Subject
(d) Air Transport Association (ATA) of America Code 21: Air conditioning.

Reason
(e) The mandatory continuing airworthiness information (MCAI) states:

The present AD requires the flight crew to follow the instructions of the “emergency procedure check of delta P = 0” of the Aircraft Flight Manual (AFM) at the latest revision date.

This AD falls within the scope of a set of corrective measures developed by AIRBUS subsequent to accidents which occurred to in-service aircraft caused by the violent opening of the passenger door related to excessive residual pressure in the cabin.

The corrective action is revising the Emergency Procedures sections of the AFMs to advise the flightcrew of new procedures for emergency evacuation.

Actions and Compliance
(f) Within 30 days after the effective date of this AD, unless already done, do the following actions.

(1) For Model A310 and A300–600 series airplanes, revise the Emergency Procedures sections of the AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

**EMERGENCY EVACUATION**

**AIRCRAFT/PARKING**

**BRAKE** ........................ Stop/Set

**ATC (VHF 1)** ........................ Notify

**Cabin crew** ........................ Notify

**EMER EXIT LT** ........................ ON

**BOTH FUEL LEVERS** ........................ OFF

**FIRE handles (ENG and APU)** ........................ Pull

**AGENTS (ENG and APU)** ........................ as rqrd

**RAM AIR INLET** ........................ Open

Before opening doors:

**AP (DIFF PRESS)** ........................ Check zero

- If evacuation required:
  - Evacuation .......................... Initiate

- If evacuation not required:
  - CABIN CREW and PASSENGERS ........................ Notify”

(2) For Model A300 series airplanes on which modification 10002 is installed, revise the Emergency Procedures sections of the AFM to include the following statement. This may be done by inserting a copy of this AD into the AFM.

**EMERGENCY EVACUATION**

(Mod 10002)

**AIRCRAFT/PARKING**

**BRAKE** ........................ Stop/Set

**ATC (VHF 1)** ........................ Notify

**Cabin crew** ........................ Notify

**EMER EXIT LT** ........................ ON

**CL LT** ........................ ON

**BOTH FUEL LEVERS** ........................ OFF

**FIRE handles (ENG and APU)** ........................ Pull

**AGENTS (ENG and APU)** ........................ as rqrd

**RAM AIR INLET** ........................ Open

Before opening doors:

**AP (DIFF PRESS)** ........................ Check zero

- If evacuation required:
  - Evacuation .......................... Initiate

- If evacuation not required:
  - CABIN CREW and PASSENGERS ........................ Notify”

(3) For Model A310 and A300–600 series airplanes, revise the Emergency Procedures sections of the AFM to include the following information. This may be done by inserting a copy of this AD into the AFM.

- If DEPRESS VALVE selected in MAN mode:
  - DEPRESS VALVE MAN CLT ........................ Full Open
  - AP (Diff press) ........................ Check zero

- If evacuation required:
  - Evacuation .......................... Initiate
  - BAT (before leaving A/C) ........................ OFF/R

- If evacuation not required:
  - CABIN CREW and PASSENGERS ........................ Notify”

Note 1: When the information described in paragraphs (f)(1), (f)(2), or (f)(3) has been included in the general revisions of the AFM, the general revisions may be inserted in the applicable AFM, and the copy of the AD may be removed from that AFM.

FAA AD Differences

Note 2: This AD differs from the MCAI and/or service information as follows: No differences.

Other FAA AD Provisions

(g) The following provisions also apply to this AD:

(1) **Alternative Methods of Compliance (AMOCs):** The Manager, International Branch, ANM–116, FAA, has the authority to approve AMOCs for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Tom Stafford, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue, SW., Renton, Washington 98057–3356; telephone (425) 227–1622; fax (425) 227–1149. Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(2) **Airworthy Product:** For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or its delegated agent). You are required to assure the product is airworthy before it is returned to service.

(3) **Reporting Requirements:** For any reporting requirement in this AD, under the provisions of the Paperwork Reduction Act, the Office of Management and Budget (OMB) has approved the information collection requirements and has assigned OMB Control Number 2120–0056.

Related Information

(h) Refer to MCAI EASA Airworthiness Directive 2007–0093 R1, dated April 17, 2007, for related information.

Issued in Renton, Washington, on September 21, 2007.

Ali Bahrami,
Manager, Transport Airplane Directorate,
Aircraft Certification Service.

[FR Doc. E7–19203 Filed 9–27–07; 8:45 am]

BILLING CODE 4910–13–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 275

[Release No. IA–2652; File No. S7–22–07]

RIN 3235–AJ97

Interpretive Rule Under the Advisers Act Affecting Broker-Dealers

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission is publishing for comment an interpretive rule that would address the application of the Investment Advisers Act of 1940 to certain activities of broker-dealers. The proposal would reinstate three interpretive provisions of a rule that was vacated by a recent court opinion. The first provision would clarify that a broker-dealer that exercises investment discretion with respect to an account or charges a separate fee, or separately contracts, for advisory services provides investment advice that is not “solely incidental to” its business as a broker-dealer. The second provision would clarify that a broker-dealer does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act solely because it charges a commission for discount brokerage services that is less than it charges for full-service brokerage. The third provision would clarify that a registered broker-dealer is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subjects it to the Advisers Act.

DATES: Comments should be received on or before November 2, 2007.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission’s Internet comment form (http://www.sec.gov/rules/proposed.shtml); or
• Send an e-mail to rule-comments@sec.gov. Please include File Number S7–22–07 on the subject line; or
• Use the Federal eRulemaking Portal (http://www.regulations.gov). Follow the instructions for submitting comments.

Paper Comments

• Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number S7–22–07. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (http://www.sec.gov/rules/proposed.shtml). Comments are also available for public inspection and copying in the Commission’s Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days from 10 a.m. to 3 p.m. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT:

David W. Blass, Assistant Director, or Vincent M. Meenan, Senior Counsel, at (202) 551–6787 or IArules@sec.gov, Office of Investment Adviser Regulation, Division of Investment Management, U.S. Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–5041.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Investment Advisers Act of 1940 (“Advisers Act” or “Act”) 1 regulates the activities of certain “investment advisers,” who are defined in section 202(a)(11) of the Act as persons who receive compensation for providing advice about securities as part of a regular business. Section 202(a)(11)(C) excepts from the definition of “investment adviser” a broker or dealer and who receives no special compensation therefor.”

In 2005, we adopted the original rule 202(a)(11)–1 under the Advisers Act, the principal purpose of which was to deem broker-dealers offering “fee-based brokerage accounts” as not subject to the Advisers Act. 2 The rule also included several interpretations of section 202(a)(11)(C). On March 30, 2007, the Court of Appeals for the District of Columbia Circuit (the “Court”), in Financial Planning Association v. SEC (the “FPA decision”), vacated the original rule 202(a)(11)–1 on the grounds that the Commission did not have the authority to except broker-dealers offering fee-based brokerage accounts from the definition of “investment adviser.” 3 Though the Court did not question the validity of our interpretive positions, it vacated the entire rule, leaving our interpretations potentially in doubt.

We have received requests from broker-dealers that we clarify the status of our interpretive positions. 4 Because of the significance of the interpretations, and in order to provide the public with an opportunity for meaningful comment on them in light of the FPA decision, we are re-proposing the interpretive positions. 5 Proposed rule 202(a)(11)–1 would clarify that (i) a broker-dealer provides investment advice that is not “solely incidental to” the conduct of its business as a broker-dealer if it exercises investment discretion (other than on a temporary or limited basis) with respect to an account or charges a separate fee, or separately contracts, for advisory services, (ii) a broker-dealer does not receive “special compensation” solely because it charges different rates for its full-service brokerage services and discount brokerage services, and (iii) a registered broker-dealer is an investment adviser solely with respect to accounts for which it provides services that subject it to the Advisers Act. We discuss these proposed interpretive positions below.

II. Discussion

A. “Soley Incidental”

Section 202(a)(11)(C) of the Advisers Act, as discussed above, provides an exception from the Act for a broker-dealer “whose performance of [advisory services] is solely incidental to his business as a broker-dealer and who receives no special compensation therefor.” This exception amounts to a recognition that broker-dealers commonly give a certain amount of advice to their customers in the course of their regular business as broker-dealers and that “it would be inappropriate to bring them within the scope of the [Advisers Act] merely because of this aspect of their business.” 6

In the 2005 Proposing Release, we explained our understanding that investment advice is “solely incidental to” the conduct of a broker-dealer’s business within the meaning of section 202(a)(11)(C) when the advisory services rendered to an account are in connection with and reasonably related to the brokerage services provided to that account. 7 We further explained that our understanding is consistent with the legislative history of the Advisers Act, which indicates Congress’ intent to exclude broker-dealers providing advice as part of traditional brokerage services. We also explained that it is consistent with the Commission’s contemporaneous construction of the Advisers Act as excepting broker-dealers whose investment advice is given “solely as an incident of their regular business.” 8

Many commenters responding to the 2005 Proposing Release urged us to clarify that certain practices are not

5 As a separate part of our response to the FPA decision, we have adopted a temporary rule on an interim final basis that establishes an alternative means for investment advisers who are registered with us as broker-dealers to meet the requirements of section 206(3) of the Advisers Act when they act, directly or indirectly, in a principal capacity with respect to transactions with certain of their advisory clients. See Temporary Rule Regarding Principal Trades with Certain Advisory Clients, Investment Advisers Act Release No. 2653 (Sept. 24, 2007).


8 Id.
solely incidental to brokerage services. Proposed rule 202(a)(11)–1(a) would re-
codify two of the interpretations we
announced in 2005 regarding activity
that is not “solely incidental” to
brokerage services for purposes of
section 202(a)(11)(C). The situations
addressed by these interpretations are
not the only ones in which a broker-
dealer provides advice that is not solely
incidental to its business as a broker-
dealer.9 Commenters are invited to
suggest other situations that should be
addressed by the rule.

1. Separate Contract or Fee for
Advisory Services. Proposed rule
202(a)(11)–1(a)(1) would provide that a
broker-dealer that separately contracts
with a customer for, or separately
charges a fee for, investment advisory
services cannot be considered to be
providing advice that is solely
incidental to its brokerage. We view a
department of providing
the provision of investment advisory
services to reflect a recognition
that the advisory services are provided
independently of brokerage services and,
therefore, cannot be considered solely
incidental to the brokerage services.10
Similarly, we have long held the view
that when a broker-dealer charges its
customer a separate fee for investment
advice, it clearly is providing advisory
services and is subject to the Advisers
Act.11 In light of the FPA decision,
brokerage firms and other interested
parties may be unsure about whether we
continue to hold these views. In order
to provide certainty to those parties, the
proposed rule would codify our
interpretations.

We request comment on our
interpretation. In the 2005 Adopting
Release, we explained our
understanding that many broker-dealers
already use the payment of a separate
fee as a bright line test to distinguish
their brokerage activities from their
advisory activities and we have received
no information since 2005 that would
change our understanding. Are we correct? Do broker-dealers also already
consider advisory services that are the
subject of a separate contract not to be
solely incidental to the brokerage
services they provide? Commenters are
invited to explain to us any situation in
which a broker-dealer could charge a
separate fee for, or separately contract
for, advisory services in a manner that,
consistent with the intent of the
Advisers Act, is “solely incidental” to
the brokerage services provided. For
example, could a broker-dealer
separately contract for advisory services,
but receive no “special compensation”
therefore, for purposes of section
202(a)(11)(C) of the Act?

2. Discretionary Investment Advice.
We have long acknowledged that a
broker-dealer’s exercise of investment
discretion over customer accounts raises
serious questions about whether those
accounts must be treated as subject to the
Advisers Act—even where no special
compensation is received.12 In
2005, we adopted, and today we are re-
interpreting, the interpretation that a
broker-dealer’s exercise of investment
discretion is subject to the Advisers Act. Specifically,
rule 202(a)(11)–1(a) would clarify that
discretionary investment advice is not
“solely incidental to” the business of a
broker-dealer within the meaning of
section 202(a)(11)(C) and, accordingly,
brokers and dealers are not excepted
from the Act for any accounts over
which they exercise investment
discretion as that term is defined in
section 202(a)(1) of the Exchange Act
(except that investment discretion
granted by a customer on a temporary or
limited basis is excluded).13

We believe that a broker-dealer’s
authority to effect a trade without first

9 We have removed the text “(among other things, and
without limitation)” from the introductory
paragraph to proposed rule 202(a)(11)–1(a), though
we included that text in 2005. We believe it is clear
that the rule as we propose it today does not
directly reference the situations in which a broker-dealer
provide advice that is not “solely incidental” to
its business as a broker-dealer for purposes of
section 202(a)(11)(C).

10 2005 Adopting Release, supra note 2 at n.145, and
accompanying text.

11 Final Extension of Temporary Rules;
Investment Advisers Act Release No. 626 (Apr. 27,
1978) [43 FR 19224 (May 4, 1978)] (“Advisers Act
2, supra note 6 (“a broker or dealer who is specially
advised for the rendition of advice should be considered an investment adviser and not
be excluded from the purview of the [Advisers] Act
merely because he is also engaged in effecting
market transactions in securities”).

12 Advisers Act Release No. 626, supra note 11
(brokerage 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.”).

13 We would view a broker-dealer’s discretion
to be temporary or limited within the meaning of
rule 202(a)(11)–1(d) when the broker-dealer is given
discretion: (i) As to the price at which or the time
to execute an order for the purchase of a
security or type of security; (ii) on an isolated or
infrequent basis, to purchase or sell a security or
type of security when a customer is unavailable for
a limited period of time not to exceed a few months;
(iii) as to cash management, such as to exchange a
position in a money market fund for another
money market fund, when the customer is
unavailable for a limited period of time not to exceed a few months; and
(iv) to purchase or sell a security or type of security
limited by specific parameters established by the
customer.

14 See Amendment and Extension of Temporary
Exemption From the Investment Advisers Act for
Certain Brokers and Dealers, Investment Advisers
Act Release No. 471 (Aug. 20, 1975) [40 FR 38156
(Aug. 27, 1975)].

15 2005 Adopting Release, supra note 2 at n.165
and accompanying text. In that release, we
described our position as a change to the staff’s
previous approach under which a discretionary
account is subject to the Act only if the broker-dealer has
enough other discretionary accounts to trigger the
Act. For the reasons discussed in this Release and
in the 2005 Adopting Release, we believe that the
interpretation we are proposing today and adopted
in 2005 better effectuates the purposes of the Act.

16 Comment Letter of Morgan, Lewis & Bockius LLP
(Feb. 7, 2005).
except such broker-dealers from the Act. We disagree. As we explained in 2005, the Advisers Act does not address directly whether a broker-dealer exercising investment discretion over a commission-based account must comply with the Act. The Act applies unless the advisory services are “solely incidental” to the broker-dealer’s business and no “special compensation” is received. We remain unable to conclude that in 1940 Congress would have understood investment discretion to be part of the traditional package of services broker-dealers offered for commissions. We are aware of nothing in the legislative history of section 202(a)(11)(C) (or of the Act as a whole) or in the brokerage practices in 1940 that would preclude our interpretation of that section as being unavailable for all accounts over which broker-dealers exercise investment discretion. Do commenters agree?

We also are interested in understanding the impact on investors of these distinctions. We also request comment on our reference in the proposed rule to the definition of “investment discretion” in section 3(a)(5) of the Exchange Act. Is a different definition more appropriate? If so, what definition should we use? Are we correct in excluding investment discretion given on a temporary or limited basis? Have we correctly identified the circumstances in which a broker-dealer exercises temporary or limited discretion?

3. Financial Planning. The rule we adopted in 2005 also contained a provision stating that when a broker-dealer provides advice as part of a financial plan or in connection with providing financial planning services, a broker-dealer provides advice that is not solely incidental if it (i) holds itself out to the public as a financial planner or as providing financial planning services, (ii) delivers to its customer a financial plan, or (iii) represents to the customer that the advice is provided as part of a financial plan or financial planning services.17

We have decided not to propose this provision as part of this rule, which many financial services firms found difficult to apply.18 Instead, we plan to consider issues relating to financial planning in light of the results of a study we commissioned by the RAND Corporation (“RAND Study”) comparing the levels of protection afforded customers of broker-dealers and investment advisers under the federal securities laws. The RAND Study is expected to be delivered to us no later than December 2007, several months ahead of schedule.19

B. Full-Service and Discount Brokerage Programs

As part of our 2005 rulemaking, we adopted an interpretive provision which clarified that a broker-dealer will not be considered to have received “special compensation” for purposes of section 202(a)(11)(C) of the Advisers Act (and therefore will not be subject to the Act) solely because the broker-dealer charges a commission, mark-up, mark-down or similar fee for brokerage services that is greater or less than one it charges another customer. We are re-proposing that interpretive position today as proposed rule 202(a)(11)–1(b).20

This interpretive position reflects the longstanding view that, with respect to brokerage commissions or other transaction-based compensation, broker-dealers receive “special compensation” where there is a clearly definable charge

19 See Commission Seeks Time for Investors and Brokers to Respond to Court Decision on Fee-Based Accounts, SEC Press Release No. 2007–95 (May 14, 2007). The results of the RAND Study are expected to provide an important empirical foundation for the Commission to consider what action to take to improve the way investment advisers and broker-dealers provide financial services to customers. One option that will be available to the Commission will be making the RAND Study results available to the public and seeking comments on them.

20 Discount brokerage programs, including electronic trading programs, offer customers who do not want or need all the services that traditionally are provided in a full-service brokerage account the ability to trade securities at a reduced commission rate. Electronic trading programs provide customers the ability to trade on-line, typically without the assistance of a broker-dealer’s registered representative. Customers trading electronically may devise their own investment or trading strategies, or may seek advice separately from investment advisers.

21 We have, however, modified the text of the rule to clarify that it is an interpretation of the phrase “special compensation.” In addition, in the 2005 rulemaking, we stated that the interpretive position was necessary to supersedes past staff interpretations that would lead to a full-service broker-dealer being subject to the Advisers Act “with respect to accounts for which it provides advice incidental to its brokerage business merely because it offers electronic trading or other forms of discount brokerage.” 2005 Proposing Release at n.88 and accompanying text. Having revisited those past staff interpretations, we conclude that they do not necessarily lead to the conclusion that a broker-dealer’s full-service accounts are advisory accounts subject to the Advisers Act merely because the broker-dealer also offers some form of discount brokerage.

22 But, if a firm negotiates different fees with its customers for similar transactions, the Commission would not conclude that the customer being charged the higher fee is paying “special compensation” for investment advice based solely on differences in charges, because whether the pricing difference is based on the presence or absence of investment advice is “too hypothetical.”

23 Similarly, if, for example, a broker-dealer had a general fee schedule for full service brokerage that included access to brokerage personnel, and had a separate fee schedule for automated transactions using an Internet Web site, we would not, absent other factors, view the difference as “special compensation.” As one commenter to our 2005 proposal noted, electronic brokerage programs offer “lower expenses and less overhead, [and it is] entirely appropriate, and necessarily competitive, for firms to have reduced their fees for such services, and this reduction is obviously in clients’ best interests.”

24 The Commission would not look outside the fee structure of a given firm to determine whether special compensation exists. That is, just because a “discount” firm offered lower rates than a “full-service” firm, we would not consider the “full-service” firm’s charges “special compensation.”

25 We request comment on this interpretation. Do commenters support it? Should we consider any modifications and, if so, which ones?

C. Dual Registrants

Finally, we adopted in 2005, and are re-proposing today, a rule providing that a broker-dealer that is registered under both the Exchange Act and the Advisers Act is an investment adviser solely with respect to those accounts for which it provides advice or receives compensation that subject the broker-dealer to the Advisers Act.26 We received few comments regarding this provision of the original rule, and we...
are proposing it as adopted. The provision would codify a long-standing interpretation of the Act that permits a broker-dealer also registered under the Act to distinguish its brokerage customers from its advisory clients.\footnote{27} 

\section*{III. General Request for Comment}

The Commission is proposing the interpretive provisions described above and we welcome your comments. We solicit comment, both specific and general, on each component of the proposals. We request and encourage any interested persons to submit comments regarding:

- The proposals that are the subject of this release;
- Additional or different revisions; and
- Other matters that may have an effect on the proposals contained in this release.

Comment is also solicited from the point of view of broker-dealers and investment advisers, their customers and clients, other regulatory bodies (such as state securities regulators), and other interested persons. Any person wishing to submit written comments on any aspect of the proposal is requested to do so.

\section*{IV. Cost-Benefit Analysis}

The Commission is sensitive to the costs and benefits imposed by its rules, and is considering the costs and benefits of proposed rule 202(a)(11)–1. Proposed rule 202(a)(11)–1 would clarify that if a broker-dealer exercises investment discretion over customer accounts or contracts with a customer for, or charges a separate fee for, advisory services it is providing analysis and empirical data to support their statements regarding any costs or benefits associated with proposed rule 202(a)(11)–1.

\section*{V. Paperwork Reduction Act}

Proposed rule 202(a)(11)–1 would not impose any new “collections of information” within the meaning of the Paperwork Reduction Act of 1995.\footnote{30} The proposed rule would not create any new filing, reporting, recordkeeping, or disclosure reporting requirements for broker-dealers or investment advisers. The proposed rule would re-codify three interpretive provisions. First, the rule would clarify that a broker-dealer that exercises investment discretion with respect to an account or contracts with a customer for, or charges a separate fee for, advisory services provides investment advice that is not “solely incidental” to its business as a broker-dealer. Second, the rule would clarify that a broker-dealer does not receive “special compensation” solely because it charges a commission rate to one customer that is greater or less than one it charges another customer. Finally, proposed rule 202(a)(11)–1 would clarify that broker-dealers that are also registered as investment advisers are subject to the Advisers Act solely with respect to accounts for which they provide services or receive compensation that subject them to the Act.

As discussed above, in 2005 we adopted the original rule 202(a)(11)–1 under the Advisers Act. The original rule included, among other things, the interpretive rules we are proposing today. On March 30, 2007, the Court vacated original rule 202(a)(11)–1.

\footnote{27} 2005 Adopting Release, supra note 2. See also Advisers Act Release No. 626, supra note 7.

\footnote{30} 44 U.S.C. 3501 to 3520.
We request comment on whether our assumption that there is no additional paperwork burden is correct.

VI. Initial Regulatory Flexibility Analysis

Section 3(a) of the Regulatory Flexibility Act requires the Commission to undertake an Initial Regulatory Flexibility Analysis of the proposed rule on small entities unless the Commission certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. Pursuant to section 605(b) of the Regulatory Flexibility Act, the Commission hereby certifies that proposed rule 202(a)(11)–1 would not, if adopted, have a significant impact on a substantial number of small entities.

Proposed rule 202(a)(11)–1 would recodify three interpretive provisions. First, the rule would clarify that a broker-dealer that exercises investment discretion with respect to an account or contracts with customers for, or charges a separate fee for, advisory services or provides discretionary brokerage to register under the Advisers Act. We estimated that the rule, which we are proposing today as rule 202(a)(11)–1(a), therefore increased the number of respondents under several existing collections of information, and, correspondingly, increased the annual aggregate burden under those existing collections of information.


We have determined not to modify these burden estimates because we continue to believe they were appropriate and, with respect to the proposals in this release, that there is no additional paperwork burden.

VII. Statutory Authority

The Commission is proposing to amend Rule 202(a)(11)–1 pursuant to section 211(a) of the Advisers Act.

Text of Rule

List of Subjects in 17 CFR Part 275

Investment advisers, Reporting and recordkeeping requirements.

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:

§275.202(a)(11)–1 Certain broker-dealers.

(a) Solely incidental. A broker or dealer provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act (15 U.S.C. 80b–2(a)(11)(C)) if the broker or dealer:

(1) Charges a separate fee, or separately contracts, for advisory services; or

(2) Exercises investment discretion (as that term is defined in section 3(a)(35) of the Securities Exchange Act of 1934 ("Exchange Act") (15 U.S.C. 78c(a)(35)), except investment discretion granted by a customer on a temporary or limited basis, over such account.

(b) Special compensation. A broker or dealer registered pursuant to section 15 of the Exchange Act (15 U.S.C. 78o) does not receive special compensation within the meaning of section 202(a)(11)(C) of the Advisers Act 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.

(c) Special rule. A broker or dealer registered with the Commission under Section 15 of the Exchange Act is an investment adviser solely with respect to those accounts for which it provides services or receives compensation that subject the broker-dealer to the Advisers Act.

By the Commission.

35 See 2005 Proposing Release, supra note 7, at Section VII; 2005 Adopting Release, supra note 2, at Section VIII.

36 In 2005, as today, we estimated that the provisions now contained in proposed rule 202(a)(11)–1(b) and 202(a)(11)–1(c) did not contain any collections of information within the meaning of the Paperwork Reduction Act.

33 5 U.S.C. 605(b).

34 5 U.S.C. 605(b).
DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–143326–05]

RIN 1545–BE95

S Corporation Guidance Under AJCA of 2004 and GOZA of 2005

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations that provide guidance regarding certain changes made to the rules governing S corporations under the American Jobs Creation Act of 2004 and the Gulf Opportunity Zone Act of 2005. The proposed regulations are necessary to replace obsolete references in the current regulations and to allow taxpayers to make proper use of the provisions that made changes to prior law. In particular, the proposed regulations provide guidance on the S corporation family shareholder rules, the definitions of “powers of appointment” and “potential current beneficiaries” (PCBs) with regard to electing small business trusts (ESBTs), the allowance of suspended losses to the spouse or former spouse of an S corporation shareholder, and relief for inadvertently terminated or invalid qualified subchapter S subsidiary (QSub) elections. The proposed regulations will affect S corporations and their shareholders. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by December 27, 2007. Outlines of topics to be discussed at the public hearing scheduled for January 16, 2008, at 10 a.m., must be received by December 27, 2007.

ADDRESSES: Send submissions to: CC:PA:LDP:PR (REG–143326–05), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LDP:PR (REG–143326–05), Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC, or sent electronically via the Federal eRulemaking Portal at http://www.regulations.gov/ (indicate IRS REG–143326–05). The public hearing will be held in the IRS Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Bradford R. Poston, (202) 622–3060; concerning submissions of comments, the hearing, or to be placed on the building access list to attend the hearing, Kelly Banks, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)). Comments on the collections of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224. Comments on the collection of information should be received by November 27, 2007.

Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the Internal Revenue Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information;

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of service to provide information.

The reporting requirement in these proposed regulations is in §1.1361–1(m)(2)(ii)(A). This information must be reported by the trustees of trusts electing to be ESBTs. This information will be used by the IRS to determine the number of shareholders of the corporation in which the trust holds stock and thus whether the corporation is an eligible S corporation. The respondents will be trusts making an ESBT election.

The following estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on the information that is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Estimated total annual reporting burden: 26,000 hours.

Estimated average annual burden: 1 hour.

Estimated number of respondents: 26,000.

Estimated annual frequency of response: On occasion.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background