

suggested that the standard of failure to provide requested information should be revised to "willful failure to provide" requested information. In the alternative, MFA suggested that the prohibition should be limited to the prohibition of the use of bunched orders, rather than a blanket prohibition of trading on all contract markets. John Henry & Company echoed MFA's concern, suggesting that the standard of failure to provide requested information should be revised to "willful failure to provide."

The Commission recognizes that prohibiting account managers from trading on contract markets would have a serious impact on the account manager and possibly the account manager's customers. The Commission notes that this approach is the same as that in similar provisions in the Act and rules and that the prohibition can only be invoked by the Commission, itself, when it has reason to believe that an account manager has failed to provide information requested pursuant to paragraph (a-1)(5)(iv)(A) or (a-1)(5)(iv)(B).²⁶ In addition, account managers will have the opportunity to have a hearing to contest the prohibition.²⁷ Thus, weighing the impact of this provision on account managers with the interest of protecting customers, the Commission has determined to adopt the provision as proposed, that a failure to answer a Commission request for information will result in a prohibition of trading on all contract markets.

The amended rule also provides that FCMs must retain certain records. Pursuant to amended Rule 1.35(a-1)(5)(iv)(C), FCMs that execute trades for orders eligible for bunching, or that carry accounts to which contracts executed for such orders are allocated, must maintain records that identify each order subject to post-execution allocation and the accounts to which contracts executed for such order are allocated.²⁸

In order for FCMs to keep records required pursuant to the rule, account managers employing post-execution allocation procedures generally would be expected to forward written allocation instructions to the clearing

firm by facsimile, e-mail, or other electronic means. In those instances in which allocation instructions are furnished orally, the FCM must create a written record of the account manager's instructions. In each case, these records will be available to the Commission and other regulatory agencies or self-regulatory organizations.

F. Account Certification and Self Regulatory Organization Rule Enforcement and Audit Procedures

As noted above, the Commission is clarifying the relative responsibilities of FCMs and account managers. Therefore, the amended rule, as proposed, deletes the requirement that account managers send certifications of their compliance with Rule 1.35(a-1) to FCMs. In addition, as the Commission is converting the recordkeeping requirement into an information availability requirement; the amended rule, as proposed, deletes the requirement that self regulatory organizations must adopt procedures to determine compliance with the previous rule's recordkeeping requirements.

III. Other Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, requires that agencies, in promulgating rules, consider the impact of those rules on small businesses. The Commission has previously determined that contract markets²⁹, futures commission merchants³⁰, registered commodity pool operators³¹ and large traders³² are not "small entities" for purposes of the Regulatory Flexibility Act. Although the Commission did not receive any comments on the impact of the amended rule on "small entities," some account managers may be considered "small entities" for the purposes of the Regulatory Flexibility Act. In such cases, the amendments to the rule will have the net effect of decreasing the regulatory burden for such small entities. In addition, the Commission has previously determined to evaluate within the context of a particular rule proposal whether all or some commodity trading advisors should be considered "small entities" for purposes of the Regulatory Flexibility Act and, if so, to analyze the economic impact on commodity trading advisors of any such rule at that time.³³ Commodity trading advisors who would place eligible

orders pursuant to these procedures would likely do so for multiple clients and would likely be participating as investment managers in more than one financial market. Accordingly, the Commission does not believe that commodity trading advisors should be considered "small entities" for purposes of this rule.

B. Paperwork Reduction Act of 1995

This rulemaking contains information collection requirements. As required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, the Commission has submitted a copy of the rule amendments to the Office of Management and Budget (OMB) for its review. No comments were received in response to the Commission's invitation in the proposed rules to comment on any potential paperwork burden associated with this regulation.

C. Cost-Benefit Analysis

Section 15(a) of the Act requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) simply requires the Commission to "consider the costs and benefits" of its action.

Section 15(a) further specifies that costs and benefits shall be evaluated in light of five broad areas of market and public concern: Protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The amended rule is intended to facilitate increased flexibility and consistency, and to rationalize application of Commission regulations to entities subject to other regulatory frameworks. The Commission is considering the costs and benefits of these rules in light of the specific provisions of section 15(a) of the Act:

1. Protection of market participants and the public.

While amended Rule 1.35(a-1)(5) is expected to lessen the burden imposed

²⁶ See, 17 CFR part 21 (2002).

²⁷ Similar statutory provisions and Commission rules have the same standard for failure to provide information. See, e.g., 7 U.S.C. § 2(h)(5)(C)(ii) (2001), 17 CFR 21.03 (2002).

²⁸ The recordkeeping provisions of Rule 1.31 would still apply. 17 CFR 1.31 (2002). It is important to note that at the time of order placement with the FCM, current rules require that a customer identification code must be placed on an order ticket, unless the order is bunched. See, 17 CFR 1.35(a-1) (2002).

²⁹ 47 FR 18618, 18619 (April 30, 1982).

³⁰ *Id.*

³¹ *Id.* at 18620.

³² *Id.*

³³ *Id.*