements would result from the amendments proposed herein.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* requires federal agencies, in promulgating rules, to consider the impact of those rules on small entities. The proposed amendments to the Acceptable Practices for Core Principle 15 affect DCMs. The Commission has previously determined that DCMs are not small entities for purposes of the Regulatory Flexibility Act.[24] Accordingly, the Acting Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed amendments to the acceptable practices will not have a significant economic impact on a substantial number of small entities.

III. Text of Proposed Amendments

List of Subjects in 17 CFR Part 38

Commodity futures, Reporting and recordkeeping requirements.

In light of the foregoing, and pursuant to the authority in the Act, and in particular, Sections 3, 5, 5c(a) and 8a(5) of the Act, the Commission hereby proposes to amend Part 38 of Title 17 of the Code of Federal Regulations as follows:

PART 38—DESIGNATED CONTRACT MARKETS

1. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 2, 5, 6, 6c, 7, 7a–2, and 12a, as amended by Appendix E of Public Law 106–554, 114 Stat. 2763A–365.

2. In Appendix B to Part 38 revise paragraphs (b)(2)(ii) through (b)(2)(v) of the acceptable practices for Core Principle 15 to read as follows:

Appendix B to Part 38—Guidance on, and Acceptable Practices in, Compliance With Core Principles

* * * * *

Core Principle 15 of section 5(d) of the Act: CONFLICTS OF INTEREST

* * * * *

(b) * * *

(2) * * *

(ii) In addition, a director shall be considered to have a ''material relationship'' with the contract market if any of the following circumstances exist:

(A) The director is an officer or employee of the contract market or an officer or employee of its affiliate. In this context, ''affiliate'' includes parents or subsidiaries of the contract market or entities that share a common parent with the contract market;

(B) The director is a member of the contract market, or an officer or director of a member. ''Member'' is defined according to Section 1a(24) of the Commodity Exchange Act and Commission Regulation 1.3(q);

(C) The director, or a firm with which the director is an officer, director, or partner, receives more than $100,000 in combined annual payments from the contract market, or any affiliate of the contract market (as defined in Subsection (2)(ii)(A)), for legal, accounting, or consulting services. Compensation for services as a director of the contract market or as a director of an affiliate of the contract market does not count toward the $100,000 payment limit, nor does deferred compensation for services prior to becoming a director, so long as such compensation is in no way contingent, conditioned, or revocable;

(D) Any of the relationships above apply to a member of the director's ''immediate family,'' i.e., spouse, parents, children and siblings.

(iii) All of the disqualifying circumstances described in Subsection (2)(ii) shall be subject to a one-year look back.

(iv) A contract market's public directors may also serve as directors of the contract market's affiliate (as defined in Subsection (2)(ii)(A)) if they otherwise meet the definition of public director in this Section (2).

(v) A contract market shall disclose to the Commission which members of its board are public directors, and the basis for those determinations.

* * * * *

Issued in Washington, DC, on January 12, 2009 by the Commission.

David Stawick,

Secretary of the Commission.

Concurring Statement of Commissioner Jill E. Sommers Regarding the Withdrawal of Previously Proposed Amendments to the Acceptable Practices for Core Principle 15 and Solicitation of Public Comments on New Proposed Amendments

I fully support the Commission's decision to issue these proposed amendments to the bright-line tests for determining when a board member has a material relationship with an exchange such that he or she is disqualified from serving as a public director. The proposed amendments attempt to cure certain ambiguities and complexities that existed in the acceptable practices adopted by the Commission on January 31, 2007, and the proposed amendments thereto published on March 26, 2007. I commend Commission staff for their dedication to this important project and their resolve, through several changes in Commission membership, to get it right. I believe the amendments proposed today provide a workable method of discerning the existence of those relationships that should be deemed automatically ''material,'' and appropriately leave to the exchanges the responsibility for determining whether other circumstances not specified in the bright-line tests may give rise to potential conflicts of interest.

I write separately, however, to express my disagreement with issuing the statement contained in footnote six of

[23] 7 U.S.C. 7(d)(15).

[24] *See* Policy Statement and Establishment of Definitions of ''Small Entities'' for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619 (Apr. 30, 1982).

the proposal, that ''the Commission believes DCMs benefit from endeavoring to recruit their public directors from a broad and culturally diverse pool of qualified candidates.'' The purpose of the acceptable practices is to ''ensure that there is adequate independence within [exchange] board[s] to insulate [their] regulatory functions from the interests of the exchange's management, members and other business interests of the market itself.'' 71 FR 38740 (July 7, 2006). It is not clear to me how recruiting directors from a culturally diverse pool of candidates advances that goal, nor is it a given that seating a well-qualified board that is culturally diverse is something that may be practicably accomplished. My primary objection, however, is based on the fact that we have no legal authority to issue pronouncements on the subject. We are not a commission of general jurisdiction. Our authority and oversight responsibilities are specifically limited by statute and do not include the promotion of equal employment opportunity. Moreover, to the extent the Commission may be suggesting that exchanges consider factors such as race, gender, national origin, or religion in selecting public directors, we may be encouraging activity that could potentially violate Title VII of the Civil Rights Act of 1964.

Concurring Statement of Commissioner Bart Chilton Regarding the Withdrawal of Previously Proposed Amendments to the Acceptable Practices for Core Principle 15 and Solicitation of Public Comments on New Proposed Amendments

I concur in the Commission's issuance of the above-referenced action. I write separately, however, to comment on certain aspects of the proposal of particular interest to me.

First, I am gratified to see language in the proposal relating to my longstanding request that we note to designated contract markets the benefits of diversity in recruiting public directors. While this is, as stated, not a requirement under the acceptable practices, it is quite obviously a laudable and attainable goal, and one that should be encouraged.

Second, I would ask commenters to respond specifically as to whether the Commission has included within the proposal all appropriate decision-making bodies at designated contract markets, or whether the class should be broadened to include entities other than boards of directors, executive committees or similarly empowered bodies, regulatory oversight committees, and disciplinary panels.

Lastly, I note with some concern the timeline of this proposal. In November 2007, the Commission stayed the ''final'' acceptable practices that had been issued in February 2007. This was a necessary action, although unfortunate in that it created further delay in an already protracted and flawed process. Even more unfortunate, swift action was promised on this proposal in December 2007, yet it has taken more than a full year to see any progress. As public servants, we can and should do better to serve American consumers and businesses.

[FR Doc. E9–891 Filed 1–16–09; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Parts 1300, 1301, 1304, 1305, and 1307

[Docket No. DEA–316A]

RIN 1117–AB18

Disposal of Controlled Substances by Persons Not Registered With the Drug Enforcement Administration

AGENCY: Drug Enforcement Administration (DEA), Justice.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: In response to concerns raised by individuals, public and private organizations, the healthcare industry, and the law enforcement community, the Drug Enforcement Administration (DEA) is soliciting information on the disposal of controlled substances dispensed to individual patients, also defined as ultimate users, as well as long term care facilities. DEA is seeking options for the safe and responsible disposal of dispensed controlled substances in a manner consistent with the Controlled Substances Act and its implementing regulations.

DATES: Written comments must be postmarked on or before March 23, 2009, and electronic comments must be sent on or before midnight Eastern time March 23, 2009.

ADDRESSES: To ensure proper handling of comments, please reference ''Docket No. DEA–316'' on all written and electronic correspondence. Written comments being sent via regular or express mail should be sent to the Drug Enforcement Administration, *Attention:* DEA Federal Register Representative/ODL, 8701 Morrissette Drive, Springfield, VA 22152. Comments may be sent to DEA by sending an electronic message to *dea.diversion.policy@usdoj.gov*. Comments may also be sent electronically through *http://www.regulations.gov* using the electronic comment form provided on that site. An electronic copy of this document is also available at the *http://www.regulations.gov* Web site. DEA will accept attachments to electronic comments in Microsoft Word, WordPerfect, Adobe PDF, or Excel file formats only. DEA will not accept any file formats other than those specifically listed here.

Please note that DEA is requesting that electronic comments be submitted before midnight Eastern time on the day the comment period closes because *http://www.regulations.gov* terminates the public's ability to submit comments at midnight Eastern time on the day the comment period closes. Commenters in time zones other than Eastern time may want to consider this so that their electronic comments are received. All comments sent via regular or express mail will be considered timely if postmarked on the day the comment period closes.

FOR FURTHER INFORMATION CONTACT: Mark W. Caverly, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, 8701 Morrissette Drive, Springfield, VA 22152, Telephone (202) 307–7297.

SUPPLEMENTARY INFORMATION:

Posting of Public Comments: Please note that all comments received are considered part of the public record and made available for public inspection online at *http://www.regulations.gov* and in the Drug Enforcement Administration's public docket. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online or made available in the public docket, you must include the phrase ''PERSONAL IDENTIFYING INFORMATION'' in the first paragraph of your comment. You must also place all the personal identifying information you do not want posted online or made available in the public docket in the first paragraph of your comment and identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online or made available in the