c. By revising the phrase ''N-Methyl-3-piperidonol'' to read ''N-Methyl-3-piperidinol'' in paragraph (k)(26).

94. Section 770.3(c)(1) is amended:

a. By revising the phrase ''is subject to the EAR is the same manner'' to read ''is subject to the EAR in the same manner''; and

b. By revising the phrase ''described at § 732.4 of the EAR.'' to read ''described in § 734.4 of the EAR.''.

95. Section 770.3 is further amended:

a. By revising the phrase ''described at § 732.4 of the EAR.'' to read ''described in § 734.4 of the EAR.'', in paragraph (c)(2);

b. By revising paragraph (d)(1)(i)(B);

c. By revising paragraph (d)(1)(ii); and

d. By revising paragraph (d)(2)(ii), as follows:

**§ 770.3 Interpretations related to exports of technology and software to destinations in Country Group D:1.**

* * * * *

(d) * * *

(1) * * *

(i) * * *

(B) Can we send an engineer (with knowledge and experience) to the customer site to perform the installation or repair, under the provisions of License Exception TSU for operation technology and software described in § 740.13(a) of the EAR, if it is understood that he is restricted by our normal business practices to performing the work without imparting the knowledge or technology to the customer personnel?

(ii) *Answer 1.* Export of technology includes release of U.S.-origin data in a foreign country, and ''release'' includes ''application to situations abroad of personal knowledge or technical experience acquired in the United States.'' As the release of technology in the circumstances described here would exceed that permitted under the License Exception TSU for operation technology and software described in § 740.13(a) of the EAR, a license would be required even though the technician could apply the data without disclosing it to the customer.

(2) * * *

(ii) *Answer 2.* (A) Provided that this is your normal training, and involves technology contained in your manuals and standard instructions for the exported equipment, and meets the other requirements of License Exception TSU for operation technology and software described in § 740.13(a), the training may be provided within the limits of those provisions of License Exception TSU. The location of the training is not significant, as the export occurs at the time and place of the actual transfer or imparting of the technology to the customer's engineers.

(B) Any training beyond that covered under the provisions of License Exception TSU for operation technology and software described in § 740.13(a), but specifically represented in your license application as required for this customer installation, and in fact authorized on the face of the license or a separate technology license, may not be undertaken while the license is suspended or revoked.

## PART 772—[AMENDED]

96. Part 772 is amended:

a. By revising the citation reference ''§ 748.4'' to read § 748.5'' in the definition for ''Applicant'';

b. By revising the phrase ''perform (a) specific function'' to read ''perform a specific function'' in the definition for ''Assembly'';

c. By revising the definition for ''CCL Group'';

d. By revising the definition for ''Category'';

e. By revising the phrase ''application for International Import Certificate; International Import Certificate; Delivery Verification Certificate'' to read ''application for International Import Certificate; Delivery Verification Certificate'' in the definition for ''Export control document'';

f–g. By revising the definition of ''Required'';

h. By revising the phrase ''Mixed sequence manipulation'' to read ''Fixed sequence manipulation'' as it appears in paragraph (b) to the Note under the definition for ''Robot'';

i. By revising the phrase ''commodities, Software, technology'' to read ''commodities, software, technology'' in the definition for ''Subject to the EAR'';

j. By revising the phrase ''by low of elongation'' to read ''by low elongation'' in the definition for ''Superplastic forming''; and

k. By revising the citation reference ''§ 748.4(b)(5)'' to read ''§ 748.5(e)'', in the definition for ''Ultimate Consignee''.

## PART 772—DEFINITIONS OF TERMS

* * * * *

*CCL Group.* The Commerce Control List (CCL) is divided into 10 categories. Each category is subdivided into five groups, designated by the letters A through E: (A) Equipment, assemblies and components; (B) Test, inspection and production equipment; (C) Materials; (D) Software; and (E) Technology. See § 738.2(b) of the EAR.

* * * * *

*Category.* The Commerce Control List (CCL) is divided into ten categories: (0) Nuclear Materials, Facilities and Equipment, and Miscellaneous; (1) Materials, Chemicals, ''Microorganisms'', and Toxins; (2) Materials Processing; (3) Electronics Design, Development and Production; (4) Computers; (5) Telecommunications and Information Security; (6) Sensors; (7) Navigation and Avionics; (8) Marine; (9) Propulsion Systems, Space Vehicles, and Related Equipment. See § 738.2(a) of the EAR.

* * * * *

*''Required''.* As applied to ''technology'' or ''software'', refers to only that portion of ''technology'' or ''software'' which is peculiarly responsible for achieving or extending the controlled performance levels, characteristics or functions. Such ''required'' ''technology'' or ''software'' may be shared by different products. For example, assume product ''X'' is controlled if it operates at or above 400 MHz and is not controlled if it operates below 400 MHz. If production technologies ''A'', ''B'', and ''C'' allow production at no more than 399 MHz, then technologies ''A'', ''B'', and ''C'' are not ''required'' to produce the controlled product ''X''. If technologies ''A'', ''B'', ''C'', ''D'', and ''E'' are used together, a manufacturer can produce product ''X'' that does not operate at or above 400 MHz. In this example, technologies ''D'' and ''E'' are ''required'' to make the controlled product and are themselves controlled under the General Technology Note. (See the General Technology Note.)

* * * * *

Dated: May 1, 1997.

**Sue E. Eckert,**

*Assistant Secretary for Export Administration.*

[FR Doc. 97–11727 Filed 5–8–97; 8:45 am]

BILLING CODE 3510–33–P

## COMMODITY FUTURES TRADING COMMISSION

## 17 CFR Part 1

## Bunched Orders and Account Identification

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of Interpretation and Approval Order.

**SUMMARY:** The Commodity Futures Trading Commission (''Commission'') hereby is issuing an Interpretation regarding the account identification requirement of Commission Regulation

1.35(a–1)(2)(i) as it pertains to the practice of combining orders for different accounts into a single order for placement and execution, *i.e.*, ''block'' or ''bunched'' orders. The Commission simultaneously is issuing an Order approving the National Futures Association (''NFA'') Interpretive Notice to NFA Compliance Rule 2–10 Relating to the Allocation of Block Orders for Multiple Accounts (''NFA Notice'').[1] This Interpretation provides that, with respect to bunched orders, compliance with the guidance provided in the NFA Notice, incorporated herein, and with the Commission guidance provided in this Interpretation, will be deemed by the Commission to be compliance with the account identification requirement of the above-cited regulation. The Commission also is providing an opportunity for comment prior to this Interpretation and Approval Order becoming effective.

**DATES:** This Interpretation and Approval Order, subject to the Commission's consideration of any comments received, shall become effective simultaneously on June 9, 1997.

**ADDRESSES:** Interested person should submit their views and comments to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st St., NW., Washington, DC 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418–5521, or by electronic mail to secretary@cftc.gov. Reference should be made to bunched orders and account identification.

**FOR FURTHER INFORMATION CONTACT:** Duane C. Andresen, Special Counsel, Division of Trading and Markets, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st St., NW., Washington, DC 20581. Telephone: (202) 418–5490.

**SUPPLEMENTARY INFORMATION:**

## I. Introduction

This Interpretation sets forth certain account documentation procedures under which bunched orders may be placed, recorded, executed, ''given up'' to multiple clearing firms, where applicable, and allocated to customer accounts, which the Commission will deem as sufficient to satisfy the account identification requirement of Regulation 1.35(a–1)(2)(i). By this Approval Order, the Commission, pursuant to Section 17(j) of the Commodity Exchange Act, is approving the NFA Notice. The Commission also is setting forth additional guidance under which bunched orders may be handled, to include situations where certain of the NFA procedures may not be applicable in that they do not apply to registrants who are not members of the NFA or under the supervision of NFA members.[2]

The Commission's issuance of this Interpretation and Approval Order is based on its understanding that (1) commodity trading advisors (''CTA''), futures commission merchants (''FCM''), introducing brokers (''IB''), consistent with their responsibilities hereunder, will maintain documentation sufficient to demonstrate that the procedures authorized hereby are in fact followed, and (2) affected registrants, exchanges and the NFA will have effective systems in place that are used to monitor compliance and that appropriate procedures will be in place to address apparent noncompliance. In this connection, Commission staff recently has reviewed relevant audit and compliance procedures at the NFA and exchanges with respect to account identification for bunched orders. Commission staff also, on an ongoing basis, has encouraged the implementation of audit enhancements to address the types of allocation abuses observed in connection with exchange and Commission investigations regarding preferential allocation and other forms of allocation fraud.

In general, as specified herein with respect to bunched orders, the floor order account identification requirement of Commission Regulation 1.35(a–1)(2)(i) may be met by prefiling the appropriate order allocation procedures with a registrant clearing or executing the trades, the NFA or an exchange. That regulation's account identification requirement also may be met by the contemporaneous transmission of such allocation instructions with the order to a registrant clearing or executing the trades, either verbally or, consistent with the methodology described in the NFA Notice, electronically. These prefiled procedures or contemporaneous instructions also must include a methodology to allocate to those accounts orders that may be filled at multiple prices (''split fills'') or at less than specified quantities (''partial fills'') and, where applicable, to allocate give ups to multiple clearing firms, including a methodology to allocate split and partial fills among those clearing firms. CTAs, FCMs, IBs, their respective associated persons (''AP''), and FBs, as applicable, who do not identify the ultimate customer(s) and appropriate quantity on a floor order must satisfy the standards set forth in the NFA Notice and the Commission guidance provided herein to be in compliance with Commission Regulation 1.35(a–1)(2)(i). Compliance with the express terms of Regulation 1.35(a–1)(2)(i) will continue to be required in all cases where the procedures referenced in this Interpretation are not applicable or are not followed.

## II. Background

Commission Regulation 1.35(a–1)(1) requires that each FCM and each IB receiving a customer order immediately prepare a written record of the order which includes certain account identification. Regulation 1.35(a–1)(2)(i) requires that each member of a contract market who receives a customer's order on the floor of a contract market that is not in the form of a written record also immediately prepare a written record of such order, including certain account identification. Under that rule, the floor order must include the account number for the ultimate customer for whom the order is placed or an identifying code which is directly linked to that specific customer account. This requirement has existed since Regulation 1.35(a–1)(2) became effective March 24, 1972.[3] Since this regulation was adopted, there have been changes in the manner in which orders are placed, executed and cleared on the futures markets that reflect changes in the manner of doing business and in the types of entities using these markets. With the growth of managed funds business, in which multiple accounts are advised by one adviser using one or more trading strategies, the practice of bunching multiple orders for different accounts into a single order for placement and execution has increased dramatically. In addition, the unbundling of clearing and execution services has resulted in the increasingly common use of give up arrangements, whereby orders are executed by one or more FCMs and given up for clearing to other FCMs. While the CTA selects the executing FCM, the CTA's customers may select different FCMs for clearing purposes.

[1] The NFA Notice is published herein as paragraph III to this Interpretation and Approval Order.

[2] The interpretation reflected herein pertains only to bunched orders as defined in this Interpretation or the NFA Notice. All other customer orders placed for execution must be documented in accordance with the express terms of Regulation 1.35(a–1)(2)(1) and applicable exchange rules.

[3] 37 FR 3802 (February 23, 1972). Regulation 1.35(a–1)(2) was amended effective August 30, 1993 and was redesignated as 1.35(a–1)(2)(i). 58 FR 31162 (June 1, 1993). The requirement to include customer account identification on the floor order remained unchanged.

Previously, to accommodate these changes in industry practice, Commission staff interpreted Regulation 1.35(a–1)(2)(i) to permit the placement and execution of bunched orders provided that the person placing the bunched order provided at the time of entry a single series designation that identified all accounts included in the bunched order and a predetermined allocation formula. That interpretation required that the allocation formula be provided to the FCM prior to or contemporaneously with the placement of the bunched order, specify by account number those accounts to which it would apply, specify the number of contracts to be allocated to each account, and be designed to provide fair and equitable treatment of the accounts such that no account or group of accounts received consistently favorable or unfavorable treatment. That interpretation of Regulation 1.35(a–1)(2)(i) consistently has been provided in response to specific inquiries and, in recognition that written regulatory guidance in this area may be necessary, was published in the **Federal Register** as paragraph (5) of a proposed amendment to Regulation 1.35(a–1).[4] In issuing this Interpretation, the Commission expressly is adopting procedures consistent with the staff interpretation as clarified herein and withdrawing proposed Regulation 1.35(a–1)(5).

## III. The NFA Notice

The NFA Notice addresses three primary issues: (1) The manner and timing of the identification of the allocation formula; (2) principles that govern the allocation of trades; and (3) bunched orders executed on a give up basis, and reads in full as follows:

### NFA Compliance Rule 2–10; Interpretive Notice Relating to the Allocation of Block Orders for Multiple Accounts

CFTC Regulation 1.35, which NFA Compliance Rule 2–10 adopts by reference, requires that each FCM receiving a customer order immediately prepare a written record of the order which includes an appropriate account identification. NFA Compliance Rule 2–4 requires CTA Members to provide FCMs with that required information. The purpose of the regulation is to prevent various forms of customer abuse, such a fraudulent allocation of trades, by providing an adequate audit trail which allows customer orders to be tracked at every step of the order processing system. Since this regulation was originally adopted, however, there have been dramatic changes in the way business is done. With the explosive growth of the managed funds business and the increasing use of ''give-up'' agreements, it is not at all uncommon for some CTAs to place block orders for hundreds of accounts on markets around the world, with orders executed by one or more FCMs and cleared by other FCMs. How the basic requirements of CFTC Regulation 1.35 apply to block orders for multiple accounts (''block or bunched order'') has been the source of considerable difficulty and confusion. While this Notice does not attempt to address all of the issues which can arise in this context, it does provide guidance on commonly recurring questions.

With respect to block orders, CFTC Regulation 1.35 has been interpreted to require that, at or before the time the order is placed, the FCM must be provided with information which identifies the accounts included in the block order and which specifies the number of contracts to be allotted to each account. In most instances, a CFTA can verbally provide all of that information contemporaneously with the placement of the order. Some of the time, however, this is not practical. Verbal transmission of numerous account numbers and allocation information could result in price slippage in filling block market orders. Most CTAs can deal with this problem by pre-filing with the FCM standing instructions which contain all of the necessary information.

For a limited number of larger and more sophisticated CTAs, however, pre-filing standing instructions may not be practicable either. For these CTAs, although their basic allocation methodology does not change, the specific allocation instructions produced by the methodology may change on a daily basis. For example, a large CTA with a dynamic trading program may regularly change its order size based upon market volatility and historical price data. Certainly, if a CTA changes its order size, then the precise number of contracts allocated to each account within the CTA's trading program will also change. Other factors could cause regular changes to a CTA's order size and/or allocation breakdowns such as the number of accounts which open and close and any additions and withdrawals made in existing accounts. In the above instances, although the specific application of a CTA's allocation methodology to the universe of its accounts may cause allocation adjustments, the allocation methodology itself remains constant. Because the methodology must meet the standards of this Notice, it must be designed to provide non-preferential treatment for all accounts. Though these CTAs could provide the allocation information to their FCMs in advance of each order, this information could disclose their trading strategies, which they are obviously reluctant to do.

In general, then, there are two alternatives to the verbal filing of all account identification data contemporaneously with order placement:

(1) pre-filing of instructions for identification of accounts included in block orders and the allocation of executed block orders to accounts; and

(2) under the stringent requirements described below, the contemporaneous filing of allocation instructions via electronic transmission.

This Interpretive Notice clarifies how either approach can be implemented consistent with the requirements of CFTC Regulation 1.35.

### Pre-Filing of Allocation Instructions

Allocation instructions for trades made through block orders for multiple accounts must deal with two separate issues. The first, which arises in all such orders, involves the question of how the total number of contracts should be allocated to the various accounts included in the block order. The second involves the allocation of split or partial fills. For example, a CTA may place a block order of 100 contracts for multiple accounts. In many instances, however, a market order for 100 contracts may be filled at a number of different prices. Similarly, if an order is to be filled at a particular price, the FCM may be able to execute some but not all of the 100 lot order. In either example, the question arises of how the different prices or the contracts in the partial fill should be allocated among the accounts included in the block order.

The same set of core principles govern the procedures to be used in handling both of these issues. Any procedure for the general allocation of trades or the allocation of split and partial fills must be:

- Designed to meet the overriding regulatory objective that allocations are non-preferential, such that no account or group of accounts receive consistently favorable or unfavorable treatment;
- Sufficiently objective and specific that the appropriate allocation for any given trade can be verified in any audit by NFA, an exchange DSRO, the CFTC or the FCM's and CTA's own accountant; and
- Consistently applied by the Member firm.

In performing audits, we have noted that Members employ a wide variety of methods to allocate split and partial fills, some of which satisfy the standards stated above and some of which do not. The following examples of procedures for the allocation of split and partial fills generally satisfy the standards stated above.

*Example #1—Rotation of Accounts*

One basic allocation procedure involves a rotation of accounts on a regular cycle, usually daily or weekly, which receive the most favorable fills. For example, if a firm has 100 accounts trading a particular trading program, in the first phase of the cycle, Account #1 receives the best fill, Account #2 the second best, etc. In phase 2 of the cycle, Account #2 receives the best fill and Account #1 moves to the end of the line and receives the least favorable fill.

*Example #2—Random Allocation*

Some firms prepare on a daily basis a computer generated random order of accounts and allocate the best price to the first account on the list and the worst to the last. This method would satisfy the standards stated above.

*Example #3—Highest Prices to the Highest Account Numbers*

Some firms rank accounts in order of their account numbers and then allocate the highest fill prices to the accounts with the

[4] 58 FR 26270 (May 3, 1993).

highest account numbers. Any advantage the higher numbered accounts enjoy on the sell order are theoretically offset by the disadvantage on the buy orders. Although under certain market conditions this may not always be true, the method generally complies with the standards.

*Example #4—Average Price and Quantity*

With regard to split and partial fills, allocations made pursuant to exchange rules which provide for the allocation of average prices and quantities in block orders for multiple accounts would, of course, be acceptable. In addition, certain firms may have internal programs which calculate the average price for each block order and allocate the actual fill prices among the accounts included in the order to approximate, as closely as possible, the average fill price. These internal programs must specifically satisfy the standards stated above and be documented by the Member firm.

Though the examples cited above are the ones NFA most commonly sees in audits, others may offer comparable treatment. We would also note that the appropriateness of any particular method for allocating split and partial fills depends on the CTA's overall trading approach. For example, a daily rotation of accounts may satisfy the general standards for CTAs who trade on a daily basis but inappropriate for CTAs who trade less frequently. In addition, certain variations of these basic methods would not satisfy those requirements. For example, it would not be acceptable for the CTA to deviate from the regular rotation to accommodate an account whose performance is lagging behind others in the same program. This would inject the CTA's subjective judgment into the process, would render the allocation impossible to duplicate in the audit process and would open the potential for customer abuse.

One related issue which has generated some confusion is whether the responsibility for the allocation of split and partial fills rests with the CTA or with the FCM. The CTA certainly has the sole responsibility for ensuring that the procedures are appropriate in light of its approach to trading. With respect to the actual implementation of the procedures, since the CTA is directing the trading in the accounts, the responsibility for allocating split and partial fills among the accounts should rest with the CTA. However, there is nothing under NFA rules to preclude an FCM from agreeing to undertake this responsibility, whether it clears or executes the trades, pursuant to either its own procedures or to those supplied by the CTA. Any division of responsibilities agreed to by the FCM and CTA should be clearly documented.

There is also good deal of confusion on how the basic principles of CFTC Regulation 1.35 apply to block orders executed on a ''give-up'' basis, a process which was essentially unknown when Regulation 1.35 was originally adopted. Subject to exchange rules, in any given block order there may be multiple executing FCMs, multiple clearing FCMs or multiple FCMs serving each of these functions. The exact form of customer identification which the FCM must receive from the CTA under Regulation 1.35 may vary depending on the FCM's role in filling the order. Essentially, each FCM must receive sufficient information to allow it to perform its function. For executing FCMs, this includes, at a minimum, the number of contracts to be given up to each clearing FCM and instructions for allocation of split and partial fills among these FCMs. Information concerning the number of contracts to be allocated to each account included in the block order must be provided to the FCM which will carry out those instructions, which, in most cases, will be the FCM clearing the accounts. All of this information must be provided at or before the time the order is placed and could be provided by pre-filing a set of instructions. If the pre-filed instructions for the general allocation or the allocation of split and partial fills meet the standards set forth in this Notice, then the clerical task of implementing the instructions could be performed by either the FCM or the CTA.

If that clerical function is performed by the CTA, this does not suggest that the FCM is relieved of any further responsibility. The FCM has certain basic duties to its customers, including the duty to supervise its own activities in a way designed to ensure that it treats its customers fairly. Specifically, the FCM would violate this duty if it has actual or constructive notice that allocations for its customers may be fraudulent and fails to take appropriate action. The FCM with such notice must make a reasonable inquiry into the matter and, if appropriate, refer the matter to the proper regulatory authorities (e.g., the CFTC or the NFA or its DSRO). Obviously, whether an FCM has such notice depends upon the information that the FCM has or should have, which, in turn, is based upon the FCM's role in the executing and clearing process. For example, an FCM that both executes and clears an entire block order will possess more information than an FCM that executives or clears only a portion of an order. In order to fulfill its duties, and FCM at any level of the process should implement appropriate compliance measures. For example, an FCM may choose to spot check the allocations made to its customer accounts for conformity with the prefiled instructions it has received from the CTA and/or review the performance of accounts being traded pursuant to the same trading program.

**Contemporaneous Filing of Instructions Via Electronic Transmission**

Instructions for the allocation of contracts to accounts included in a block order can also be given at the time the CTA places the trade. NFA notes, however, that as a general rule allocation procedures for split and partial fills should be pre-filed with the appropriate FCM. For instructions on the number of contracts to be assigned to each account in the block order, many CTA's simply provide the necessary allocation information by phone when they call in the block order. For certain CTAs, however, providing allocation instructions verbally when the block order is placed may not be a practicable option. These CTAs may have hundreds of accounts included in the block order and providing detailed allocation information by phone may be extremely time consuming. Delaying the execution of the order while that process drags on might ultimately harm customers through market price slippage. For most of these CTAs, the prefiling of instructions provides an adequate alternative. However, for a limited number of CTAs, it may not be practicable to pre-file with the FCM a standing set of allocation instructions. The trading programs used by these CTAs are complex and dynamic. Given the fine tuning adjustments that are made on a daily basis, the exact number of contracts these CTAs allocate to any given account may vary from one day to the next, and may make the prefiling of instructions impracticable.

Under these circumstances, one way the CTA may provide the account identification information required under CFTC Regulation 1.35 would be to send the FCM, by facsimile or other form of electronic transmission, the breakdown of contracts to be assigned to each account included in the block order. The CTA would have to begin to send that information at the time the order is placed. Given the possibility of busy signals, paper jams and other limitations of electronic transmissions, there may be momentary delays in the completion of the transmission. Such delays should be neither commonplace nor lengthy, and the CTA should maintain appropriate documentation whenever such delays occur. When those delays do occur, however, CFTC Regulation 1.35 does not necessarily require the FCM to delay execution of the order until the electronic transmission of the allocation information is completed. To avoid delays in execution due to such transmission difficulties, the CTA must have provided the FCM with a written certification that:

(1) the CTA will begin the transmission to the FCM of the allocation breakdown contemporaneously with the placement of the order and will maintain appropriate documentation regarding any delays experienced in such transmission;

(2) prior to the placement of an order, the CTA has also generated a non-preferential allocation breakdown for each order which has been computer time-stamped indicating the date on which the order is to be placed and the date and time the allocation breakdown was printed;

(3) the CTA maintains with either their executing or clearing FCMs a complete list of all accounts traded by the CTA, by trading program if applicable;

(4) if a bunched order does not include all accounts within a particular trading program, then prior to the execution of the order these CTAs will identify for their FCMs the accounts which are included, by account identifier or designation;

(5) on a daily basis, these CTAs confirm that all their accounts have the correct allocation of contracts; and

(6) at least once a month, these CTAs analyze each trading program to ensure that the allocation method has been fair and equitable. If divergent performance results exist over time, then such results must be shown to be attributable to factors other than

the CTA's trade allocation or execution procedures. Additionally, a CTA must document its internal audit procedures and the results of its monthly analysis and maintain these audit procedures and results as firm records subject to review during an NFA audit.

An FCM which relies in good faith on the above certification would be deemed to be in compliance with CFTC Regulation 1.35. The CTA must also file a copy of that certification with NFA at least thirty days prior to implementing these procedures. This time period will provide NFA with an opportunity to review and verify the information contained in the certification.

For most block orders, the pre-filing of allocation instructions is the most practicable and preferred course of action. The procedure described herein relating to the contemporaneous filing of instructions via electronic transmission is an alternative available to those relatively few CTAs that can demonstrate a need for this alternative and meet the requirements of the certification. Each CTA availing itself of this alternative must not only adhere to the requirements of this Notice, but also demonstrate on a continuing basis to the appropriate regulator or self-regulator both its need to use this alternative and that the information in the certification is correct. If a CTA utilizes this alternative, it must adhere to this Notice's requirements or may face disciplinary action for its failure to do so. If any Member has questions concerning how this Interpretive Notice would apply to its operations, please contact NFA's Compliance Department.

## IV. Commission Guidance

In any instance in which a CTA bunches multiple orders for different accounts into a single order for placement and execution, the antifraud provisions of Sections 4b and 4*o* of the Commodity Exchange Act may be violated if the resulting allocation is not fair, equitable and consistent in its treatment of the accounts included in the order. A CTA may bunch orders and provide, at the time of order placement with an executing registrant,[5] an allocation designator, as defined herein, that the Commission will find to constitute compliance with the account identification requirement of Regulation 1.35(a–1)(2)(i) for the accounts included in the order, by the CTA or the executing registrant, respectively, provided that, consistent with the NFA Notice and the following:

1. The CTA provides to each carrying FCM to which fills are to be allocated, either by prefiling allocation procedures or (consistent with the guidance set forth in the NFA Notice) contemporaneously providing allocation instructions with the placement of the order, a methodology to allocate contracts to customer accounts that identifies the ultimate customer account numbers and includes procedures for allocating prices and quantities for split and partial fills to those customers;

2. The order pertains to a group of specified accounts previously or contemporaneously identified to the carrying firm(s); and

3. The order is intended to provide fills for all accounts included in a single trading program.

4. The executing registrant documents the order as follows:

a. For purposes of the documentation required pursuant to this paragraph 4., an allocation designator means a symbol which represents all or any portion of the following information not reflected on the floor order as may be necessary to identify the ultimate customers, quantities and prices: that is, the trading program and the allocation procedures or methodology, including procedures for allocating prices and quantities for split and partial fills among carrying firms and/or among ultimate customers.

b. If the bunched order is to be allocated to customer accounts at one carrying FCM, prior to the time the order is executed, the floor order must reflect (1) the carrying FCM, (2) the order quantity, and (3) an allocation designator.

c. If the bunched order is to be given up for allocation to customer accounts at more than one carrying FCM, prior to the time the order is executed, the floor order must reflect (1) each carrying FCM, (2) the quantity to be given up to each such FCM, and (3) an allocation designator.[6] Consistent with the guidance provided in the NFA Notice, allocation instructions may be provided by electronic transmission to the executing registrant contemporaneously with order placement.

d. Alternatively, if the bunched order is to be given up for allocation to customer accounts at more than one FCM and the CTA has prefiled, consistent with exchange rules,[7]—with the NFA, a designated clearing member, an executing registrant, or an exchange—a set of allocation procedures which (1) Identifies each FCM to which trades will be given up, (2) identifies a methodology to determine how many contracts each FCM would receive, and (3) identifies an allocation designator, prior to the time the order is executed, the floor order must reflect the order quantity and the allocation designator identifying the prefiled procedures.

e. Prefiled procedures ordinarily would be standing procedures that would remain unchanged for a reasonable period of time.

5. Any time a CTA prefiles allocation procedures as provided herein and the CTA, rather than the executing or clearing registrant, provides specific allocations, after the execution of an order, implementing those prefiled procedures, the CTA must provide those allocations as soon as practicable.

Consistent with the NFA Notice, if an executing registrant has notice, based upon the information available to that registrant, that (1) allocation procedures are not prefiled, (2) the CTA's instructions do not conform to the prefiled procedures of (3) the give up and/or split and partial fill procedures or instructions result in allocations that are not being made in a fair, equitable and consistent manner, either by quantity or price, the executing registrant must make reasonable inquiry into the matter and, if appropriate, refer the matter to the proper regulatory authorities.

## V. Conclusion

Based on the foregoing, FCMs, IBs, CTAs, their respective APs, and FBs who handle bunched orders for multiple accounts shall be deemed to be in compliance with the account identification requirement of Commission Regulation 1.35(a–1)(2)(i) if such orders are placed, recorded, executed, given up to multiple clearing firms, if applicable, and allocated to customer accounts in accordance with the provisions set forth in the NFA Notice and in compliance with the above-stated Commission guidance.

This Interpretation and Approval Order is based upon the Commission's understanding that (1) affected registrants, consistent with their responsibilities as set forth herein, will maintain documentation sufficient to demonstrate that the procedures thus authorized are in fact followed and (2) affected registrants, exchanges and the NFA will have effective systems in place to monitor compliance and to address apparent noncompliance with

[5] "Executing registrant" refers to the registrant with whom the CTA places the bunched order for execution, and may be either an FCM or a floor broker.

[6] If the allocation instructions are provided contemporaneously with order placement to a floor trading desk or floor broker's clerk, the person receiving the order may immediately transmit the order's terms (that is, contract, quantity and price) to the executing broker, either by hand signals, verbal or written communication, while continuing to record the allocation information on the floor order. Order execution need not be delayed while such information is being recorded.

[7] Any exchange which permits the prefiling of procedures with the NFA or an exchange pursuant to this interpretation of Regulation 1.35(a–1)(2)(i) must have procedures in place for their executing members to confirm that CTA allocation procedures, including designators, are in fact prefiled.

the terms hereof. The Commission intends to monitor the procedures and practices followed pursuant hereto, including through review of the results of audits of registrants handling bunched orders. Based thereon, the Commission may provide further guidance as appropriate.

Dated: May 5, 1997.

By the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

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## DEPARTMENT OF HEALTH AND HUMAN SERVICES

## Food and Drug Administration

## 21 CFR Part 178

**[Docket No. 95F–0163]**

## Indirect Food Additives: Adjuvants, Production Aids, and Sanitizers

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of high-purity furnace black as a colorant for polymers intended for use in contact with food. This action is in response to a petition filed by Cabot Corp.

**DATES:** The regulation is effective May 9, 1997. Submit written objections and requests for a hearing by June 9, 1997. The Director of the Office of the Federal Register approves the incorporation by reference in accordance with 5 U.S.C. 552(a) and 1 CFR part 51 of a certain publication in 21 CFR 178.3297(e), effective May 9, 1997.

**ADDRESSES:** Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, 12420 Parklawn Dr., rm. 1–23, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** Vir D. Anand, Center for Food Safety and Applied Nutrition (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–418–3081.

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** of July 20, 1995 (60 FR 37452), FDA announced that a food additive petition (FAP 5B4464) had been filed by Cabot Corp., 75 State St., Boston, MA 02109–1806. The petition proposed to amend the food additive regulations in § 178.3297 *Colorants for polymers* (21 CFR 178.3297) to provide for the safe use of high-purity furnace black as a colorant for polymers intended for use in contact with food.

In its evaluation of the safety of this additive, FDA has reviewed the safety of the additive itself and the chemical impurities that may be present in the additive resulting from its manufacturing process. Although the additive itself has not been shown to cause cancer, it has been found to contain minute amounts of polynuclear aromatic hydrocarbons (PAH's), which are carcinogenic impurities resulting from the manufacture of the additive. Residual amounts of reactants and manufacturing aids, such as polynuclear aromatic hydrocarbons in this instance, are commonly found as contaminants in chemical products, including food additives.

### I. Determination of Safety

Under the general safety standard of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(c)(3)(A)), a food additive cannot be approved for a particular use unless a fair evaluation of the data available to FDA establishes that the additive is safe for that use. FDA's food additive regulations (21 CFR 170.3(i)) define safe as ''a reasonable certainty in the minds of competent scientists that the substance is not harmful under the intended conditions of use.''

The food additive anticancer, or Delaney, clause of the act (21 U.S.C. 348(c)(3)(A)) provides that no food additive shall be deemed safe if it is found to induce cancer when ingested by man or animal. Importantly, however, the Delaney clause applies to the additive itself and not to impurities in the additive. That is, where an additive itself has not been shown to cause cancer, but contains a carcinogenic impurity, the additive is properly evaluated under the general safety standard using risk assessment procedures to determine whether there is a reasonable certainty that no harm will result from the intended use of the additive (*Scott* v. *FDA*, 728 F.2d 322 (6th Cir. 1984)).

### II. Safety of Petitioned Use of the Additive

FDA concludes that the additive, high-purity furnace black, is insoluble in common solvents, including aqueous and fatty foods. As a consequence, there is no potential for significant levels of migration of the furnace black to contacted food (Ref. 1).

FDA does not ordinarily consider chronic toxicological studies to be necessary to determine the safety of an additive whose use will result in such low exposure levels (Ref. 2), and the agency has not required such testing here. However, the agency has reviewed the available toxicological data on the additive and concludes that because there is no potential for significant levels of migration of furnace black to contacted food, there are no concerns regarding the safety of the additive itself.

FDA has evaluated the safety of this additive under the general safety standard, considering all available data and using risk assessment procedures to estimate the upper-bound limit of lifetime human risk presented by PAH's, the carcinogenic chemicals that may be present as impurities in the additive. The risk evaluation of PAH's has two aspects: (1) Assessment exposure to the impurities from the intended use of the additive; and (2) extrapolation of the risk observed in the animal bioassay to the conditions of exposure to humans.

#### *A. Polynuclear Aromatic Hydrocarbons*

FDA has estimated the worst-case exposure to PAH's from the petitioned use of the additive as a colorant in polymers to be no greater than 0.001 parts per billion (ppb) in the daily diet (3 kilograms (kg)), or 3 nanograms per person per day (ng/person/day). Further, the dietary concentration of benzo[a]pyrene, one member of the PAH family, was estimated to be no greater than 0.01 parts per trillion in the daily diet (3 kg), or 30 picograms /person/day (Ref. 1).

PAH's occur as a mixture of compounds; the toxicity of these compounds varies, and some members of the family have been shown to be carcinogenic in animal studies. In assessing the upper-bound limit of lifetime human risk, FDA prefers to use actual toxicity data for the specific contaminants. However, in the absence of such data, the agency believes that using the toxicity of one of the most potent cogeners in a family of contaminants will ensure that the upper-bound limit of lifetime human risk will not be underestimated. For this risk estimate, FDA has made the ''worst-case'' assumption that all PAH's in the additive have the same carcinogenic potency as benzo[a]pyrene, a member of the PAH family that current data show to be one of the most potent carcinogens of this group.

The agency used data from a carcinogenesis bioassay on benzo[a]pyrene, conducted by H. Brune et al. (Ref. 3), to estimate the upper-bound limit of lifetime human risk from exposure to this chemical resulting from the petitioned use of the additive. The