

Proposed Rules

Federal Register

Vol. 75, No. 174

Thursday, September 9, 2010

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AC46

Commodity Pool Operators: Relief From Compliance With Certain Disclosure, Reporting and Recordkeeping Requirements for Registered CPOs of Commodity Pools Listed for Trading on a National Securities Exchange; CPO Registration Exemption for Certain Independent Directors or Trustees of These Commodity Pools

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing changes to its regulations as they affect certain commodity pool operators (CPOs) of commodity pools whose units of participation are listed and traded on a national securities exchange (Proposal). Specifically, the Proposal would codify the relief from certain disclosure, reporting and recordkeeping requirements that Commission staff previously has issued on a case-by-case basis to these CPOs. In addition, the Proposal would provide relief from the CPO registration requirement for certain independent directors or trustees of actively-managed commodity pools.

DATES: Written comments must be received on or before October 25, 2010.

ADDRESSES: Interested persons may submit comments by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *E-mail:* [e-mail address TBD] Include "Proposed Regulatory Relief for CPOs of Exchange-Listed Commodity Pools" in the subject line of the message.

- *Fax:* (202) 418-5521.

- *Mail:* Send to David Stawick, Secretary, Commodity Futures Trading

Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

- *Courier:* Same as Mail above.

All comments received will be posted, without change, to <http://www.cftc.gov>. All comments must be in English or, if in another language, accompanied by an English translation.

FOR FURTHER INFORMATION CONTACT:

Christopher W. Cummings, Special Counsel, Division of Clearing and Intermediary Oversight, or Barbara S. Gold, Associate Director, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, telephone number: (202) 418-5450; facsimile number: (202) 418-5528; and electronic mail: ccummings@cftc.gov, or bgold@cftc.gov, respectively.

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulation of CPOs

Section 1a(5) of the Commodity Exchange Act (Act) defines the term "commodity pool operator" to mean:

[A]ny person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market or derivatives transaction execution facility, * * *

Section 4m(1) of the Act provides, in relevant part, that it is unlawful for any CPO, "unless registered under [the] Act, to make use of the mails or any means or instrumentality of interstate commerce" in connection with its business as a CPO.²

Part 4 of the Commission's regulations governs the operations and activities of CPOs.³ Generally, CPOs who are, or

¹ 7 U.S.C. 1a(5) (2006).

The Act and the Commission's regulations may be accessed through the Commission's Web site, at: <http://www.cftc.gov>.

² 7 U.S.C. 6m(1) (2006).

³ The Commission's regulations are found at 17 CFR Ch. I (2010), and, as noted previously, can be accessed through the Commission's Web site. Part 4 of the regulations also governs the operations and activities of commodity trading advisors (CTAs), who are defined in Section 1a(6) of the Act and, like

who are required to be, registered with the Commission must deliver to prospective pool participants a Disclosure Document containing specified information⁴—e.g., the business background of the CPO and its principals, past performance of the pool being offered, fees and other expenses, and conflicts of interest—and they must distribute to participants in their pools periodic unaudited Account Statements and certified Annual Reports of their pools' operations.⁵ These CPOs also must make and keep specified books and records at their main business office.⁶ Additionally, regardless of registration status, all persons who come within the CPO definition are subject to certain operational⁷ and advertising requirements⁸ under Part 4, to all other provisions of the Act and the Commission's regulations prohibiting fraud that apply to CPOs,⁹ and to all other relevant provisions of the Act and the Commission's regulations that apply to all commodity interest market participants, such as the general antifraud provisions, prohibitions against manipulation, and the trade reporting requirements.¹⁰

B. Relief From CPO Regulation

1. In General

In implementing its statutory mandate to regulate the activities of CPOs, the Commission has endeavored to refine its regulations as appropriate to respond to changing market conditions in a manner consistent with customer protection. In addition to the issuance of relief by Commission staff on a case-by-case basis to facilitate application of regulatory requirements to new market conditions, the Commission has provided certain exemptions for registered CPOs from various of the requirements of Part 4 of its regulations, and where appropriate, it has provided exemptions from the CPO registration requirement itself. In 1985, the Commission adopted Regulation 4.5 to exclude from the CPO

CPOs, are subject to registration under Section 4m(1) of the Act. However, the operations and activities of CTAs are not the subject of the Proposal.

⁴ Regulation 4.21.

⁵ Regulation 4.22.

⁶ Regulation 4.23.

⁷ Regulation 4.20.

⁸ Regulation 4.41.

⁹ See, e.g., Section 4o of the Act.

¹⁰ See, e.g., Section 4b of the Act and Parts 15 and 18 of the Regulations.

definition (and thus from the requirement to register as a CPO) certain otherwise highly-regulated persons in connection with their operation of specified “qualifying entities”—*i.e.*, registered investment companies, insurance company separate accounts, bank collective trust funds and qualifying pension plans.¹¹ In 1987, the Commission adopted Regulation 4.12(b) to provide relief from specific compliance with certain disclosure, reporting and recordkeeping requirements of Part 4 for certain CPOs who operate pools that trade generally and routinely in securities instruments, and who intend to commit no more than 10 percent of the value of their pools’ assets as initial margin or as option premiums for commodity interest trading.¹² In addition, in 1992, the Commission adopted Regulation 4.7 to make available a simplified regulatory framework for CPOs privately offering commodity pools to certain highly accredited investors, termed “qualified eligible participants” or “QEPs.”¹³ In 2000, the Commission amended Regulation 4.7 to expand the rule’s availability.¹⁴ Most recently, in 2003, the Commission adopted Regulations 4.13(a)(3) and (a)(4) to exempt, respectively, from the CPO registration requirement operators of pools that are offered to certain types of sophisticated investors and that restrict their commodity interest trading to specified limits and operators of pools that admit exclusively investors meeting a higher sophistication standard, but that need not restrict their trading.

As is explained in greater detail below, the Proposal is intended to respond to financial market developments by providing relief to operators of commodity pools where units of participation in the pool are listed for trading on a national securities exchange.

2. Commodity Exchange Traded Funds

Historically, exchange-traded funds, or ETFs, have been investment companies registered as such under the Investment Company Act of 1940 either as unit investment trusts or as open-end investment companies. Shares of ETFs are traded by both institutional and retail investors on national securities exchanges, and in the over-the-counter markets. ETFs are designed to replicate the holdings, or correspond to the performance and yield of, a referenced securities index or a highly-correlated

subset of the securities underlying the index.¹⁵ More recently, ETFs have been offered that seek to use active management of the fund’s trading.

In 2005, registered CPOs began offering commodity pools whose units of participation (“shares”) are publicly-offered and listed for trading on a national securities exchange. These pools have come to be known as “Commodity ETFs” because they are designed to emulate ETFs.¹⁶ Like ETFs, a Commodity ETF may passively seek to track or replicate the performance of a specific commodity index, or it may actively trade commodity interests without regard to an index or benchmark.

CPOs of Commodity ETFs have requested and received from Commission staff exemptive relief from certain of the disclosure, reporting and recordkeeping requirements of Subpart B of Part 4 of the Commission’s regulations (Prior Relief Letters).¹⁷ In each case, the CPO sought exemption from certain of the Disclosure Document

¹⁵ See Letter from James A. Brigagliano, Esq., Assistant Director, SEC Division of Market Regulation, to Stuart M. Strauss, Esq., dated October 24, 2006 (re: Class Relief for Exchange Traded Index Funds), available at: <http://www.sec.gov/divisions/marketreg/mr-noaction/etifclassrelief102406-msr.pdf>.

¹⁶ CPOs have operated Commodity ETFs on the basis that the units of participation or shares constitute securities for purposes of the U.S. federal securities laws and that they can be offered, sold and transferred as such. However, in Commission Staff Letters cited below at n. 17, staff stated that, while not necessarily agreeing with the SEC’s or the CPOs’ analyses or conclusions on this issue, it would not recommend that the Commission commence any enforcement action against a Commodity ETF or market participants in connection with the offer, sale and transfer of units of participation in the Commodity ETFs.

¹⁷ See CFTC Staff Letters 10–24 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,586 (Jun. 28, 2010); 10–23 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,584 (Jun. 7, 2010); 10–22 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,583 (Jun. 3, 2010); 08–16 [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,925 (Sep. 3, 2008); 08–15 [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,924 (Aug. 20, 2008); 08–02 [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,796 (Jan. 29, 2008); 08–01 [2007–2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,795 (Jan. 11, 2008); 06–26 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,396 (Sep. 26, 2006); 06–27 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,397 (Sep. 26, 2006); 06–16 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,311 (Jul. 6, 2006); 06–15 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,310 (Jul. 12, 2006); and 05–19 [2005–2007 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶30,164 (Nov. 10, 2005). The following involve actively-traded Commodity ETFs: CFTC Staff Letters 10–06 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,557 (Mar. 29, 2010) and 09–39 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶31,473 (Jul. 30, 2009). All of the foregoing are accessible at the Commission’s Internet Web site at <http://www.cftc.gov>. Staff issued these exemptions pursuant to the authority delegated to it by the Commission under Regulation 140.93.

delivery and acknowledgment requirements of Regulation 4.21,¹⁸ the periodic Account Statement distribution requirement of Regulation 4.22,¹⁹ and the requirement under Regulation 4.23 to keep the pool’s books and records at the CPO’s main business office.²⁰ In support of their requests, the CPOs offered substituted compliance with other requirements and various undertakings.²¹ The Proposal would codify the exemptions that Commission staff has granted.

These CPOs sought relief from the specific Disclosure Document delivery and acknowledgment requirements of Regulation 4.21 because the prospectus delivery requirements under federal securities laws applicable to registered public offerings of exchange-traded shares (such as units of participation in Commodity ETFs) differ from Commission regulations with respect to timing and other aspects. Thus, the CPOs claimed that requiring simultaneous compliance with both sets of requirements was unnecessarily cumbersome, and would needlessly interfere with the established procedures for conducting a registered public offering of shares to be listed on a national securities exchange. In support of their requests, the CPOs represented that the prospectus required under federal securities laws would contain all of the information required to be included in a Disclosure Document under Regulations 4.24 and

¹⁸ Regulation 4.21 requires each CPO registered or required to be registered to deliver to a prospective participant in a pool that it operates or intends to operate, a Disclosure Document prepared in accordance with Regulations 4.24 and 4.25. It further provides that the CPO may not accept or receive funds, securities or other property from a prospective participant unless the CPO first receives from the prospective participant a signed and dated acknowledgment stating that the prospective participant received a Disclosure Document for the pool.

¹⁹ Regulation 4.22 provides that each CPO registered or required to be registered must periodically distribute to each participant in each pool that it operates an Account Statement presented in the form of a Statement of Income (Loss) and a Statement of Changes in Net Asset Value for the prescribed period. The Account Statement must be distributed monthly in the case of pools with net assets of more than \$500,000, and otherwise at least quarterly. CPOs of Commodity ETFs will generally be subject to the requirement to distribute Account Statements monthly. The financial statements must be presented in accordance with generally accepted accounting principles, consistently applied.

²⁰ Regulation 4.23 provides, in relevant part, that each CPO who is registered or required to be registered must make and keep the books and records specified in the regulation “at its main business office.”

²¹ See the Prior Exemption Letters for the particular details of the Commodity ETF structure and offering mechanics, as well as for the exemptive relief and the facts and conditions upon which it was based.

¹¹ See 50 FR 15868 (Apr. 23, 1985).

¹² See 52 FR 41975 (Nov. 2, 1987).

¹³ See 57 FR 34853 (Aug. 7, 1992).

¹⁴ See 65 FR 47848 (Aug. 4, 2000).

4.25,²² and that, in addition to being made available in accordance with SEC prospectus delivery requirements, the Disclosure Document would be made readily available at the CPO's Internet Web site.²³ Further, the CPOs represented that in acquiring Commodity ETF shares, prospective and actual investors would utilize the services of registered broker-dealers, who would be directed by the CPO either to inform investors where they could obtain the current Disclosure Document or to deliver a copy of the Disclosure Document.

The CPOs sought relief from the Account Statement delivery requirement for the reason that an issuer of exchange-traded shares held in book-entry form through the Depository Trust Company (such as the CPO of a Commodity ETF) typically does not readily know the identities of the ultimate beneficial owners of the shares. The CPOs argued that it would be unduly burdensome and costly to require them to ascertain, on a monthly basis, the identities of purchasers of shares in the secondary market in order to comply with the requirement under Rules 4.22(a) and (b) to deliver monthly Account Statements to those participants. Commission staff noted that, while traditional publicly-offered commodity pools typically provide for redemption of shares no more frequently than monthly, because of the secondary market for a Commodity ETF's shares on a national securities exchange, ownership of those shares was expected to change, frequently on a daily basis, and even throughout the day. The CPOs subject to the Prior Exemption Letters undertook that the same information that would otherwise be provided in the monthly Account Statements, including net asset value and the certification required by Regulation 4.22(h),²⁴ would be made

²² The Commission has said that a prospectus can be used to satisfy the Disclosure Document requirement so long as the prospectus complies with the Commission's content requirements. See 44 FR 1918, 1922 (Jan. 8, 1979).

²³ The CPOs did not seek relief from Regulation 4.21 with respect to sales of pool shares on a national securities exchange (i.e., sales on the secondary market). A CPO's obligation to deliver a Disclosure Document (and the requirement to obtain a signed acknowledgment of receipt) extends to the direct purchaser of units of participation, and not to persons who subsequently purchase from that purchaser. In this regard, the Commission has stated that, with respect to the transfer of a participation unit in a commodity pool, the CPO of the pool "is not required to provide a Disclosure Document (Rule 4.21) to a person who purchases a unit of participation or interest in the pool from a pool participant if the pool operator did not solicit the purchase." 44 FR 25658, 25659 (May 2, 1979).

²⁴ Pursuant to Regulation 4.22(h), a representative duly authorized to bind the CPO must sign an oath

readily available via the CPO's Internet Web site, of which availability the Disclosure Document would advise participants.

The CPOs also sought exemption from the requirement to keep the books and records required under Regulation 4.23 at the CPO's main business address, seeking instead to keep books and records with one or more banks or professional service providers.²⁵ As a condition to granting the requested exemption, Commission staff required the CPO to provide signed acknowledgments by each alternate recordkeeper that the books and records may be inspected and copied by any representative of the Commission, the National Futures Association (NFA) or the United States Department of Justice and may be inspected and copied during normal business hours by pool participants.

C. CPO Registration Relief for Independent Directors or Trustees of Commodity ETFs

As directed by the Sarbanes-Oxley Act of 2002,²⁶ the SEC has adopted rules requiring national securities exchanges to prohibit the listing of the securities of any issuer (e.g., units of participation in a Commodity ETF) that does not comply with specified requirements for audit

or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the Account Statement is accurate and complete.

²⁵ For example, in one case, the alternate recordkeepers were a CPO-affiliated national banking association, a state-regulated bank and a registered broker-dealer. In several other cases, the alternate recordkeepers were a state- and Federal Reserve Board-regulated bank and a registered broker-dealer performing distribution-related services.

The CPOs also asked Commission staff to confirm that none of the entities selected as alternate recordkeepers would be deemed to be CPOs solely by reason of keeping required books and records of a pool. In response, staff noted that the Commission has stated that such service providers as a registered investment company's depositor, sponsor, underwriter or investment adviser were "outside the CPO definition." See 50 FR 15868 at 15871 (Apr. 23, 1985). It further noted that, as the Commission previously has acknowledged, in determining who is acting in the manner contemplated by the statutory CPO definition, Commission staff typically looks at such factors as "who will be promoting the pool by soliciting, accepting or receiving from others, property for the purpose of commodity interest trading—and who will have the authority to hire (and fire) the pool's CTA and to select (and change) the pool's [futures commission merchant]." *Id.*, citing 49 FR 4778, 4780 (Feb. 8, 1984).

²⁶ Public Law 107–204, 116 Stat. 745, enacted July 30, 2002.

committees.²⁷ Pursuant to Rule 10A–3²⁸ under the Securities Exchange Act of 1934 ('34 Act), in order for a national securities exchange to permit an issuer to list its securities, the members of the issuer's audit committee must be members of its board of directors but otherwise independent.²⁹ The audit committee is to be responsible for appointing, compensating and overseeing the public accountant employed to prepare the issuer's audit report. National securities exchanges have amended their listing requirements to conform to, and carry out, the SEC rule.

Under SEC Rule 10A–3(c)(7), a trust or other unincorporated organization that does not have a board of directors or persons acting in a similar capacity is not subject to the audit committee requirements if the organization's activities are limited to passively owning or holding securities or other assets for the benefit of the organization's security holders. Commodity ETFs that track commodity indices have relied upon this provision. Now that Commodity ETFs are being formed to trade commodity interests in an active manner, such Commodity ETFs must have independent directors (or trustees). Because a director (or trustee) of a commodity pool is presumed to be a CPO by virtue of the power such person can exercise, these independent directors (trustees) must either register as CPOs or seek registration relief.³⁰

II. Relief From Compliance With Subpart B of Part 4 for CPOs of Commodity ETFs: New Regulation 4.12(c)

Regulation 4.12 currently contains paragraph (a), which states the Commission's power to exempt persons from the provisions of Part 4, consistent with the public interest and subject to appropriate terms and conditions, and paragraph (b), which makes an exemption from certain disclosure,

²⁷ The requirements, set forth in 15 U.S.C. 78j–1(m)(2) through (6) (2006), concern: Responsibility for appointing, compensating and overseeing the issuer's public accounting firm; independence of audit committee members; procedures for handling complaints regarding accounting and auditing matters; and the audit committee's authority to engage outside advisers.

²⁸ 17 CFR 240.10A–3 (2010).

²⁹ Audit committee members may not accept any consulting, advisory or other compensatory fee from the issuer, other than as a member of the board or of a committee thereof, and they may not be affiliated persons of the issuer or any of its subsidiaries. See 17 CFR § 240.10A–3(b)(1)(ii) (2010).

³⁰ See CFTC Staff Letter 10–06 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 31,557 (Mar. 29, 2010), for additional explanation of this point.

reporting and recordkeeping requirements available to registered CPOs whose pools, among other requirements, trade commodity interests in a manner solely incidental to their securities trading activities and do not enter into commodity interest transactions for which the aggregate initial margin and premiums exceed 10 percent of the fair market value of the pool's assets (after taking into account unrealized profits and losses). To make generally available the relief its staff has issued to the registered CPOs of Commodity ETFs, the Commission is proposing to add a new paragraph (c) to existing Regulation 4.12.³¹ The new paragraph would first specify the eligibility requirements for the exemption, and would then set forth the relief that an eligible CPO could claim.

A. Eligibility

Under proposed paragraph (c)(1), a registered CPO, or a person who has applied for CPO registration, would be able to claim the relief available under the rule with respect to any pool that meets the following criteria: that the units of participation be offered and sold pursuant to an effective registration statement under the '33 Act, and that they be listed for trading on a national securities exchange registered as such under the '34 Act.³²

B. The Proposed Relief

Proposed paragraph (c)(2) would specify the exemptive relief available under the Proposal, as well as the duties and obligations of the CPO who claims the relief.

1. Relief From the Disclosure Document Delivery and Acknowledgment Requirement of Regulation 4.21

Proposed paragraph (c)(2)(i) would provide certain relief from the Disclosure Document delivery requirement of Regulation 4.21(a), and relief from the signed acknowledgment requirement of Regulation 4.21(b) for an eligible CPO. The CPO claiming relief would be required to make the pool's Disclosure Document readily accessible on an Internet Web site maintained by

³¹ In addition, the Commission is proposing certain technical changes to Regulation 4.12 to accommodate this new paragraph. Specifically, existing subparagraphs (b)(3) through (b)(6) of Regulation 4.12 (which currently set forth the filing requirements to claim relief under Regulation 4.12(b)) would be re-designated as a separate paragraph (d) and revised to include similar filing requirements for CPOs seeking to claim the proposed new relief.

³² The claimed relief would become effective upon filing the notice, for registered CPOs, and upon CPO registration for applicants.

the CPO.³³ The CPO must also comply with the requirements of Regulation 4.26 to keep the Disclosure Document current and to correct the Disclosure Document as necessary. The CPO must clearly inform prospective pool participants of the availability of the Disclosure Document and the Internet address for accessing it, and to direct any selling agent to whom the pool operator sells units of participation to so inform prospective participants. Finally, the CPO must comply with all other requirements in Part 4 applicable to Disclosure Documents, which includes the form and content requirements of Regulations 4.24 and 4.25.

Proposed paragraph (c)(2)(ii) would state that the CPO may satisfy the requirement of Regulation 4.26(b) to attach to the Disclosure Document a copy of the pool's most current Account Statement and Annual Report by making the same readily accessible on an Internet Web site maintained by the CPO.

2. Relief From the Periodic Account Statement Distribution Requirement of Regulation 4.22

Proposed paragraph (c)(2)(iii) would provide certain substituted compliance relief from Regulations 4.22(a) and (b). In lieu of compliance with the requirement in the regulation that the CPO distribute a monthly Account Statement to each pool participant, the Proposal would permit the CPO to maintain the pool's Account Statement, including the certification required by Regulation 4.22(h), readily accessible on a Web site operated by the CPO. This relief, however, would be subject to the CPO: (1) Keeping the Account Statement readily accessible on the Web site for a period of 30 days following the date the Account Statement is first posted on the Web site;³⁴ (2) indicating in the

³³ In its *Interpretation Regarding Use of Electronic Media by Commodity Pool Operators and Commodity Trading Advisors for Delivery of Disclosure Documents and Other Materials*, 62 FR 39104 (July 22, 1997), the Commission said "[i]n stating that the Disclosure Document be 'readily accessible,' the Commission requires that the Disclosure Document be accessible on a comparable basis to other promotional material on the CPO's or CTA's Web site." 62 FR at 39108-39109. In other words, the user should not have to proceed through a confusing series of menus or hyperlinks in order to reach the desired item. The process of retrieving an item cannot be so burdensome that the intended user cannot effectively access the information in a manner comparable to receiving a hard-copy document.

³⁴ A requirement to make each Account Statement readily accessible for a 30-day period corresponds to the existing requirement as to currency of the information in the Account Statement. Unlike a Disclosure Document that is required to be updated and kept current, each Account Statement is superseded by the succeeding Account Statement.

Disclosure Document that the information required to be included in the Account Statement will be readily accessible on the CPO's Web site; and (3) including in the Disclosure Document the Internet address of the pool's Account Statement. (Proposed Regulations 4.12(c)(2)(iii)(A) and (B)).³⁵

3. Relief From the Books and Records Location Requirement of Regulation 4.23

Proposed paragraph (c)(2)(iv) would provide relief from the location requirement of Regulation 4.23. The proposed regulation would permit such of the required books and records as are not kept at the CPO's main business address to be kept at the office of the pool's administrator, its distributor, or a bank or registered broker dealer that is providing services to the CPO or the pool similar to those provided by an administrator or distributor.

Under proposed paragraph (c)(2)(iv)(B), the CPO would be required to provide certain information about storage of books and records at the time that the CPO files to claim relief under Regulation 4.12(c). When filing the notice claiming relief (discussed in greater detail below), the CPO would include a statement identifying, by name and specified contact information, each person other than the CPO who will be keeping required pool books and records, and it would identify each of the categories of books and records, as set forth in various numbered paragraphs of Regulation 4.23, that each such person will be keeping.

Proposed paragraph (c)(2)(iv)(B)(4) would require that the CPO's statement contain representations from the CPO that: (1) It will promptly amend the statement if the contact information or location of any required books and records change;³⁶ (2) the CPO ultimately remains responsible for maintenance and availability of all books and records required under

This 30-day requirement does not affect the CPO's obligation under Regulation 4.23(a)(12) to retain for a period of five years a manually signed copy of each Account Statement for the pool.

³⁵ The CPOs did not request, and the Commission is not now proposing, relief from the requirement that a CPO prepare and deliver an Annual Report for the pool at this time. The Commission does not believe that the burden involved in distributing an Annual Report to pool participants is outweighed by the benefit to the participants of receiving certified financial statements at least annually.

³⁶ The CPO would be required to file a separate claim of exemption and accompanying statement if additional required books and records are subsequently kept at a location other than the CPO's main business address, or if the CPO chooses to keep books and records subsequently at an additional location other than its main business address.

Regulation 4.23; (3) it will obtain and provide to Commission, NFA or Department of Justice representatives within 48 hours of any request, original books and records from whatever location they are being kept;³⁷ and (4) it will disclose in the pool's Disclosure Document the location of its books and records that are required under Regulation 4.23.

Finally, proposed paragraph (c)(2)(iv)(C) would require that the statement contain an acknowledgment by each person keeping pool books and records (other than the CPO) that the person will be keeping the books and records identified by the CPO, and that the person will make those books and records available in accordance with Regulation 4.23.

C. Procedure for Claiming Relief

As noted previously³⁸ the Proposal would redesignate existing paragraphs (b)(3) through (b)(6) of Regulation 4.12, which currently set forth the filing requirements to claim relief under Regulation 4.12(b), as a separate paragraph (d). The Proposal would also revise the existing language to include filing requirements for CPOs claiming the proposed new relief (as well as those claiming relief under Regulation 4.12(b)).

As with Regulation 4.12(b), a CPO wishing to obtain the exemption provided under Regulation 4.12(c) would electronically file a claim of exemption with NFA through NFA's electronic exemptions filing system, which claim will be effective upon filing. The claim would provide the specified identifying information, representations that the pool will be operated in compliance with the requirements of Regulation 4.12(c)(1), and specify the relief sought. As discussed above, the claim of exemption must also include the statements required under paragraphs (c)(2)(iii)(B) and (c)(2)(iii)(C) concerning books and records kept and maintained at a location other than the CPO's main business office.³⁹

Failure to meet the criteria for exemption as set forth in the Proposal will mean that the person claiming exemption is not exempt and that the full range of Part 4 requirements continue to apply to it.

³⁷ If original books and records are maintained at a location outside the United States, the CPO is required to provide them at its main business office within seventy-two hours of a request.

³⁸ See footnote 31.

³⁹ If the Proposal is adopted, the Commission will issue an order authorizing NFA to accept electronically the notices and other documents called for by Regulation 4.12(c).

III. CPO Registration Relief for Certain Directors or Trustees of Commodity ETFs: New Regulation 4.13(a)(5)

The Commission is proposing to provide an exemption from the requirement to register as a CPO for persons who serve as a pool's director, trustee or in a similar position, solely for the purpose of complying with the audit committee requirements of SEC Rule 10A-3. The new exemption would be contained in paragraph (a)(5) of Regulation 4.13 (and existing paragraph (a)(5) would be re-numbered as paragraph (a)(6)). Like the other exemptions provided in Regulation 4.13, the new exemption would require a notice to be filed electronically with NFA before the exemption became effective.⁴⁰ The notice would be filed by the individual director or trustee. The pool's registered CPO would be liable for any violation of the Act or of the Commission's regulations by the director or trustee in connection with serving as a director or trustee of the pool.

IV. Effect of Final Rulemaking on Prior Relief Letters

If the requirements for obtaining relief in the final rule are no more restrictive than those set forth in a Prior Relief Letter, then the person or persons granted relief under that Prior Relief Letter will not be required to do anything further in order to continue operating under that relief. If, however, the requirements for obtaining relief in the final rule are more restrictive than those set forth in a Prior Relief Letter, then the person or persons granted relief under that Prior Relief Letter may not continue operating under that relief and will be required to file a Notice under the final rule. Also, if the facts and representations upon which the Prior Relief Letter was based materially change, the person will be required to file a Notice under the final rule, or cease engaging in the activities that prompted the request for the Prior Relief Letter.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)⁴¹ requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of "small entities" to be used by the Commission in

⁴⁰ The Commission has delegated to NFA the authority to process statements of exemption from registration as a CPO pursuant to Regulation 4.13. See 62 FR 52088 (Oct. 6, 1997).

⁴¹ 5 U.S.C. 601 *et seq.*

evaluating the impact of its rules on such entities in accordance with the RFA.⁴² With respect to CPOs, the Commission has previously determined that a CPO is a small entity if it meets the criteria for exemption from registration under current Regulation 4.13(a)(2).⁴³ Therefore, the requirements of the RFA do not apply to CPOs who do not meet those criteria. The Commission believes that the Proposal will not place any burdens, whether new or additional, on CPOs who would be affected hereunder. This is because the instant proposal, if adopted, would provide disclosure, reporting and recordkeeping relief for more CPOs.

B. Paperwork Reduction Act

The Proposal affects information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission has submitted a copy of this section to the Office of Management and Budget for its review.

If adopted, the Proposal will require existing and new CPO registrants that operate pools whose units of participation are listed on a national securities exchange, and that wish to claim the exemptive relief provided by the proposed amended regulations, to submit certain filings to the Commission that had not been required previously. As registered CPOs, persons claiming exemption under the Proposal will also be subject to the same information collection requirements under Regulations 4.22 and 4.23 as other registered CPOs, and the burden previously approved by OMB for Collection 3038-005 will be adjusted to account for the additional registrants. Because the information required under Regulation 4.21 will already have been collected under the requirements of the Federal securities laws for which Paperwork Reduction Act collections and burdens have already been established, the burden attributable to Commission Regulation 4.21 will not be affected.

Collection of Information

Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB Control Number 3038-0005.

The burden associated with Commission Regulation 4.12 is expected to be increased by 5 hours:

Estimated number of respondents: 35.

⁴² 47 FR 18618 (Apr. 30, 1982).

⁴³ *Id.* at 18619-20.

Annual responses by each

respondent: 1.

Estimated average hours per response:

.5.

Annual reporting burden: 17.5.

This annual reporting burden of 17.5 hours represents an increase of 5 hours as a result of the proposed amendments to Regulation 4.12.

The burden associated with Commission Regulations 4.22(a) and (b) is expected to be increased by 1,039.5 hours, due solely to additional, new registrants:

Estimated number of respondents:

519.

Pools by each respondent: 3

Annual responses by each

respondent: 9.

Estimated average hours per response:

3.85.

Annual reporting burden: 53,950.05.

This annual reporting burden of 53,950.05 hours represents an increase of 1,039.5 hours as a result of the proposed amendments to Regulation 4.12.

The burden associated with Commission Rule 4.23 is expected to be increased by 520 hours:

Estimated number of respondents:

516.

Annual responses by each

respondent: 1.

Estimated average hours per response:

52.

Annual reporting burden: 26,832

This annual reporting burden of 26,832 hours represents an increase of 520 hours as a result of the proposed amendments to Regulation 4.12.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Commodity Futures Trading Commission.

The Commission considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

- Evaluating the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of collection of information on those who are to

respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting delivery of information via Internet Web sites.

OMB is required to make a decision concerning the collection of information contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Commission on the proposed regulations.

Copies of the information collection submission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW., Washington, DC 20581, (202) 418-5160.

C. Cost-Benefit Analysis

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

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

The Proposal is intended to facilitate market innovation, and to rationalize application of Commission regulations to entities subject to other regulatory frameworks. The Commission is considering the costs and benefits of these rules in light of the specific provisions of Section 15(a) of the Act as follows:

1. Protection of Market Participants and the Public

While the proposed amendments are expected to lessen the burden that would otherwise be imposed upon CPOs of Commodity ETFs, any exemption of persons from regulatory requirements would be based on such factors as substituted compliance with other similar requirements. Accordingly, the Proposal should have no effect on the Commission's ability to protect market participants and the public.

2. Efficiency and Competition

The Proposal is expected to benefit efficiency and competition by facilitating the listing and trading on national securities exchanges of units of participation in commodity pools.

3. Financial Integrity of Futures Markets and Price Discovery

The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity or price discovery function of the commodity futures and options markets.

4. Sound Risk Management Practices

The Proposal should increase the available range of risk management alternatives for CPOs and other market participants.

5. Other Public Interest Considerations

The Proposal will also take into account new product developments in the financial services industry (i.e., the offering of Commodity ETFs).

After considering these factors, the Commission has determined to propose the amendments discussed above. The Commission invites public comment on its application of the cost-benefit considerations. Commenters also are invited to submit with their comment letters any data that they may have quantifying the costs and benefits of the Proposal.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons presented above, the Commission proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23.

2. Section 4.12 is amended by:

a. Revising the heading of paragraph (b);

b. Revising the introductory text of paragraph (b)(1);

c. Amending paragraph (b)(2) by adding a heading;

d. Redesignating paragraphs (b)(3) through (b)(6) as paragraphs (d)(1) through (d)(4) and revising the redesignated paragraphs; and

e. Adding new paragraph (c), to read as follows:

§ 4.12 Exemption from provisions of part 4.

* * * * *

(b) *Exemption from Subpart B for certain commodity pool operators based on amount and nature of commodity interest trading.* (1) *Eligibility.* Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (b)(2) of this section if:

* * * * *

(2) *Relief available to pool operator.*

* * *

(c) *Exemption from Subpart B for certain commodity pool operators based on listing of pool participation units for trading on a national securities exchange.* (1) *Eligibility.* Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (c)(2) of this section if the units of participation in the pool for which it makes such claim:

(i) Will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933; and

(ii) Will be listed for trading on a national securities exchange.

(2) *Relief available to pool operator.* The commodity pool operator of a pool whose units of participation meet the criteria of paragraph (c)(1) of this section may claim the following relief:

(i) In the case of § 4.21, exemption from the specific requirements of that section, *Provided, however,* that the pool operator:

(A) Cause the pool's Disclosure Document to be readily accessible on an Internet Web site maintained by the pool operator;

(B) Cause the Disclosure Document to be kept current in accordance with the requirements of § 4.26(a);

(C) Clearly inform prospective pool participants of the Internet address of such Web site and direct any broker, dealer or other selling agent to whom the pool operator sells units of participation in the pool to so inform prospective pool participants; and

(D) Comply with all other requirements applicable to pool Disclosure Documents under Part 4. The pool operator may satisfy the requirement of § 4.26(b) to attach to the Disclosure Document a copy of the pool's most current Account Statement and Annual Report if the pool operator makes such Account Statement and Annual Report readily accessible on an Internet Web site maintained by the pool operator.

(ii) In the case of § 4.22, exemption from the Account Statement distribution requirement of that section; *Provided, however,* that the pool operator:

(A) Cause the pool's Account Statements, including the certification required by § 4.22(h), to be readily accessible on an Internet Web site maintained by the pool operator within 30 calendar days after the last day of the applicable reporting period and continuing for a period of not less than 30 calendar days; and

(B) Cause the Disclosure Document for the pool to clearly indicate:

(1) That the information required to be included in the Account Statements will be readily accessible on an Internet Web site maintained by the pool operator; and

(2) The Internet address or URL of such Web site.

(iii) In the case of § 4.23, exemption from the requirement to keep the books and records specified by that section at the pool operator's main business office; *Provided, however,* that:

(A) The books and records that the pool operator will not keep at its main business office will be maintained by one or more of the following: The pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool;

(B) At the time it files electronically with the National Futures Association the notice required under paragraph (d) of this section, the pool operator files a statement that:

(1) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records *in lieu* of the pool operator;

(2) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records *in lieu* of the pool operator;

(3) Specifies, by reference to the respective paragraph of § 4.23, the books and records that such person will be keeping; and

(4) Contains representations from the pool operator that:

(i) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by § 4.23 changes, by identifying in such amendment the new location and any other information that has changed;

(ii) It remains responsible for ensuring that all books and records required by § 4.23 are kept in accordance with § 1.31;

(iii) Within forty-eight hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office;

Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within seventy-two hours of such a request; and

(iv) It will disclose in the pool's Disclosure Document the location of its books and records that are required under § 4.23.

(C) At the time it files the notice required under paragraph (d) of this section, the pool operator files electronically with the National Futures Association a statement from each person who will be keeping required books and records *in lieu* of the pool operator wherein such person:

(1) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;

(2) Agrees to keep and maintain such required books and records in accordance with § 1.31 of this chapter; and

(3) Agrees to keep such required books and records open to inspection by any representative of the Commission or the United States Justice Department in accordance with § 1.31 of this chapter and to make such required books and records available to pool participants in accordance with § 4.23 of this chapter.

(d)(1) *Notice of claim for exemption.* Any registered commodity pool operator, or applicant for commodity pool operator registration, who desires to claim the relief available under paragraph (b) or (c) of this section must file electronically a claim of exemption

with the National Futures Association through its electronic exemption filing system. Such claim must:

(i) Provide the name, main business address and main business telephone number of the registered commodity pool operator, or applicant for such registration, making the request;

(ii) Provide the name of the commodity pool for which the request is being made;

(iii) Contain representations, as appropriate, that:

(A) The pool will be operated in compliance with paragraph (b)(1)(i) of this section and the pool operator will comply with the requirements of paragraph (b)(1)(ii) of this section; or

(B) The pool will be operated in compliance with paragraph (c)(1) of this section;

(iv) Specify the relief sought under paragraph (b)(2) or (c)(2), as the case may be, of this section; and

(v) Be filed by a representative duly authorized to bind the pool operator.

(2)(i) The claim of exemption must be filed before the date the commodity pool first enters into a commodity interest transaction.

(ii) The claim of exemption shall be effective upon filing; *Provided, however*, That any exemption claimed hereunder:

(A) Will not be effective unless and until the notice required by this paragraph (d) contains all information called for herein and any statements required under paragraph (c)(2)(iii) of this section have been provided; and

(B) Will cease to be effective upon any change which would render the representations made pursuant to paragraph (d)(1)(iii) of this section inaccurate or the continuation of such representations false or misleading.

(3)(i) If a claim of exemption has been made under paragraph (b)(2)(i) of this section, the commodity pool operator must make a statement to that effect on the cover page of each offering memorandum, or amendment thereto, that it is required to file with the National Futures Association pursuant to § 4.26.

(ii) If a claim of exemption has been made with respect to paragraph (b)(2)(iii) of this section, the pool operator must make a statement to that effect on the cover page of each annual report that it is required to file with the National Futures Association pursuant to § 4.22(c).

(4)(i) Any claim of exemption effective hereunder shall be effective only with respect to the pool for which it has been made.

(ii) The effectiveness of such claim shall not affect the obligations of the commodity pool operator to comply

with all other applicable provisions of this part 4, the Act and the Commission's regulations issued thereunder with respect to the pool and any other pool the pool operator operates or intends to operate.

3. Section 4.13 is amended by:

a. Removing the word "or" at the end of paragraph (a)(3)(iv);

b. Removing the period at the end of paragraph (a)(4)(ii)(B) and adding "; or";

c. Redesignating paragraph (a)(5) as paragraph (a)(6), and revising newly designated paragraph (a)(6)(i) introductory text;

d. Adding new paragraph (a)(5); and

e. Revising paragraphs (b)(1)(ii) and (b)(2), to read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

(5) The person is acting as a director or trustee with respect to a pool whose operator is registered as a commodity pool operator and is eligible to claim relief under § 4.12(c) of this chapter, *Provided, however*, that:

(i) The person acts in such capacity solely to comply with a requirement under the Federal securities laws that the pool have an audit committee comprised exclusively of independent directors or trustees;

(ii) The person has no power or authority to manage or control the operations or activities of the pool except as necessary to comply with such requirement; and

(iii) The registered pool operator of the pool is and will be liable for any violation of the Act or the Commission's regulations by the person in connection with the person's serving as a director or trustee with respect to the pool.

(6)(i) Eligibility for exemption under paragraph (a)(1), (a)(2), (a)(3) or (a)(4) of this section is subject to the person furnishing in written communication physically delivered or delivered through electronic transmission to each prospective participant in the pool:

* * *

* * * * *

(b)(1) * * *

(ii) Contain the section number pursuant to which the operator is filing the notice (i.e., § 4.13(a)(1), (a)(2), (a)(3), (a)(4) or (a)(5), or both (a)(3) and (a)(4)) and represent that the pool will be operated in accordance with the criteria of that paragraph or paragraphs; and

* * * * *

(2) The person must file the notice by no later than the time that the pool operator delivers a subscription agreement for the pool to a prospective participant in the pool; *Provided*,

however, that in the case of a claim for relief under § 4.13(a)(5), the person must file the notice by the later of the effective date of the pool's registration statement under the Securities Act of 1933 or the date on which the person first becomes a director or trustee; and *Provided, further*, that where a person registered with the Commission as a commodity pool operator intends to withdraw from registration in order to claim exemption hereunder, the person must notify its pool's participants in written communication physically delivered or delivered through electronic transmission that it intends to withdraw from registration and claim the exemption, and it must provide each such participant with a right to redeem its interest in the pool prior to the person filing a notice of exemption from registration.

* * * * *

Issued in Washington, DC, on September 1, 2010 by the Commission.

David Stawick,

Secretary of the Commission.

[FR Doc. 2010-22395 Filed 9-8-10; 8:45 am]

BILLING CODE P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 16

RIN 3038-AC63

Account Ownership and Control Report

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

ACTION: Extension of comment period.

SUMMARY: The Commission is extending the comment period for the Notice of Proposed Rulemaking ("NPRM") that calls for the collection of ownership, control and related information.¹ The new deadline for submitting public comments is October 7, 2010.

DATES: Written comments must be received on or before October 7, 2010.

ADDRESSES: Comments should be sent to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be submitted via e-mail at OCR@cftc.gov. "Account Ownership and Control Report" must be in the subject field of responses submitted via e-mail, and clearly indicated on written submissions. Comments may also be submitted by connecting to the Federal eRulemaking Portal at <http://>

¹ 75 FR 41775 (July 19, 2010).