FOR FURTHER INFORMATION CONTACT: Nancy B. Shelton, Manager, Airspace Branch, Air Traffic Division, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–5586.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify the airspace docket number and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Airspace Docket No. 99–ASO–21.'' The postcard will be date/time stamped and returned to the commenter. All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. All comments submitted will be available for examination in the Office of the Regional Counsel for Southern Region, Room 550, 1701 Columbia Avenue, College Park, Georgia 30337, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the Federal Aviation Administration, Manager, Airspace Branch, ASO–520, Air Traffic Division, P.O. Box 20636, Atlanta, Georgia 30320. Communications must identify the notice number of this NPRM. Persons interested in being placed on a mailing list for future NPRMs should also request a copy of Advisory Circular No. 11–2A which describes the application procedure.

The Proposal

The FAA is considering an amendment to part 71 of the Federal Aviation Regulations (14 CFR Part 71) to establish Class E airspace at Okeechobee, FL. A GPS RWY 4 SIAP has been developed for Avon Park Municipal Airport. As a result, controlled airspace extending upward from 700 feet AGL is needed to accommodate the SIAP and for IFR operations at Okeechobee County Airport. The operating status of the airport will change from VFR to include IFR operations concurrent with the publication of the SIAP. Class E airspace designations for airspace areas extending upward from 700 feet or more above the surface are published in Paragraph 6005 of FAA Order 7400.9G dated September 1, 1999, and effective September 16, 1999, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document would be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulation action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, CLASS B, CLASS C, CLASS D, AND CLASS E AIRSPACE AREAS; AIRWAYS; ROUTES; AND REPORTING POINTS

1. The authority citation for part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g); 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9G, Airspace Designations and Reporting Points, dated September 1, 1999, and effective September 16, 1999, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ASO GA E5 Okeechobee, FL [New]

Okeechobee County Airport, FL
(Lat. 27°15′00″N, long. 80°51′01″W)

That airspace extending upward from 700 feet or more above the surface of the earth within a 6.5-mile radius of Okeechobee County Airport.

* * * * *

Issued in College Park, Georgia, on November 1, 1999.

Wade T. Carpenter,

Acting Manager, Air Traffic Division, Southern Region.

[FR Doc. 99–29478 Filed 11–9–99; 8:45 am]

BILLING CODE 4910–13–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 275 and 279

[Release Nos. 34–42099; IA–1845; File No. S7–25–99]

RIN 3235–AH78

Certain Broker-Dealers Deemed Not To Be Investment Advisers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: Broker-dealers have begun offering their customers full service brokerage (including advice) for an asset-based fee instead of traditional commissions, mark-ups, and mark-downs. Some full service broker-dealers have also begun offering electronic trading for reduced brokerage commissions. The Commission is publishing for comment a new rule under the Investment Advisers Act of 1940 (Advisers Act) that would address the application of the Advisers Act to brokers offering these programs. The new rule would keep broker-dealers from being subject to the Advisers Act solely as a result of re-pricing their services.

DATES: Comments must be received on or before January 14, 2000.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Comments may also be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–25–99; this File number should be included on the subject line if E-mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters also will be posted on the Commission's Internet web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Cynthia M. Fornelli, Attorney Fellow, Division of Investment Management, (202) 942–0720, or J. David Fielder, Senior Counsel, Task Force on Investment Adviser Regulation, Division of Investment Management, (202) 942–0530, fielderd@sec.gov, at Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0506.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed rule 202(a)(11)–1 and a proposed amendment to the instructions for Schedule I of Form ADV [17 CFR 279.1], both under the Investment Advisers Act of 1940 [15 U.S.C. 80b] (''Advisers Act'' or ''Act'').

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Executive Summary

Broker-dealers recently have begun to give their customers the option of paying for brokerage services in different ways. In addition to traditional commission-based brokerage, customers can now pay for securities transactions, related advice, and other services by paying a fee that is a fixed dollar amount or based on a percentage of assets held on account with the broker-dealer. Customers can also pay a reduced commission for electronic trading without the assistance and advice of a registered representative.

While these new programs promise to benefit broker-dealer customers by aligning their interests more closely with those of the brokerage firm and its registered representatives, they may also subject the broker-dealers to regulation under the Advisers Act as well as the Securities Exchange Act of 1934 (Exchange Act). The new programs essentially re-price traditional full service brokerage programs but do not fundamentally change their nature. Therefore, we are proposing to use our authority under the Act to adopt a rule that would keep broker-dealers from being subject to the Advisers Act when they offer these programs.

Under the proposed rule, a broker-dealer providing investment advice to customers, regardless of the form of its compensation, would be excluded from the definition of investment adviser as long as: (i) The advice is provided on a non-discretionary basis; (ii) the advice is solely incidental to the brokerage services; and (iii) the broker-dealer discloses to its customers that their accounts are brokerage accounts. The rule also would keep a broker-dealer providing advice to customers from being subject to the Advisers Act solely because it also offers execution-only brokerage services at reduced commission rates. Finally, the proposed rule will clarify that broker-dealers that are subject to the Advisers Act are subject to the Act only with respect to advisory clients. We are also proposing to amend the instructions for Form ADV under the Advisers Act to clarify how broker-dealers calculate the aggregate assets under management of their advisory clients for determining whether they must register with the Commission.

Until the Commission takes final action on the proposed rule, the Division of Investment Management will not recommend, based on the form of compensation received, that the Commission take any action against a broker-dealer for failure to treat any account over which the broker-dealer does not exercise investment discretion as subject to the Act.

I. Background

The Advisers Act regulates the activities of certain ''investment advisers,'' which are defined in Section 202(a)(11) as persons who receive compensation for providing advice about securities as part of a regular business.[1] Section 202(a)(11)(C) of the Advisers Act excepts from the definition a broker or dealer ''whose performance of [advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.'' [2] The broker-dealer exception ''amounts to a recognition that brokers and dealers commonly give a certain amount of advice to their customers in the course of their regular business and that it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business.'' [3]

Many securities firms currently are registered with us under both the Exchange Act [4] (as broker-dealers) and the Advisers Act (as advisers), but treat only certain of their accounts as subject to the Advisers Act. We have viewed the Advisers Act as applying only to those persons to whom the broker-dealer provides investment advice that is *not* incidental to brokerage services or for which the firm receives special compensation.[5] The protections of the Advisers Act and our rules must only be afforded those persons (''advisory clients''). For example, only advisory clients must be delivered an informational brochure.[6]

Recently, several full service brokerage firms have introduced or announced new types of brokerage programs that raise questions as to whether they are receiving special compensation and, as a result, whether they continue to be eligible for the broker-dealer exception to the Advisers Act. In the case of broker-dealers

[1] 15 U.S.C 80b–2(a)(11). For a discussion of this definition and the scope of the Advisers Act, see Investment Advisers Act Release No. 1092 (Oct. 8, 1987) [52 FR 38400 (Oct. 16, 1987)].

[2] 15 U.S.C. 80b–2(a)(11)(C). A person (including a broker-dealer) that falls within the definition of investment adviser in Section 202(a)(11) (and is not excepted) must register with the Commission unless one of the exemptions from registration in Section 203(b) [15 U.S.C. 80b–3(b)] is available or the person is prohibited from registering with us by Section 203A [15 U.S.C. 80b–3A] because they are a state-regulated adviser. *See Rules Implementing Amendments to the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 1633 (May 15, 1997) [62 FR 28112 (May 22, 1997)].

[3] *Opinion of General Counsel Relating to Section 202(a)(11)(C) of the Investment Advisers Act of 1940*, Investment Advisers Act Release No. 2 (Oct. 28, 1940) [11 FR 10996 (Oct. 28, 1940)] (''Release No. 2'').

[4] 15 U.S.C. 78a.

[5] *Final Extension of Temporary Rule*, Investment Advisers Act Release No. 626 (Apr. 27, 1978) [43 FR 19224 (May 4, 1978)] (''Release No. 626'').

[6] Rule 204–3 [17 CFR 275.204–3]. Additionally, advisory clients must receive, among other things, certain disclosures about their investment adviser, including disclosure about the firm's conflicts of interest, other business activities and affiliations, disciplinary history and, in some cases, financial condition. Rule 206(4)–4 [17 CFR 275.206(4)–4]. Advisory clients' accounts also have restrictions on effecting principal trades. 15 U.S.C. 80b–6(3).

already registered under the Act, these programs raise the question of whether customers selecting these new programs must be treated as advisory clients. For convenience, we will refer to these programs as ''fee-based programs.'' [7]

Fee-based programs offer customers a package of brokerage services—including execution, investment advice, custodial and recordkeeping services—for a fixed fee or a fee based on the amount of assets on account with the broker-dealer. In some programs, broker-dealers also assess a fixed charge for each transaction.[8] These fee-based programs benefit customers by better aligning their interests with those of their broker-dealers, and thus are responsive to the best practices suggested in the Report of the Committee on Compensation Practices (''Tully Report'').[9] Under these programs, broker-dealers'' and their registered representatives' compensation no longer depends on the number of transactions or the size of mark-ups or mark-downs charged, thus reducing incentives for registered representatives to churn accounts, recommend unsuitable securities, or engage in high-pressure sales tactics. The Commission welcomes the introduction of these programs, which may reduce substantially conflicts between broker-dealers and their customers.

Some full service brokerage firms are also ''unbundling'' brokerage services, giving customers the option of purchasing execution-only services at a reduced commission rate.[10] These execution-only programs often give customers the ability to trade securities over the Internet without the assistance of a registered representative. These programs offer customers who do not want or need investment advice the ability to trade securities at a lower commission rate.[11]

Both types of programs may result in the loss of the broker-dealer exception to the Advisers Act. Fee-based compensation may constitute special compensation under the Act because it involves the receipt by a broker of compensation other than traditional brokerage commissions.[12] In addition, the introduction of execution-only services at a lower commission rate may trigger application of the Act to the full service accounts for which the broker provides some investment advice. This is because the difference between full service and execution-only commission rates represents a clearly definable portion of a brokerage commission that is attributable, at least in part, to investment advice. We have viewed such a two-tiered fee structure as an indication of ''special compensation'' under the Advisers Act.[13]

These new programs are not, however, fundamentally different from traditional brokerage programs not subject to the Advisers Act. Fee-based brokerage programs offer the same package of services as traditional full-service broker-dealer programs. Execution-only programs do not offer *any* advisory service, but merely make visible that which has always been apparent—a portion of commissions charged by full service broker-dealers compensated the broker-dealer for advisory services. The re-pricing of traditional brokerage services in the fee-based programs has regulatory implications only because the broker-dealer exception is limited to broker-dealers not receiving special compensation.

As discussed above, we believe that broker-dealers offering fee-based programs may be receiving ''special compensation'' under the Advisers Act. We do not believe, however, that Congress intended these programs, which are not substantially different from traditional brokerage arrangements, to be subject to the Act. While in 1940 the form of compensation a broker-dealer received may have been a reliable distinction between brokerage and advisory services, development of the new brokerage programs suggest strongly that it is no longer. Moreover, we are concerned that, as a result of these new programs, most brokerage arrangements by full service broker-dealers may be subject to regulation under both the Advisers Act and the Exchange Act, a result Congress could not have intended. We are therefore proposing a new rule, described below, that would deem a broker-dealer not to be an adviser solely as a result of receiving special compensation, provided certain conditions are met. The proposed exception would be limited to circumstances where the Commission believes that Congress did not intend to apply the Advisers Act.

II. Discussion

A. Broker-Dealers Deemed Not To Be Investment Advisers

The Commission is proposing new rule 202(a)(11)–1 under the Advisers Act. The rule is designed to avoid application of the Advisers Act to broker-dealers solely because they re-price their full-service brokerage or provide execution-only services in addition to full service brokerage. The rule would also codify our long-standing view of how the Act applies to broker-dealers that are registered advisers.

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[7] For ease of discussion, we assume in the discussion below that broker-dealers offering fee-based programs are currently registered with us under the Advisers Act as a result of advisory activities unrelated to these programs. For broker-dealers that are not currently registered with us under the Advisers Act, fee-based programs present a first question of whether they are subject to the Act and, if so, whether they must register with us as an adviser.

[8] ''Merrill Adapting to New Breed of Investors,'' *The Deseret News (Salt Lake City, UT)*, July 18, 1999; ''A New Order for Brokers,'' *Los Angeles Times*, July 4, 1999; ''Prudential Rolls Out Fee-Plus Pricing Alternative,'' *Registered Representative*, July 1999; ''Charley's Web: Drawing Rivals into the Internet, Schwab Takes its Biggest Risk,'' *Investment Dealers Digest*, June 21, 1999; ''Online Trading Forces Brokerages to Change,'' *Star Tribune (Minneapolis, MN)*, June 7, 1999.

[9] The Tully Report was prepared by a committee formed in 1994 at the request of Chairman Arthur Levitt to identify the brokerage industry's ''best practices.'' *Report of the Committee on Compensation Practices*, Apr. 10, 1995. *See also* ''You Should Get What You Pay for—and Vice Versa,'' *Los Angeles Times*, July 4, 1999; ''No More Portfolio-Churning Broker-Dealers,'' *The Washington Post*, June 7, 1999.

[10] ''Merrill Adapting to New Breed of Investors,'' *The Deseret News (Salt Lake City, UT)*, July 18, 1999.

[11] Some discount brokers are now providing some advice to their brokerage customers. ''Charley's Web: Drawing Rivals into the Internet, Schwab Takes its Biggest Risk,'' *Investment Dealers Digest*, June 21, 1999. The distinctions between full service brokerage firms and discount brokerage firms are thus becoming blurred.

[12] *See Committee on Banking and Currency, Investment Company Act of 1940 and Investment Advisers Act of 1940*, Report No. 1775, 76th Cong., 3d Sess. 22 (June 6, 1940) (section 202(a)(11)(C) applies to broker-dealers ''insofar as their advice is merely incidental to brokerage transactions for which they receive brokerage commissions''). *See also Financial Planners: Report of the Staff of the United States Securities and Exchange Commission to the House Committee on Energy and Commerce's Subcommittee on Telecommunications and Finance*, February 1988 (Appendix B) (''[Special compensation] has been interpreted to exclude ordinary brokerage commissions * * * unless a 'clearly definable' part of the commission is for investment advice.'')

Five years ago we adopted rules for broker-sponsored wrap fee programs based on our conclusion that wrap fees constitute special compensation. *Disclosure by Investment Advisers Regarding Wrap Fee Programs*, Investment Advisers Act Release No. 1401 (Jan. 13, 1994) at n.2 (proposing amendments to Form ADV) [59 FR 3033 (Jan. 20, 1994)]; Investment Advisers Act Release. No. 1411 (Apr. 19, 1994) (adopting amendments to Form ADV) [59 FR 21657 (Apr. 26, 1994)]. *See also National Regulatory Services*, SEC No-Action Letter (Dec. 2, 1992). The *compensation* in the new, fee-based programs is indistinguishable from wrap fee compensation.

[13] Release 626, *supra* at note 5. *See also* Release No. 2, *supra* at note 3; *Robert S. Strevell*, SEC No-Action Letter (Apr. 29, 1985) (''If two general fee schedules are in effect, either formally or informally, the lower without investment advice and the higher with investment advice, and the difference is primarily attributable to this factor, there is special compensation.'')

1. Fee-Based Brokerage Programs

Under the proposed rule, a broker-dealer providing investment advice to its brokerage customers would not be required to treat those customers as advisory clients solely because of the form of the broker-dealer's compensation. The proposed rule would be available to broker-dealers registered under the Exchange Act that satisfy three conditions: (i) The broker-dealer must not exercise investment discretion over the account from which it receives special compensation; (ii) any investment advice is incidental to the brokerage service provided to each account; and (iii) advertisements for and contracts or agreements governing the account must contain a prominent statement that it is a brokerage account.[14]

Under the rule, the nature of the services provided, rather than the form the broker-dealer's compensation takes, would be the primary feature distinguishing an advisory account from a brokerage account. Discretionary accounts that are charged an asset-based fee would be considered advisory accounts because they bear a strong resemblance to traditional advisory accounts, and it is highly likely that investors will perceive such accounts to be advisory accounts.[15] Under the statute, however, discretionary accounts from which a broker-dealer does not receive special compensation, *e.g.*, accounts that pay commissions, would still be treated as brokerage accounts not subject to the Act. In this respect, a regulatory distinction would continue to be drawn based solely on the pricing of an advisory service. We request comment on whether this remains an appropriate distinction. Should all discretionary accounts of broker-dealers be treated as advisory accounts?[16]

The proposed rule would include the requirement, taken from the broker-dealer exception, that the advisory services provided the account be incidental to the brokerage services provided.[17] The rule would clarify that the advice the broker-dealer provides must be incidental to brokerage services provided by the broker-dealer to *each* account rather than the overall operations of the broker-dealer.

Finally, the proposed rule would require that all advertisements for the accounts and all agreements and contracts governing the operation of the accounts contain a prominent statement that the accounts are brokerage accounts.[18] We have observed that some broker-dealers offering these new accounts have heavily marketed them based on the advisory services provided rather than the execution services, which raises troubling questions as to whether the advisory services are not (or will be perceived by investors not to be) incidental to the brokerage services. We have, however, never viewed the broker-dealer exception as precluding a broker-dealer from marketing itself as providing some amount of advisory services.[19] Comment is requested as to whether, instead of the proposed disclosure, we should preclude brokers from relying on the rule if they market these accounts in such a way as to suggest they are advisory accounts.

Under the proposed rule, broker-dealer sponsors of wrap fee programs would continue to treat wrap fee accounts as advisory accounts.[20] Wrap fee program sponsors that also provide portfolio management services typically have discretionary authority over the accounts, and thus could not use the rule. In many cases, sponsors of wrap fee programs execute transactions for wrap accounts and provide some non-discretionary advisory services such as asset allocation or selection of portfolio managers. The sponsors do not themselves have discretionary authority, which is delegated to an advisory firm that receives a portion of the wrap fee. In these cases, the non-discretionary advisory services provided by the sponsor could not be viewed as incidental to the brokerage services.[21]

2. Execution-Only Brokerage Programs

Proposed rule 202(a)(11)–1 would also keep a full service broker-dealer from being subject to the Act solely because it also offers execution-only brokerage.[22] Conversely, a discount broker would not be subject to the Act solely because it introduces a full service brokerage program. Under the rule, a broker-dealer would not be considered to have received special compensation solely because the broker-dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer. Thus, a broker-dealer would be able to offer both full-service and execution-only brokerage without losing the broker-dealer exception. This provision would make a broker-dealer's eligibility for the broker-dealer exception with respect to an account turn on the characteristics of that account and not others.

3. Scope of Broker-Dealer Exception

As discussed above, a broker-dealer registered under both the Exchange Act (as a broker-dealer) and the Advisers Act (as an adviser) need not treat all of its customers as advisory clients. We have viewed the Advisers Act as applying only to those customers to whom the broker-dealer provides advice that is *not* incidental to brokerage services or for which the firm receives special compensation.[23] We have included a provision in the proposed rule codifying this view.[24]

B. Calculation of Assets Under Management for Broker-Dealers

Generally, only investment advisers with at least $25 million of assets under management must register with the

[14] Proposed rule 202(a)(11)–1(a)(1)–(3).

[15] *See* Release 626, *supra* at note 5.

[16] In Release 626, *supra* at note 5, we stated that broker-dealer relationships ''which include discretionary authority to act on a client's behalf have many of the characteristics of the relationships to which the protections of the Advisers Act are important,'' and indicated that we were considering taking action that would make the broker-dealer exception not available to broker-dealers that exercised discretionary authority. We also noted in Release 626 the staff's position that broker-dealers whose business consists almost exclusively of managing accounts on a discretionary basis are not providing advice solely on an incidental basis, and thus are subject to the Advisers Act.

[17] Proposed rule 202(a)(11)–1(a)(2).

[18] Proposed rule 202(a)(11)–1(a)(3). An advertisement would include any notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television. *See* Rule 206(4)–1(b) [17 CFR 275.206(4)–1(b)] (defining the term ''advertisement'').

[19] *See Elmer D. Robinson,* SEC No-Action Letter (Jan. 6, 1986); *Nathan & Lewis,* SEC No-Action Letter (Apr. 4, 1988). However, a broker-dealer that employs terms such as ''financial planner'' merely as a device to induce the sale of securities might violate the antifraud provisions of the Securities Act of 1933 and the Exchange Act. *Cf. In re Haight & Co., Inc.*, Securities Exchange Act Release No. 9082 (Feb. 19, 1971) (Broker-dealer defrauded its customers in the offer and sale of securities by holding itself out as a financial planner that would give comprehensive and expert planning advice and choose the best investments for its clients from all available securities, when in fact it was not an expert in planning and made its decisions based on the receipt of commissions and upon its inventory of securities.)

[20] Sponsors must, therefore, continue to deliver to wrap fee clients a wrap fee brochure required by Rule 204–3(f) under the Advisers Act [17 CFR 275.204–3(f)]. *See also* Schedule H of Form ADV [17 CFR 279.1] (prescribing contents of a wrap fee brochure).

[21] The brokerage transactions executed by the sponsor are initiated by the third-party portfolio manager, and not the sponsor. *See generally, National Regulatory Services,* SEC No-Action Letter (Dec. 2, 1992) (wrap fee program is not solely incidental to the sponsor's business as a broker-dealer); ''Mutual Fund Blues? Try a 'Wrap,''' *Business Week,* July 12, 1999 (''[B]rokerage firms also offer annual asset-based fees as an alternative to charging commissions on each trade [but] the accounts don't offer the same services [as wrap accounts].'')

[22] Proposed rule 202(a)(11)–1(b).

[23] Release No. 626, *supra* at note 5.

[24] Proposed rule 202(a)(11)–1(c).

Commission.[25] Advisers with fewer assets under management generally must register with one or more state securities authorities.[26] The staff has taken the position that broker-dealers may include in their calculation of assets under management the value of brokerage accounts that receive continuous and regular supervisory or management services.[27] We are proposing to codify this position by amending the instructions to Schedule I of Form ADV, but limiting it to accounts over which broker-dealers exercise investment discretion.[28]

III. General Request for Comment

Any interested persons wishing to submit written comments on the proposed rule that is the subject of this release, or submit comments on other matters that might have an effect on the proposals described above, are requested to do so. Commenters suggesting alternative approaches are encouraged to submit proposed rule text.

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

IV. Paperwork Reduction Act

Certain provisions of proposed Rule 202(a)(11)–1 contain a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 to 3520), and the Commission has submitted it to the Office of Management and Budget in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The title for the collection of information is ''Certain Broker-Dealers Deemed Not To Be Investment Advisers.'' An agency may not sponsor, conduct, or require response to an information collection unless a currently valid OMB control number is displayed.

Broker-dealers taking advantage of the proposed rule would need to maintain certain records that establish their eligibility to do so, but rules under the Exchange Act already require the maintenance of those records. Specifically, broker-dealers are currently required to maintain all ''evidence of the granting of discretionary authority given in any respect of any account'' [29] and all ''written agreements * * * with respect to any account.'' [30] Therefore, the proposed rule will not increase the recordkeeping burden for any broker-dealer.

For an account to which the proposed rule applies, advertisements [31] and contracts or agreements must include a prominent statement that the account is a brokerage account.[32] This information is necessary to prevent customers and prospective customers from mistakenly believing that the account is an advisory account subject to the Advisers Act and will be used to assist clients in making an informed decision on whether to establish an account. We believe that the burden to comply with this provision of the rule is insignificant. In preparing model contracts and advertisements, for example, compliance officials would be required to verify that the appropriate disclosure is made. For purposes of the Paperwork Reduction Act, the average annual burden for ensuring compliance is 5 minutes per broker-dealer taking advantage of the proposed rule. If all of the approximately 8,500 broker-dealers registered with us took advantage of the rule, the total estimated annual burden would be 706 hours (.083 hours x 8,500 brokers). At an assumed $120 per hour those 706 hours would cost $84,720. We request comment on these figures.

The collection of information requirements under the proposed rule are mandatory. In general, the information collected pursuant to the proposed rule would be held by the broker-dealers. The Commission, self-regulatory organizations, and other securities regulatory authorities would only gain possession of the information upon request. Any information received by the Commission related to the proposed rule would be kept confidential, subject to the provisions of the Freedom of Information Act, 5 U.S.C. 552.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and also should send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 5th Street, N.W., Stop 6–9, Washington, D.C. 20549 with reference to File No. 270–471. OMB is required to make a decision concerning the collection of information requirements between 30 and 60 days after publication. A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

V. Cost-Benefit Analysis

The proposed rule would keep broker-dealers from being subject to the Advisers Act solely as a result of re-pricing their full-service brokerage services. Proposed rule 202(a)(11)–1 would have no effect on the regulatory burden borne by investment advisers because it only operates to exempt from the Advisers Act certain brokerage accounts. For broker-dealers that would otherwise be subject to the Advisers Act, the proposed rule would reduce

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[25] 15 U.S.C. 80b–3A (prohibiting advisers without assets under management of $25 million or more or that do not advise a registered investment company from registering with the Commission). The Commission has adopted a rule that exempts certain types of advisers from this prohibition. 17 CFR 275.203A–2.

[26] *Id.*

[27] *See* <http://www.sec.gov/rules/othern/advfaq.htm#asst>, ''Assets Under Management,'' Question No. 5.

[28] Broker-dealers that are also registered with us as investment advisers may, in certain circumstances, be requested during the course of investment adviser inspections by Commission staff, to provide certain information and records related to their brokerage clients over whose accounts they exercise investment discretion. For example, such information and records may be necessary for an evaluation of the reported amount of assets under management that receive continuous and regular supervisory or management services.

[29] 17 CFR 240.17a–4(b)(6). Proposed rule 202(a)(11)–1(a)(1) limits its application to accounts that a broker-dealer does not exercise investment discretion over.

[30] 17 CFR 240.17a–4(b)(7). Proposed rule 202(a)(11)–1(a)(3) requires a prominent statement be made in agreements governing the accounts to which the rule applies.

[31] Broker-dealers already are required to maintain records regarding their advertisements under existing self-regulatory organizations' rules.

[32] The Commission estimates that the current annual burden for the approximately 8,500 broker-dealers registered with us related to the maintenance of these, and other records required by the Commission is approximately 2.1 million hours. This is the current burden estimate for Rule 17a–4. It includes the estimated burden from complying with Rule 17a–4's requirements to maintain certain records unrelated to this rule, such as customer communications, order tickets, and transaction confirmations.

their regulatory burden.[33] Thus, the benefits to broker-dealers to which the proposed rule would apply are substantial in terms of avoiding an increased regulatory burden stemming from re-pricing their brokerage services.

Substantial benefits for individual investors from the repricing of brokerage services, and therefore from the proposed rule which eliminates unintended regulatory disincentives to that repricing, are expected. Under the fee-based programs discussed above, a broker-dealer's or registered representative's compensation no longer depends on the number of transactions or the size of mark-ups or mark-downs charged, thus reducing incentives for a registered representative to churn accounts, recommend unsuitable securities, or engage in high-pressure sales tactics. Thus, these programs may better align the interests of broker-dealers and their customers.

While the benefits of the proposed rule are substantial (although difficult to quantify), the incremental costs associated with the rule are small. Broker-dealers taking advantage of the rule will need to maintain certain records establishing their eligibility for the rule (*e.g.,* contracts or agreements governing the accounts and advertisements related to the accounts), but rules under the Exchange Act already require the maintenance of those records. Thus, the only incremental cost associated with the rule is the cost of adding a statement to those documents that the accounts are brokerage accounts. As discussed in the Paperwork Reduction Act analysis above, we believe this cost is insignificant.

Comment is requested on issues relating to the proposed rule's costs and benefits. Commenters are requested to provide views and empirical data relating to any costs and benefits associated with the proposed rule and form amendment.

VI. Initial Regulatory Flexibility Analysis

The Commission has prepared the following Initial Regulatory Flexibility Analysis (''IRFA'') in accordance with 5 U.S.C. 603 regarding proposed rule 202(a)(11)–1.

A. Reasons for Proposed Action

Broker-dealers recently have begun to give their customers the option of paying for securities transactions, related advice, and other services by paying a fee that is a fixed dollar amount or based on a percentage of assets held on account with the broker-dealer. While these new programs promise to benefit broker-dealer customers by aligning their interests more closely with those of the brokerage firm and its registered representatives, they may also subject the broker-dealers to regulation under the Advisers Act. The new programs essentially re-price traditional full service brokerage programs but do not fundamentally change their nature. Subjecting broker-dealers that offer these programs to the Advisers Act would impose unnecessary regulatory burdens on the provision of brokerage services contrary to the intent of Congress when it passed the Advisers Act.

B. Objectives and Legal Basis

The proposed rule is designed to prevent application of the Advisers Act to broker-dealers solely because they re-price their full-service brokerage or provide execution-only services in addition to full service brokerage. The rule would also codify certain long-standing positions regarding application of the Advisers Act to broker-dealers that are registered advisers. We are proposing the rule pursuant to our authority under sections 202(a)(11)(F)[34] and 211(a)[35] under the Act. Section 202(a)(11)(F) gives us authority to except, by rule or order, from the statutory definition of ''investment adviser'' persons not within the intent of that definition. Section 211(a) gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act.

C. Small Entities Subject to Rule

For the purposes of the Exchange Act and the Regulatory Flexibility Act, a broker-dealer, under Commission rules, generally is a small entity if it had total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared and it is not affiliated with any person (other than a natural person) that is not a small entity.[36]

The Commission estimates that as of December 31, 1998, approximately 1,000 Commission-registered broker-dealers were small entities.[37] The Commission is not aware of any small entities that are re-pricing their brokerage services in a manner that the proposed rule addresses, but assumes that all of these small entities could be affected by the proposed rule.

D. Reporting, Recordkeeping, and Other Compliance Requirements

The proposed rule would impose no new recordkeeping requirements, and will not materially alter the time required for broker-dealers to comply with the Commission's rules. The proposed rule keeps unnecessary regulatory burdens from being imposed on broker-dealers. Broker-dealers taking advantage of the rule are required to make certain disclosures to customers and potential customers in advertising and contractual materials.

E. Duplicative, Overlapping, or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with, the proposed rule.

F. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. In connection with the proposed rule, the Commission considered the following alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for such small entities.

The proposed rule is designed to eliminate unnecessary regulatory burdens that otherwise might be imposed on broker-dealers. Small entities, as well as large entities, will benefit from the proposed rule. It is thus inappropriate to exempt small entities from the proposed rule. The provision of the proposed rule requiring certain disclosures to customers and potential customers is designed to prevent investors from being misinformed regarding the nature of the services they are receiving. Consequently, it would be

[33] Investment advisers are required, for example, to deliver an informational brochure to clients and prospective clients, Rule 204–3 [17 CFR 275.204–3], and to make detailed disclosures about the advisory firm and its supervised persons. Rule 206(4)–4 [17 CFR 275.206(4)–4].

[34] 15 U.S.C. 80b–2(a)(11)(F).

[35] 15 U.S.C. 80b–11(a).

[36] 17 CFR 240.0–10(c).

[37] This estimate is based on the information provided in Form X–17A–5 Financial and Operational Combined Uniform Single Reports filed pursuant to section 17 of the Exchange Act and Rule 17a–5 thereunder.

inconsistent with the purposes of the Advisers Act to use performance standards to specify different requirements for small entities.

The Commission believes that the proposed rule will not adversely affect small entities because it does not impose significant, new reporting, recordkeeping, or compliance requirements. Instead, the proposed rule would avoid the imposition of unnecessary regulatory burdens on the provision of brokerage services solely because broker-dealers re-price their full-service brokerage or provide execution-only services in addition to full service brokerage. Therefore, it is not feasible to further clarify, consolidate or simplify the rule's provisions for small entities.

G. Solicitation of Comments

We encourage written comments on matters discussed in this IRFA. In particular, the Commission seeks comment on: (i) The number of small entities that would be affected by the proposed rule; and (ii) whether the impact of the proposed rule on small entities would be economically significant. Commenters are asked to describe the nature of any impact and provide empirical data supporting the extent of the impact.

VII. Statutory Authority

We are proposing the rule pursuant to our authority under Sections 202(a)(11)(F) and 211(a) under the Act. Section 202(a)(11)(F) gives us authority to except, by rule or order, from the statutory definition of ''investment adviser'' persons not within the intent of that definition.[38] Section 211(a) gives us authority to classify, by rule, persons and matters within our jurisdiction and to prescribe different requirements for different classes of persons, as necessary or appropriate to the exercise of our authority under the Act.

List of Subjects in 17 CFR Parts 275 and 279

Reporting and recordkeeping requirements.

[38] Because we are using our authority under section 202(a)(11)(F), broker-dealers relying on the rule would not be subject to state adviser statutes. Section 203A(b)(1)(B) of the Act (15 U.S.C. 80b–3A(b)(1)(B)) provides that ''[n]o law of any State or political subdivision thereof requiring the registration, licensing, or qualification as an investment adviser or supervised person of an investment adviser shall apply to any person * * * that is not registered under [the Advisers Act] because *that person is excepted from the definition of an investment adviser under section 202(a)(11).*'' (emphasis added).

Text of Proposed Rule

For the reasons set out in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 275—RULES AND REGULATIONS, INVESTMENT ADVISERS ACT OF 1940

1. The general authority citation for part 275 is revised to read as follows:

Authority: 15 U.S.C. 80b–2(a)(11)(F), 80b–2(a)(17), 80b–3, 80b–4, 80b–6(4), 80b–6a, 80b–11, unless otherwise noted.

* * * * *

2. Section 275.202(a)(11)–1 is added to read as follows:

§ 275.202(a)(11)–1 Certain broker-dealers deemed not to be investment advisers.

A broker or dealer registered with the Commission under Section 15 of the Securities Exchange Act of 1934 (15 U.S.C. 78o) (the ''Exchange Act''):

(a) Will not be deemed to be an investment adviser based solely on its receipt of special compensation, provided that:

(1) The broker or dealer does not exercise investment discretion, as that term is defined in Section 3(a)(35) of the Exchange Act (15 U.S.C. 78c(a)(35)), over the accounts from which it receives special compensation;

(2) Any investment advice provided by the broker or dealer with respect to accounts from which it receives special compensation is solely incidental to the brokerage services provided to those accounts; and

(3) Advertisements for, and contracts or agreements governing, accounts for which the broker or dealer receives special compensation include a prominent statement that the accounts are brokerage accounts;

(b) Will not be deemed to have received special compensation solely because the broker or dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater than or less than one it charges another customer; and

(c) Is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker or dealer to the Act.

PART 279—FORMS PRESCRIBED UNDER THE INVESTMENT ADVISERS ACT OF 1940

3. The authority citation for part 279 continues to read as follows:

Authority: The Investment Advisers Act of 1940, *15 U.S.C. 80b–1, et seq.*

4. By amending Instruction 7 in Form ADV Schedule I Instructions (referenced in § 279.1) by adding paragraph (c)(5) to read as follows:

Note: The text of Form ADV does not and the amendment will not appear in the Code of Federal Regulations.

Form ADV

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Schedule I Instructions

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Instruction 7. *Determining Assets Under Management*

* * * * *

(c) *Continuous and Regular Supervisory or Management Services.*

* * * * *

Accounts that do not receive continuous and regular supervisory or management services:

* * * * *

(5) Brokerage accounts, unless the applicant has discretionary authority.

* * * * *

Dated: November 4, 1999.

By the Commission.

Jonathan G. Katz,

Secretary.

[FR Doc. 99–29395 Filed 11–9–99; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 101

Extension of Port Limits of Puget Sound, WA

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations pertaining to the field organization of Customs by extending the geographical limits of the consolidated port of Puget Sound, Washington. This proposed change is being made as part of Customs continuing program to obtain more efficient use of its personnel, facilities, and resources and to provide better service to carriers, importers, and the general public.

DATES: Comments must be received on or before January 10, 2000.

ADDRESSES: Written comments may be submitted to and inspected at the Regulations Branch, Office of Regulations and Rulings, 1300 Pennsylvania Avenue N.W., Third Floor, Washington, D.C. 20229, on