COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AD49

Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting From the Dodd-Frank Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (Commission) is amending its regulations governing the operations and activities of commodity pool operators (CPOs) and commodity trading advisors (CTAs) in order to have those regulations reflect changes made to the Commodity Exchange Act (CEA) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

DATES: *Effective Date:* November 5, 2012.

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SUPPLEMENTARY INFORMATION:

I. Background

A. The Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Act.[1] Title VII of the Dodd-Frank Act [2] amended the CEA [3] to establish a comprehensive new regulatory framework for swaps and security-based swaps. The goal of this legislation was to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of swap dealers (SDs) and major swap participants (MSPs); (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the oversight of the Commission. Among the changes made by the Dodd-Frank Act to the CEA were to include within the CPO definition the operator of a collective investment vehicle that trades swaps, and to include within the CTA definition a person who provides advice concerning swaps.[4]

B. The Proposed Amendments to Part 4

Part 4 of the Commission's regulations sets forth a comprehensive regulatory framework for the operations and activities of CPOs and CTAs. It includes disclosure, reporting and recordkeeping requirements for registered CPOs and CTAs, registration and compliance exemptions for CPOs and CTAs, and other provisions, including anti-fraud provisions, applicable to CPOs and CTAs, regardless of registration status. To ensure that the Part 4 regulations applied to CPOs and CTAs in the context of these intermediaries' involvement with swap transactions, on March 3, 2011, the Commission proposed certain amendments to Part 4 (Proposal).[5]

As the Commission explained in the Proposal, because many of the existing Part 4 regulations generally applied to CPOs and CTAs, they would continue to be applicable to CPOs and CTAs with respect to their swap activities without the need for amendment thereto. The Commission noted that in other instances, however, the text of certain existing Part 4 regulations was specific to activities involving futures contracts, commodity options, and off-exchange retail foreign currency (''commodity interests''), and it did not include, refer to or otherwise take account of swap activities. As the Commission stated: ''The Proposal [was] intended to clarify and ensure that the requirements governing the operations and activities of CPOs and CTAs continue to apply for these intermediaries in the context of their involvement with swap transactions.'' [6] Accordingly, the Commission proposed to amend Regulations 4.7, 4.10, 4.22, 4.23, 4.24 4.30, 4.33 and 4.34 to include in each of these regulations a reference to swaps or swap activities.

II. Comments on the Proposal

The Commission received two comment letters on the Proposal,[7] each of which supported the Proposal. One of these letters stated that the Proposal ''should act to reduce risk and increase its transparency, and promote market integrity by ensuring that all entities are consistently regulated to the extent that their trading and other activities pertain to swaps.'' [8] The other letter urged the Commission ''to work quickly and diligently on writing these rules and putting them in place as soon as possible.'' [9]

III. The Final Regulations

In light of the supportive comments it received, with one exception the Commission is adopting the amendments to the Part 4 regulations it proposed. That exception concerns the proposed amendment to Regulation 4.10(a) that, *for the purposes of Part 4,* would have expanded the definition of the term ''commodity interest'' to include ''swaps.'' This proposal was superseded by a proposed amendment to Regulation 1.3(yy) that, *for the purposes of all of the Commission's regulations,* would define the term ''commodity interest'' to include ''swaps.'' [10] Accordingly, the Commission is considering the proposed definition of the term ''commodity interest'' in connection with its consideration of the comment letters it received on its proposed amendment to Regulation 1.3(yy).

A. Adding ''Swap'' Terms to Part 4

As proposed, the Commission is inserting ''swap,'' ''swap transaction'' or a similar term at various regulations throughout Part 4. *See* the amendments to Regulations 4.23(a)(1), 4.24(g), (h)(1), and (i)(2) for CPOs and Regulations 4.34(g) and 4.34(i)(2) for CTAs. For

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[1] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed through the Commission's Web site, *www.cftc.gov.*

[2] Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[3] 7 U.S.C. 1 *et seq.* (2006). The Commission's regulations are found at 17 CFR part 1 *et seq.* (2012). Both the CEA and the Commission's regulations also may be accessed through the Commission's Web site.

[4] *See* Section 721(a) of the Dodd-Frank Act, which re-organized (and in some cases amended) existing definitions in, and added new definitions to, Section 1a of the CEA. The CPO and CTA definitions, as amended, are codified at CEA sections 1a(11) and 1a(12), respectively.

[5] 76 FR 11701.

[6] 76 FR 11701. Part 4 applies to CPOs with respect to their activities affecting pool participants and to CTAs with respect to their activities affecting clients. Depending on the nature of its activities, a CPO or CTA may also come within the definition of the term ''swap dealer'' or ''major swap participant'' in new CEA Section 1a(49) or 1a(33), respectively. As directed by the Dodd-Frank Act, the Commission has adopted new regulations that establish business conduct standards for SDs and MSPs. *See* 77 FR 9734 (Feb. 17, 2012). These new regulations apply to SDs and MSPs with respect to the counterparties with whom they transact swap business, and govern different activity than that to which the Part 4 regulations apply.

[7] These comment letters currently are available on the Commission's Web site.

[8] Comment letter from Chris Barnard (Mar. 29, 2011).

[9] Comment letter from Kyle Vandergrift (Apr. 20, 2011).

[10] *See* 76 FR 33066, 33069–70 (June 7, 2011).

example, Regulation 4.23(a)(1) is being amended to include ''swap type and counterparty'' in the itemized daily record that a CPO must make and keep with respect to a pool's commodity interest transactions.

At other Part 4 regulations, the Commission has included as proposed the term ''swap dealer'' among the persons for whom a CPO or CTA must provide information in its Disclosure Document and for whom a CPO must provide information in a pool's periodic Account Statement. *See* the amendments to Regulations 4.22(a)(3), 4.24(j)(1), (j)(3), (l)(1), and (l)(2) for CPOs and Regulations 4.34(j)(1), (j)(3), (k)(1) and (k)(2) for CTAs. For example, Regulations 4.24(j) and 4.34(j) are being amended to include SDs in the group of persons as to which conflicts of interest must be disclosed by CPOs and CTAs.

Similarly, the Commission has included as proposed ''a registered swap dealer'' among the persons listed in Regulation 4.7(a)(2) that do not have to satisfy a portfolio requirement in order to be a qualified eligible person (QEP), such that a CPO or CTA that has claimed relief under Regulation 4.7 may accept the SD as a pool participant or advisory client without regard to the size of its investment portfolio. As the Commission explained, ''this would be consistent with the current treatment of other financial intermediaries registered with the Commission (such as futures commission merchants [FCMs] and retail foreign exchange dealers [RFEDs]) as QEPs under Regulation 4.7(a)(2).'' [11]

B. Including Books and Records Relating to Swap Transactions within Part 4

The Commission has adopted as proposed amendments to Part 4 that require a CPO or CTA to make and keep certain books and records generated by the swap transactions in which it engages on behalf of not only its pool participants and clients, but also itself. *See* the amendments to Regulations 4.23(a)(7) and (b)(1) for CPOs and Regulations 4.33(a)(6) and (b)(1) for CTAs. The amendments to Regulations 4.23(a)(7) and 4.33(a)(6) require CPOs and CTAs to retain each acknowledgment of a swap transaction received from an SD. The amendments to Regulations 4.23(b)(1) and 4.33(b)(1) make clear that if a CPO or CTA was a counterparty to a swap transaction, then it would be subject to the swap data recordkeeping and reporting requirements of Part 45 of the Commission's regulations, as applicable.[12]

C. Regulation 4.30

Subject to certain exceptions, Regulation 4.30 provides that no CTA may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor's name (or extend credit in lieu thereof) to purchase, margin, guarantee or secure any commodity interest of the client.

The Commission proposed to amend Regulation 4.30 by adding to the list of intermediaries then excepted from the foregoing prohibition—*i.e.,* registered FCMs, leverage transaction merchants and RFEDs—a registered SD in connection with a swap that was not cleared through a derivatives clearing organization. The Commission explained that this amendment to Regulation 4.30 was necessary ''[b]ecause swap dealers will generally fall within the statutory definition of CTA, and because a swap dealer engaging in uncleared swap transactions may be accepting funds or other property from its counterparties as variation and initial margin payments.'' [13]

Subsequently, the Commission amended Regulation 4.6 to provide therein for an exclusion from the definition of the term ''commodity trading advisor'' for an SD, *provided* the commodity interest and swap advisory activities of the SD are solely incidental to the conduct of its business as an SD.[14] Because not all SDs may always meet the ''solely incidental'' proviso, the Commission has determined to amend Regulation 4.30 as proposed, such that any registered SD who is a CTA is not subject to the regulation's operational prohibition.

D. Deleting Regulation 4.32

The Commission has deleted as proposed Regulation 4.32, which concerned trading by a registered CTA on or subject to the rules of a derivatives transaction execution facility (DTEF) for non-institutional customers. As the Commission explained:

> Section 734(a) of the Dodd-Frank Act repeals Section 5a of the CEA, which is the section establishing and providing for the regulation of DTEFs. Accordingly, because subsequent to the effective date of the Dodd-Frank Act Regulation 4.32 will no longer have a statutory basis or purpose, the Proposal would remove and reserve Regulation 4.32.[15]

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') [16] requires federal agencies to consider the impact of those rules on small businesses.[17] A regulatory flexibility analysis or certification typically is required for ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to'' the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b).[18] The amendments to the Part 4 regulations contained herein will affect CPOs and CTAs. The Commission stated in the Proposal that:

> With respect to CPOs, the Commission previously has determined that a CPO is a small entity for the purpose of the RFA if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2). Thus, because the Proposal applies to registered CPOs, the RFA is not applicable to it. As for CTAs, the Commission previously has stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of the particular rule. In this regard, the Commission notes that the Proposal applies to registered CTAs. Moreover, the Proposal would not have a significant economic impact on any CPO or CTA who would be affected thereby, because it would merely bring within the current Part 4 regulatory structure of disclosure, reporting and recordkeeping information with respect to swap activities. It would not impose any additional operative requirements or otherwise direct or confine the activities of CPOs and CTAs.[19]

The Commission did not receive any comments regarding its RFA analysis in the Proposal. Accordingly, pursuant to 5 U.S.C. 605(b), the Chairman, on behalf of the Commission, certifies that the amendments to the Part 4 regulations being published today by this **Federal Register** release will not have a significant economic impact on a substantial number of small entities.

[11] 76 FR at 11702.

[12] *See* Regulation 45.2, which requires SDs and MSPs to keep full, complete and systematic records, together with all pertinent data and memoranda, of all activities relating to their business with respect to swaps, as prescribed by the Commission. (Non-SD and non-MSP counterparties subject to the Commission's jurisdiction have a similar requirement, but only with respect to each swap to which they are a counterparty.)

[13] 76 FR at 11702. In this regard, the Commission has proposed regulations addressing the circumstances in which non-bank SDs may be required or permitted to accept margin payments in uncleared swap transactions. *See* 76 FR 23732 (Apr. 28, 2011). Accordingly, this amendment to Regulation 4.30 should not be interpreted to impose or authorize any such margin requirements.

[14] *See* 77 FR 9734, 9739–40 (Feb. 17, 2012).

[15] 76 FR at 11702.

[16] 5 U.S.C. 601 *et seq.*

[17] By its terms, the RFA does not apply to ''individuals.'' *See* 48 FR 14933, n. 115 (Apr. 6, 1983).

[18] 5 U.S.C. 601(2), 603, 604 and 605.

[19] 76 FR at 11703.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) [20] imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The amendments to the Part 4 regulations will not require any new collection of information from any entity that is subject to them. Additionally, the Commission did not receive any comments regarding its PRA analysis in the Proposal. Accordingly, for purposes of the PRA, the Chairman, on behalf of the Commission, certifies that the amendments to the Part 4 regulations being published today by this **Federal Register** release will not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Analysis

Prior to the passage of the Dodd-Frank Act, the Part 4 regulations did not apply to swap-related activities. This pre-Dodd-Frank Act construct provides a useful reference point from which to compare the costs and benefits of the proposed regulations to the alternative where the Commission would not be taking any action to incorporate swap-related information into Part 4.

As a result of the Dodd-Frank Act including swap-related activities among the activities on which the CPO and CTA definitions are based, CPOs and CTAs who engage in swap-related activities are now subject to Part 4. In various places, however, the wording of particular provisions of Part 4 was incomplete or inconsistent in the context of CPOs and CTAs involved with swap transactions; there is no regulatory need for the prohibition in Regulation 4.30 against directly accepting margin payments to apply to an SD; and the subject matter of Regulation 4.32 (trading on DTEFs) was rendered moot by the Dodd-Frank Act. Under such a scenario, the costs to the public of inaction would be, in qualitative terms, failure to receive Part 4 disclosure, reporting and recordkeeping protections from their CPOs and CTAs with regard to their swap activities, an unnecessary burden on SDs, and regulatory text that is obsolete. The costs of these amendments, if any, will be minimal—limited to the costs associated with including information related to swaps in the Disclosure Documents, Account Statements and books and records already required of CPOs and CTAs under existing Part 4 regulations. Moreover, this information should be readily available to CPOs and CTAs. The costs cannot be feasibly quantified or estimated, because they will vary according to each registrant's internal processes and registration category. In contrast, the amendments will yield significant if unquantifiable benefit to the public, relative to inaction, by clarifying the application of Part 4 and the obligations of CPOs and CTAs to their participants and clients, respectively.

In the CEA,[21] Congress provided the Commission with the authority to promulgate regulations that, among other things, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. In accordance with Section 15(a) of the CEA, it is in this post-Dodd-Frank Act environment that the Commission considers the costs and benefits of its actions before promulgating a regulation under the CEA or issuing an order.

Section 15(a) specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

In light of the provisions of the Dodd-Frank Act that expand the ''commodity pool operator'' and ''commodity trading advisor'' definitions to include swap-related activities, these amendments incorporate into the existing Part 4 framework regulations to take account of the swap-related activities of CPOs and CTAs. Specifically, the amendments subject CPOs and CTAs when involved with swap transactions to the same Part 4 requirements that apply when they are involved with commodity interest transactions, to the extent regulations in place at the time of the enactment of the Dodd-Frank Act did not clearly do so.[22] The revision to Regulation 4.30 excepts SDs from the prohibition on accepting margin to treat them equivalently with FCMs and RFEDs. In addition, these amendments delete Regulation 4.32, pertaining to trading by registered CTAs on DTEFs, given the repeal by the Dodd-Frank Act of CEA Section 5a, which authorized such trading facilities.

In the Proposal the Commission sought public comment on the costs and benefits of its contemplated amendments to Part 4.[23] The Commission did not receive any comments in response to this request.

Section 15(a) Factors

(1) Protection of market participants and the public.

The Commission believes the amendments to the Part 4 regulations will provide protection to market participants and the public by requiring CPOs and CTAs to include information on swap intermediaries and activities in the disclosure, reporting and recordkeeping framework under Part 4. For example, Regulation 4.24(j) has provided protections to commodity pool participants by requiring their CPO to disclose any actual or potential conflict of interest with any FCM with whom their pool was required to maintain its account. The amendment to Regulation 4.24(j) the Commission has adopted will provide similar protections, by requiring the CPO to disclose any actual or potential conflict of interest with any SD with whom their pool maintains its swap positions.

(2) Efficiency, competitiveness, and financial integrity of the futures markets.

The Commission does not expect the amendments to Part 4 to have an impact on the efficiency, competitiveness and financial integrity of the commodity interest markets.

(3) Price Discovery.

The Commission does not expect the amendments to Part 4 to have an impact on the market's price discovery functions.

(4) Sound risk management practices.

The Commission does not expect the amendments to Part 4 to have an impact on risk management practices by CPOs, CTAs and other Commission registrants. However, the requirement that CPOs and CTAs account for SD, MSP and swap activities when complying with their disclosure, reporting and recordkeeping requirements under Part 4 will benefit prospective and actual pool participants and clients by ensuring that these participants and clients are afforded the same customer protections as participants and clients

[20] 44 U.S.C. 3501 *et seq.*

[21] *See* 7 U.S.C. 12(a)(5).

[22] As is explained above, when the Dodd-Frank Act extended the statutory definitions of the terms ''commodity pool operator'' and ''commodity trading advisor,'' those existing Part 4 regulations that applied generally to CPOs and CTAs became applicable to CPOs and CTAs captured by the expanded statutory definitions, without further amendment. Certain other existing Part 4 regulations, however, spoke specifically to activities involving commodity interests, but not to swap activities. Accordingly, this rulemaking amends this latter subset of Part 4 regulations by making them applicable to swap activities, thus closing the regulatory gap that would otherwise exist.

[23] 76 FR 11701, 11703.

in all other commodity pools and managed account programs.

(5) Other public interest considerations.

The Commission has not identified any other public interest considerations regarding the costs and benefits of the amendments to Part 4.

List of Subjects in 17 CFR Part 4

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

For the reasons presented above, the Commission hereby amends 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 is revised to read as follows:

Authority: 7 U.S.C. 1a, 2, 6b, 6c, 6*l,* 6m, 6n, 6*o,* 12a and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (July 21, 2010).

■ 2. Section 4.7 is amended by adding paragraph (a)(2)(i)(C) to read as follows:

§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

* * * * *

(a) * * *

(2) * * *

(i) * * *

(C) A swap dealer registered pursuant to section 4s(a)(1) of the Act, or a principal thereof;

* * * * *

■ 3. Section 4.22 is amended by revising paragraph (a)(3) to read as follows:

§ 4.22 Reporting to pool participants.

(a) * * *

(3) The Account Statement must also disclose any material business dealings between the pool, the pool's operator, commodity trading advisor, futures commission merchant, retail foreign exchange dealer, swap dealer, or the principals thereof that previously have not been disclosed in the pool's Disclosure Document or any amendment thereto, other Account Statements or Annual Reports.

* * * * *

■ 4. Section 4.23 is amended by:

■ a. Revising paragraphs (a)(1) and (a)(7); and

■ b. Revising paragraph (b)(1), to read as follows:

§ 4.23 Recordkeeping.

* * * * *

(a) * * *

(1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized.

* * * * *

(7) Copies of each confirmation or acknowledgment of a commodity interest transaction of the pool, and each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant, retail foreign exchange dealer or swap dealer.

* * * * *

(b) * * *

(1) An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, swap type and counterparty, the futures commission merchant or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized; *Provided, however,* that if the pool operator is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of Part 45 of this chapter, as applicable.

* * * * *

■ 5. Section 4.24 is amended by:

■ a. Revising paragraph (g);

■ b. Revising paragraph (h)(1)(i);

■ c. Revising paragraph (*i*)(2)(xii);

■ d. Revising paragraphs (j)(1)(vi) and (j)(3); and

■ e. Revising paragraphs (l)(1)(iii), (l)(2) introductory text and (l)(2)(i), to read as follows:

§ 4.24 General disclosures required.

* * * * *

(g) *Principal risk factors.* A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, counterparty creditworthiness, as applicable to the types of trading programs to be followed, trading structures to be employed and investment activity (including retail forex and swap transactions) expected to be engaged in by the offered pool.

(h) * * *

(1) * * *

(i) The approximate percentage of the pool's assets that will be used to trade commodity interests, securities and other types of interests, categorized by type of commodity or market sector, type of swap, type of security (debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating, as applicable;

* * * * *

(i) * * *

(2) * * *

(xii) Any costs or fees included in the spread between bid and asked prices for retail forex or, if known, swap transactions; and

* * * * *

(j) * * *

(1) * * *

(vi) Any other person providing services to the pool, soliciting participants for the pool, acting as a counterparty to the pool's retail forex or swap transactions, or acting as a swap dealer with respect to the pool.

* * * * *

(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, from the maintenance of the pool's account with the futures commission merchant and/or retail foreign exchange dealer and/or from the maintenance of the pool's swap positions with a swap dealer, or from the introduction of the pool's account to a futures commission merchant and/or retail foreign exchange dealer and/or swap dealer by an introducing broker (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.

* * * * *

(l) * * *

(1) * * *

(iii) The pool's futures commission merchants and/or retail foreign exchange dealers and/or swap dealers and its introducing brokers, if any.

(2) With respect to a futures commission merchant and/or retail

foreign exchange dealer and/or swap dealer or an introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's, retail foreign exchange dealer's, swap dealer's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

* * * * *

■ 6. Section 4.30 is revised to read as follows:

§ 4.30 Prohibited activities.

(a) Except as provided in paragraph (b) of this section, no commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor's name (or extend credit in lieu thereof) to purchase, margin, guarantee or secure any commodity interest of the client.

(b) The prohibition in paragraph (a) of this section shall not apply to:

(1) A futures commission merchant that is registered as such under the Act;

(2) A leverage transaction merchant that is registered as a commodity trading advisor under the Act;

(3) A retail foreign exchange dealer that is registered as such under the Act; or

(4) A swap dealer that is registered as such under the Act, with respect to funds, securities or other property accepted to purchase, margin, guarantee or secure any swap that is not cleared through a derivatives clearing organization.

§ 4.32 [Removed and Reserved]

■ 7. Section 4.32 is removed and reserved.

■ 8. Section 4.33 is amended by:

■ a. Revising paragraph (a)(6); and

■ b. Revising paragraph (b)(1), to read as follows:

§ 4.33 Recordkeeping.

* * * * *

(a) * * *

(6) Copies of each confirmation or acknowledgment of a commodity interest transaction, and each purchase and sale statement and each monthly statement received from a futures commission merchant, a retail foreign exchange dealer or a swap dealer.

* * * * *

(b) * * *

(1) An itemized daily record of each commodity interest transaction of the commodity trading advisor, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized; *Provided, however,* that if the trading advisor is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of Part 45 of this chapter, as applicable.

* * * * *

■ 9. Section 4.34 is amended by:

■ a. Revising paragraph (g);

■ b. Revising paragraph (i)(2);

■ c. Revising paragraph (j)(3); and

■ d. Revising paragraphs (k)(1)(iii), (k)(2) introductory text and (k)(2)(i), to read as follows:

§ 4.34 General disclosures required.

* * * * *

(g) *Principal risk factors.* A discussion of the principal risk factors of this trading program. This discussion must include, without limitation, risks due to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable to the trading program and the types of transactions and investment activity expected to be engaged in pursuant to such program (including retail forex and swap transactions, if any).

* * * * *

(i) * * *

(2) Where any fee is determined by reference to a base amount including, but not limited to, ''net assets,'' ''gross profits,'' ''net profits,'' ''net gains,'' ''pips'' or ''bid-asked spread,'' the trading advisor must explain how such base amount will be calculated. Where any fee is based on the difference between bid and asked prices on retail forex or swap transactions, the trading advisor must explain how such fee will be calculated;

* * * * *

(j) * * *

(3) Included in the description of any such conflict must be any arrangement whereby the trading advisor or any principal thereof may benefit, directly or indirectly, from the maintenance of the client's commodity interest account with a futures commission merchant and/or retail foreign exchange dealer, and/or from the maintenance of the client's swap positions with a swap dealer or from the introduction of such account through an introducing broker (such as payment for order flow or soft dollar arrangements).

(k) * * *

(1) * * *

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant and/or retail foreign exchange dealer and/or swap dealer.

(2) With respect to a futures commission merchant, retail foreign exchange dealer, swap dealer or introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's, retail foreign exchange dealer's, swap dealer's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

* * * * *

Dated: Issued in Washington, DC, on August 23, 2012, by the Commission.

Sauntia S. Warfield,

Assistant Secretary of the Commission.

Appendices to Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting From the Dodd-Frank Act—Commission Voting Summary and Statements of Commissioners

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rule to amend certain provisions of Part 4 of the Commission's regulations regarding the operations and activities of commodity pool operators (CPOs) and commodity trading advisors (CTAs). The amendments ensure that CFTC regulations with regard to CPOs and CTAs reflect changes made to the Commodity Exchange Act by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

Consistent with Dodd-Frank's expansion of the CPO and CTA definitions to include those involved in swaps and advising on swaps, the final amendments require swaps information to be included in the disclosure, reporting and recordkeeping obligations that currently exist for CPOs and CTAs under Part 4. Such information will enhance customer

protections by increasing the transparency of CPO and CTA swap activities to their pool participants and clients.

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DEPARTMENT OF COMMERCE

Patent and Trademark Office

37 CFR Parts 1 and 41

[PTO–C–2011–0007]

RIN 0651–AC55

CPI Adjustment of Patent Fees for Fiscal Year 2013

AGENCY: United States Patent and Trademark Office, Commerce.

ACTION: Final rule.

SUMMARY: The United States Patent and Trademark Office (Office or USPTO) is adjusting certain patent fee amounts for fiscal year 2013 to reflect fluctuations in the Consumer Price Index (CPI). The patent statute provides for the annual CPI adjustment of patent fees set by statute to recover the higher costs associated with doing business as reflected by the CPI.

DATES: This final rule is effective on October 5, 2012.

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SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose: Section 41(f) of Title 35 of the United States Code provides the USPTO with the authority to adjust certain statutory patent fees to reflect fluctuations during the preceding twelve months in the Consumer Price Index (CPI). The purpose of this provision is to allow the USPTO to recover higher costs of providing services as reflected by the CPI. This final rule sets forth which fees will be adjusted and how the adjustment is calculated based on the current fluctuation in the CPI over the twelve months preceding this notice.

Summary of Major Provisions: The USPTO is adjusting certain patent fees in accordance with 35 U.S.C. 41(f), as amended by the Consolidated Appropriations Act (Pub. L. 108–447, 118 Stat. 2809 (2004)) and the Leahy-Smith America Invents Act (Pub. L. 112–29). The fee increase helps the USPTO to meet its strategic goals and maintain effective and efficient operation of the patent system.

Costs and Benefits: This rulemaking is not economically significant as that term is defined in Executive Order 12866 (Sept. 30, 1993).

Background

Statutory Provisions: Patent fees are set by or under the authority provided in 35 U.S.C. 41, 119, 120, 132(b), 156, 157(a), 255, 302, 311, 376, section 532(a)(2) of the Uruguay Round Agreements Act (URAA) (Pub. L. 103–465, § 532(a)(2), 108 Stat. 4809, 4985 (1994)), and section 4506 of the American Inventors Protection Act of 1999 (AIPA) (Pub. L. 106–113, 113 Stat. 1501, 1501A–565 (1999)). For fees paid under 35 U.S.C. 41(a) and (b) and 132(b), independent inventors, small business concerns, and nonprofit organizations who meet the requirements of 35 U.S.C. 41(h)(1) are entitled to a fifty-percent reduction.

The USPTO published a notice proposing to adjust the patent fees charged under 35 U.S.C. 41(a) and (b) for fiscal year 2013 to reflect fluctuations in the CPI on May 14, 2012.

The fiscal year 2005 Consolidated Appropriations Act (section 801 of Division B) provided that 35 U.S.C. 41(a), (b), and (d) shall be administered in a manner that revises patent application fees (35 U.S.C. 41(a)) and patent maintenance fees (35 U.S.C. 41(b)), and provides for a separate filing fee (35 U.S.C. 41(a)), search fee (35 U.S.C. 41(d)(1)), and examination fee (35 U.S.C. 41(a)(3)) during fiscal years 2005 and 2006. See Public Law 108–447, 118 Stat. 2809, 2924–30 (2004). The Omnibus Appropriations Act, 2009, extended the patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act through September 30, 2011. See Public Law 112–4, 125 Stat. 6 (2011); Public Law 111–322, 124 Stat. 3518 (2010); Public Law 111–317, 124 Stat. 3454 (2010); Public Law 111–290, 124 Stat. 3063 (2010); Public Law 111–242, 124 Stat. 2607 (2010); Public Law 111–224, 124 Stat. 2385 (2010); Public Law 111–117, 123 Stat. 3034 (2009); Public Law 111–8, 123 Stat. 524 (2009); Public Law 111–6, 123 Stat. 522 (2009); Public Law 111–5, 123 Stat. 115 (2009); Public Law 110–329, 122 Stat. 3574 (2008); Public Law 110–161, 121 Stat. 1844 (2007); Public Law 110–149, 121 Stat. 1819 (2007); Public Law 110–137, 121 Stat. 1454 (2007); Public Law 110–116, 121 Stat. 1295 (2007); Public Law 110–92, 121 Stat. 989 (2007); Public Law 110–5, 121 Stat. 8 (2007); Public Law 109–383, 120 Stat. 2678 (2006); Public Law 109–369, 120 Stat. 2642 (2006); and Public Law 109–289, 120 Stat. 1257 (2006). The Leahy-Smith America Invents Act, enacted September 16, 2011, codified the patent and trademark fee provisions of the fiscal year 2005 Consolidated Appropriations Act.

Section 11 of the Leahy-Smith America Invents Act provides for a surcharge of fifteen percent, rounded by standard arithmetic rules, on all fees charged or authorized by 35 U.S.C. 41(a), (b), and (d)(1), as well as by 35 U.S.C. 132(b). Section 11 of the Act provides that this fifteen percent surcharge is effective ten days after the date of enactment (*i.e.*, September 26, 2011). Section 11 also provides that this fifteen percent surcharge shall terminate, with respect to a fee to which the surcharge applies, on the effective date of the setting or adjustment of that fee pursuant to the exercise of the authority under section 10 of the Act for the first time with respect to that fee. Section 10 fee-setting will be implemented in a future separate rulemaking.

As for this rulemaking, Section 41(f) of Title 35, United States Code, provides that fees established under 35 U.S.C. 41(a) and (b) may be adjusted on October 1, 1992, and every year thereafter, to reflect fluctuations in the Consumer Price Index over the previous twelve months. If the annual change in CPI is one percent or less, no fee adjustment for CPI fluctuations will be pursued.

This CPI increase will be implemented on October 1, 2012. This interim increase in fees is necessary to allow the USPTO to meet its strategic goals within the time frame outlined in the FY 2013 President's Budget. The interim fee increase is a bridge to provide resources until the USPTO exercises its fee-setting authority and develops a new fee structure that will provide sufficient financial resources in the long term. An adequately funded USPTO will optimize the administration of the U.S. intellectual property system, and thereby move innovation to the marketplace more quickly, creating and sustaining U.S. jobs and enhancing the health and living standards of Americans.

Fee Adjustment Level: The patent statutory fees established by 35 U.S.C. 41(a) and (b) are adjusted to reflect the most recent fluctuations occurring during the twelve-month period prior to publication of the final rule implementing this CPI adjustment, as measured by the Consumer Price Index for All Urban Consumers (CPI–U). The Office of Management and Budget (OMB) has advised that in calculating these fluctuations, the USPTO should use CPI–U data as determined by the Secretary of Labor, which is found at