

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 4, 30, 140 and 180

RIN 3038-AB37

#### 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

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission") is revising Commission Rule 4.7 ("Revision")<sup>1</sup> through both substantive and technical revisions. Rule 4.7 provides a simplified regulatory framework for commodity pool operators ("CPOs") operating commodity pools consisting of certain highly accredited pool participants and for commodity trading advisors ("CTAs") directing or guiding the commodity interest trading accounts of certain highly accredited clients. These persons formerly were termed "qualified eligible participants" (or "QEPs") and "qualified eligible clients" (or "QECs"), respectively. Under the Revision, all such persons are termed "qualified eligible persons."

The substantive revisions will make Rule 4.7 available to more CPOs and CTAs and under more situations, by bringing within the scope of the rule additional persons. They add, among others, the following persons to the qualified eligible person definition: Principals of certain registered investment professionals who themselves are defined as qualified eligible persons; certain registered securities investment advisers and their principals; "qualified purchasers" and "knowledgeable employees" as those terms are defined under the federal securities laws; certain employees and agents of pools, CPOs and CTAs and certain of those employees' and agents' immediate family members; and trusts whose advisors and settlors are qualified eligible persons. In addition, these revisions make it easier for certain charitable organizations, trusts and collective investment vehicles to be qualified eligible persons, and it includes persons who are not "United States persons" in the qualified eligible person definition with respect to both

Rule 4.7 exempt pools and exempt accounts. Certain of the technical revisions, *i.e.*, those which reorganize the rule, will facilitate employment of the rule. Other technical revisions conform the nomenclature of the text of Rule 4.7 to reflect the revised structure of the Rule. The Commission has made similar conforming revisions to Rules 30.6(b), 140.99(i)(A) and 180.3(b)(2)(vi), which prior to these revisions referred to, *e.g.*, "qualified eligible participants" in their text.

In light of the breadth of the revisions to Rule 4.7, the Commission is including at Part IV of this release a distribution table that indicates where the provisions of the former rule can be found in the revised rule and a derivation table that indicates where the provisions of the revised rule can be found in the former rule.

**DATES:** Effective August 4, 2000.

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#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

###### A. Background

In 1992, the Commission adopted Rule 4.7 as part of the Commission's ongoing program for review of its rules.<sup>2</sup> Rule 4.7 provides an exemption from certain disclosure, reporting and recordkeeping requirements for registered CPOs in connection with their operation of commodity pools whose participants meet specified eligibility criteria.<sup>3</sup> The exemption provides relief from all of the specific disclosures required by Rules 4.21 and 4.24 through 4.26 and streamlines the reporting and recordkeeping requirements of Rules 4.22 and 4.23, respectively.<sup>4</sup> Rule 4.7 provides similar

<sup>2</sup> 57 FR 34853 (Aug. 7, 1992). The Commission made certain technical, non-substantive amendments to Rule 4.7 in 1995. 60 FR 38146, 38182-93 (July 25, 1995). These amendments were necessary to conform certain of the references in Rule 4.7 to other Part 4 rules the Commission had renumbered in connection with revising the disclosure rules generally applicable to CPOs and CTAs.

<sup>3</sup> As stated above, these persons formerly were termed "qualified eligible participants." As a result of the Revision, they are now termed "qualified eligible persons."

<sup>4</sup> Under Rule 4.7, however, a registered CPO operating a pool for which it has claimed Rule 4.7 relief ("exempt pool") remains subject to all other applicable requirements of the Act and the Commission's regulations issued thereunder with

relief from the specific disclosure requirements of Rules 4.31 and 4.34 through 4.36 and recordkeeping requirements of Rule 4.33 to registered CTAs who direct or guide the commodity interest trading accounts of clients who meet specified eligibility criteria.<sup>5</sup>

Subsequent to the adoption of Rule 4.7, and consistent with the purposes of the rule, Commission staff permitted various CPOs and CTAs to claim relief under the rule with respect to certain persons who did not meet the specified eligibility criteria of the rule. In addition, in 1996, Congress enacted the National Securities Markets Improvement Act of 1996 ("NSMIA").<sup>6</sup> Among other things, NSMIA added Section 3(c)(7) to the ICA<sup>7</sup> thereby providing an additional exemption from the definition of the term "investment company" under the ICA with respect to funds comprised exclusively of qualified purchasers ("QPs"). NSMIA also directed the Securities and Exchange Commission ("SEC") to promulgate rules that would permit ownership by knowledgeable employees

respect to the exempt pool and any other pool the CPO operates or intends to operate. Former Rule 4.7(a)(4); Revised Rule 4.7(d)(4)(i). For example, it remains subject to the antifraud provisions of Sections 4b and 4o of the Act, 7 U.S.C. 6b and 6o (1994), the prohibited activities and advertising provisions applicable to CPOs in Rules 4.20 and 4.41, respectively, and the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's regulations. Moreover, if a CPO distributes an offering memorandum in connection with soliciting participations in an exempt pool, the memorandum must include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading. Former Rule 4.7(a)(2)(i)(A); Revised Rule 4.7(b)(1)(i).

<sup>5</sup> As also stated above, these persons formerly were termed "qualified eligible clients." As a result of the Revision, they, too, are termed "qualified eligible persons."

Under Rule 4.7, a CTA that has claimed Rule 4.7 relief with respect to a qualified eligible person likewise remains subject to all other applicable requirements of the Act and the Commission's regulations with respect to the qualified eligible person and any other client to which the CTA provides or intends to provide commodity interest trading advice. Former Rule 4.7(b)(4); Revised Rule 4.7(d)(4)(ii). Similarly, if a CTA delivers a brochure or other disclosure statement to qualified eligible persons, the brochure or statement must include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading. Former Rule 4.7(b)(2)(i)(A); Revised Rule 4.7(c)(1)(i).

<sup>6</sup> Pub. L. No. 104-290, 110 Stat. 3416 (codified as amended in scattered sections of 15 U.S.C. and 29 U.S.C.). Many collective investment vehicles trade both securities and commodity interests, and absent an exemption, they are subject to registration as an investment company under the Investment Company Act of 1940 (the "ICA") and their operators are subject to registration as a CPO under the Act. *See, e.g., Peavey Commodity Futures Funds I, II, III*, [1983-1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶77,511 (June 2, 1983).

<sup>7</sup> 15 U.S.C. 80a-3(c)(7) (Supp. III 1997).

<sup>1</sup> Commission rules referred to herein are found at 17 CFR Ch. I (2000).

of the securities of the issuer (or affiliate) without loss of the issuer's definitional exemption under Section 3(c)(1)<sup>8</sup> or 3(c)(7) of the ICA. In 1997, the SEC adopted Rule 3c-5 under the ICA,<sup>9</sup> which defines the term "knowledgeable employee."<sup>10</sup>

Based upon staff's experience in administering Rule 4.7 and taking into account these recent developments in the federal securities laws, on March 2, 2000 the Commission published for comment in the **Federal Register** proposed revisions to Rule 4.7 (the "Proposal").<sup>11</sup> Certain of the proposed revisions were substantive in nature—*i.e.*, they would expand the definitions employed in Rule 4.7, which would have the effect of permitting registered CPOs and CTAs to claim relief in additional circumstances under the rule. In proposing this action, the Commission noted that it had been guided by the purposes of Rule 4.7. With respect to CPOs, these purposes are to: (1) Reduce unnecessary regulatory burdens with respect to persons who appear not to need the full protections of the Part 4 framework; and (2) coordinate the Commission's rules with certain federal securities laws.<sup>12</sup> As for CTAs, the rationale for relief "is analogous to that for \* \* \* CPOs, *i.e.*, that [qualified eligible persons] are sophisticated investors who have the financial ability and experience necessary to understand the risks of futures trading and to obtain the information they require."<sup>13</sup>

#### B. The Comments

The Commission received six comment letters on the Proposal: one from a firm registered as a futures commission merchant, CPO and CTA; one from a firm registered as a CPO; one from a designated self-regulatory organization; one from a bar association; one from a member of the commodities bar; and one from a trade association representing CPOs and CTAs.<sup>14</sup> All of

the persons who commented on the proposed revisions to Rule 4.7 expressed strong support for the Proposal. Among the reasons commenters provided for their support were that the Proposal: (1) Would coordinate and harmonize the commodities and securities laws where they have a common purpose; (2) would relieve Commission staff from expending its resources on what have become routine and redundant Rule 4.7 letters; (3) would provide similar relief to the applicants for those letters; and (4) would make the rules more "user friendly."

In light of the comments received, the Commission generally has adopted the revisions to Rule 4.7 that it proposed.<sup>15</sup> In addition, the Commission has further reorganized the rule and has included more persons in the qualified eligible person definition. Each of the changes from the Proposal is discussed below, and distribution and derivation tables are provided at Section IV below.

In the **Federal Register** release announcing the Proposal ("Proposing Release"), the Commission gave a detailed explanation of each revision it had proposed to make to Rule 4.7.<sup>16</sup> The scope of this **Federal Register** release generally is restricted to the comments received on the Proposal and changes to the Proposal that the Commission has made in response thereto. Accordingly, the Commission encourages interested persons to read the Proposing Release for a discussion of the purpose of each of the revisions the Commission proposed to make to the various provisions under Rule 4.7.

Comments do not specifically concern Rule 4.7, the Commission is not by this **Federal Register** release addressing them (although, as discussed below, the Commission has revised Rule 4.7 so that it now provides relief with respect to "qualified eligible persons" (emphasis added)). The Commission does, however, intend to consider these comments in connection with other regulatory reform initiatives that it may propose—*e.g.*, in connection with revisions to the registration requirements for CPOs and CTAs that it may propose.

<sup>15</sup> As discussed more fully below, the Commission has adopted certain provisions without the qualifying limitations it had proposed thereon. These provisions concern the treatment of family members of—*e.g.*, the CPO of the exempt pool or the CTA of the exempt account—as qualified eligible persons for other purposes of Rule 4.7 (*see* Section II.D.3. below) and the availability of rule 4.7 relief to a CTA with respect to those of its clients who are Non-United States persons (*see* Section II.E. below).

<sup>16</sup> The Commission also cited at various places in the Proposing Release to the letters its staff had issued granting relief from the definitional requirements of Rule 4.7.

## II. Responses to the Comments Received

### A. Reorganization of Rule 4.7

The Commission proposed to reorganize Rule 4.7 to assist CPOs and CTAs in determining the availability of the rule to them. This proposed reorganization would have put all of the definitions used in Rule 4.7 in one place, proposed paragraph (a) of the rule.<sup>17</sup> In particular, proposed paragraph (a)(1) would have contained the general definitions used throughout Rule 4.7.<sup>18</sup> One of those definitions was the term "Portfolio Requirement" in proposed paragraph (a)(1)(v).<sup>19</sup> One of the commenters questioned the need for two separate definitions of the term "Portfolio Requirement" (one for QEPs and one for QECs) because, as it noted, these definitions were virtually identical except for those references where the definition applicable to QEPs concerned "pool participants" and "exempt pool" and the definition applicable to QECs concerned "clients" and "exempt account." Accordingly, the commenter recommended that the Commission should merge the two "Portfolio Requirement" definitions into one definition. The Commission believes this is a useful recommendation, and it has thus adopted in Rule 4.7(a)(1)(v) a single definition of "Portfolio Requirement" that equally applies to pool participants and exempt pools and to clients and exempt accounts.

In furtherance of this comment, the Commission additionally has streamlined other definitions used in Rule 4.7, such that now the rule solely refers to "qualified eligible persons." Under both the former rule and the Proposal, persons for whom a CPO or CTA could claim relief under Rule 4.7 were termed QEPs and QECs, respectively, and the criteria each such person had to satisfy was separately set forth depending on whether the person had to meet the Portfolio Requirement. Thus, under proposed Rule 4.7(a)(2), two categories of persons were defined as QEPs (persons who were QEPs irrespective of the Portfolio Requirement and persons who were required to satisfy the Portfolio Requirement to be QEPs) and under proposed Rule 4.7(a)(3) two categories of persons were defined as QECs (persons who were QECs irrespective of the Portfolio Requirement and persons who were required to satisfy the Portfolio Requirement to be QECs). This

<sup>17</sup> *See generally* 65 FR at 11255-56.

<sup>18</sup> 65 FR at 11256.

<sup>19</sup> *Id.*

<sup>8</sup> 15 U.S.C. 80a-3(c) (1)(1994 & Supp. III 1997).

<sup>9</sup> 17 CFR 270.3c-5 (1999).

<sup>10</sup> 62 FR 17512 (Apr. 9, 1997).

<sup>11</sup> 65 FR 11253.

<sup>12</sup> 57 FR 3148, 3150-51 (Jan. 28, 1992).

<sup>13</sup> 57 FR at 3151.

<sup>14</sup> Not all of the comments, however, were directly related to the Proposal. One comment recommended adoption of a uniform "sophisticated customer definition" for various of the Commission's rules (*i.e.*, Rules 1.3, 1.55, 4.7, 35.1 and 36.1); another comment recommended adoption of an exemption from CPO registration for operators of privately-offered collective investment vehicles limited solely to Non-United States persons; and yet another comment recommended adoption of an exclusion from the CPO definition for a collective investment vehicle using commodity interests solely for recognized risk management purposes. Inasmuch as these

made for a total of four eligibility categories under Rule 4.7.<sup>20</sup> By employing solely the term “qualified eligible person” in Rule 4.7, the Commission has reduced to two from four the categories of persons defined under the rule: Persons who do not need to satisfy the Portfolio Requirement to be qualified eligible persons (Rule 4.7(a)(2))<sup>21</sup> and persons who do need to satisfy the Portfolio Requirement to be qualified eligible persons (Rule 4.7(a)(3)).<sup>22</sup>

The Commission additionally has streamlined Rule 4.7 by combining at one place, Rule 4.7(d), text applicable to the notice of claim for exemption that must be made to claim the relief available under Rule 4.7. Under both the former rule and the Proposal, text applicable to this notice was included at two places in Rule 4.7: After the relief that CPOs could claim and after the relief that CTAs could claim. Inasmuch as this text was virtually identical at both places, the Commission has combined it into one location, Rule 4.7(d).

Finally, to assist CPOs and CTAs in their reading and application of Rule 4.7, the Commission has adopted introductory text to the rule, which

<sup>20</sup> See generally 65 FR at 11256–61 for persons who were proposed to be QEPs and QECs irrespective of the Portfolio Requirement and 65 FR at 11261–62 for persons who were proposed to be QEPs and QECs if they satisfied the Portfolio Requirement.

<sup>21</sup> As proposed, the Commission employed the phrase “persons who are QEPs or QECs irrespective of the Portfolio Requirement.” As adopted, the Commission is employing the phrase “persons who do not need to satisfy the Portfolio Requirement to be qualifying eligible persons.” This phrase is consistent with the other phrase employed for eligibility status under Rule 4.7 applicable to “persons who must satisfy the Portfolio Requirement to be qualified eligible persons.”

<sup>22</sup> As a result of this reorganization, Rule 4.7(a)(3)(xi) now defines a qualified eligible person as:

A pool, trust, insurance company separate account or bank collective trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of either participating in the exempt pool or opening an exempt account, and whose participation in the exempt pool or investment in the exempt account is directed by a qualified eligible person (emphasis added.)

Former Rule 4.7 included pools within the applicable QEP definition but it did not include pools within the applicable QEC definition. The Commission stated that this difference in definitions was “to ensure that pools generally, that is pools whose participants are not all QEPs, continue to receive a Disclosure Document from their CTAs.” 57 FR at 34856. Upon reconsideration, the Commission is now of the view that all pools which meet the criteria of Rule 4.7(a)(3)(xi) should be defined as qualified eligible persons. With respect to exempt accounts in particular, this is because investment by a pool in an exempt account must be directed by a qualified eligible person—who, as the CPO of the pool and on behalf of the participants in the pool, will direct the investment in the exempt account.

explains the organization of Rule 4.7 as follows: Paragraph (a) contains definitions for the purposes of Rule 4.7; paragraph (b) contains the relief available to CPOs under Rule 4.7; paragraph (c) contains the relief available to CTAs under Rule 4.7; paragraph (d) concerns the Notice of Claim for Exemption under Rule 4.7; and paragraph (e) concerns insignificant deviations from a term, condition or requirement of Rule 4.7.

#### B. Clarification of the Term “Non-United States Person”

Under the Proposal, the term “Non-United States person” would have been defined at proposed Rule 4.7(a)(1)(iv).<sup>23</sup> Similar to the definition of the term “Portfolio Requirement,” the Commission did not propose to change the definition but, rather, it proposed to change its placement within the rule and to replace with the term “Non-United States person” the former reference in the rule to “a person that is not a United States person.”

Under the Proposal, a Non-United States person would have been defined to include, among other persons:

(D) An entity organized principally for passive investment such as a pool, investment company or other similar entity; *Provided*, That units of participation in the entity held by persons who do not qualify as Non-United States persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain requirements of Part 4 of the Commission’s regulations by virtue of its participants being Non-United States persons.

One of the commenters stated that it was unclear as to how, if at all, persons who did not qualify as Non-United States persons but who otherwise were QEPs should be counted for purposes of the 10% limitation of this definition. This commenter contended that they should not be counted because they were, after all, QEPs in their own right.

The Commission agrees with this commenter, and has revised the rule accordingly. Thus, as adopted, the ownership limitation of Rule 4.7(a)(1)(iv)(D) provides that “units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity” (emphasis added).

<sup>23</sup> 65 FR at 11256 and n.32.

#### C. The Reasonable Belief Standard

Because of the organization of the former rule, CPOs and CTAs were required to have a “reasonable belief” that certain persons defined in Rule 4.7 as QEPs and QECs, respectively were, in fact, QEPs and QECs. Under the proposed reorganization of the rule, CPOs and CTAs would have been required to have a “reasonable belief” that all persons defined as QEPs and QECs, respectively, were, in fact, QEPs and QECs. While the Commission stated that it did not believe that this should impose any additional burdens on CPOs and CTAs, it nonetheless requested comment on the proposed revision.<sup>24</sup> The three persons who commented on this proposed revision stated that they had no objection to it. And, in response to one of those commenters, the Commission is clarifying that CPOs and CTAs have latitude in determining how to obtain a “reasonable belief”—e.g., whether by statements from the prospective participant or client, its agent, or other similar means. Of course, what will establish a “reasonable belief” will depend on the facts of each particular case.

#### D. Transferees of Insiders, Agents Engaged by Insiders, and the Family Members of Insiders as Qualified Eligible Persons

##### 1. Transferees of Insiders as Qualified Eligible Persons

Under the Proposal, the QEP definition would have been expanded in proposed Rule 4.7(a)(2)(i)(H) to include, in addition to the CPO or the CTA of the exempt pool, the following persons: the investment adviser of the exempt pool; an affiliate of the exempt pool, CPO, CTA or investment adviser; a principal of these persons; certain employees of these persons; and certain family members of these persons.<sup>25</sup> Similarly, the QEC definition would have been expanded in proposed Rule 4.7(a)(3)(i)(B) to include the following persons: an affiliate of the CTA of the exempt account; a principal of the CTA or the affiliate; certain employees of these persons; and certain family members of these persons.<sup>26</sup> For the purposes of the discussion below, all of the foregoing persons collectively are referred to as “Insiders.”

The Commission has adopted as proposed the provisions that would define each of the Insiders as a qualified eligible person. Further, in response to the comments received, the Commission

<sup>24</sup> 65 FR at 11257.

<sup>25</sup> 65 FR at 11259–61.

<sup>26</sup> *Id.*

has included certain other persons as qualified eligible persons and has expanded from the Proposal the availability of the qualified eligible person definition to certain family members of Insiders.

For example, one of the commenters on the proposed addition of Insiders to the QEP and QEC definitions suggested that the Commission include in Rule 4.7 a provision allowing transfers of interests in a Rule 4.7 exempt pool or exempt account from Insiders to other persons by gift or bequest. This commenter stated that support for including such a provision is found in rules under the ICA,<sup>27</sup> which permit transfers of interests in a Section 3(c)(1) or 3(c)(7) fund from a knowledgeable employee or QP to another person under specified situations. The Commission agrees with this suggestion and has adopted it in Rule 4.7(a)(2)(viii), which provides that a qualified eligible person includes the following: (1) Any person who acquires a participation in the exempt pool or an interest in the exempt account by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from an Insider; (2) the estate of an Insider; or (3) a company established by an Insider exclusively for the benefit of (or owned exclusively by) the Insider and any other permitted transferee. This language generally follows the provisions of Rule 3c-6(b) under the ICA, which applies to transfers of interests in Section 3(c)(1) and (3)(c)(7) funds.

## 2. Agents Engaged by Insiders as Qualified Eligible Persons

Proposed Rule 4.7(a)(2)(i)(H)(4) would have included within the QEP definition certain employees of the exempt pool, CPO, CTA, investment adviser of the exempt pool, or affiliate thereof, and proposed Rule 4.7(a)(3)(i)(B)(4) would have included within the QEC definition certain employees of the CTA of the exempt account or of an affiliate of the CTA, provided that the employee: (1) Was an accredited investor as defined in Rule 501(a)(5) or (a)(6) under the Securities Act of 1933<sup>28</sup> ("Accredited Investor"); and (2) had been employed by any of the foregoing persons, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months. As the Commission explained, the purpose of these rules was in furtherance of the intent of Rule 4.7: to reduce

unnecessary regulatory prescriptions for CPOs and CTAs with respect to persons who do not appear to need the full protections offered by the Part 4 framework.<sup>29</sup> The Commission has adopted this proposed definition and, in response to a comment received, has additionally included certain agents as qualified eligible persons under this rule.

One of the commenters on the Proposal suggested that the Commission consider including as QEPs and QECs certain attorneys and other persons similarly engaged whose activities and degree of sophistication would merit their being treated as QEPs and QECs. The Commission agrees with this comment and has incorporated it in Rule 4.7. Specifically, Rule 4.7(a)(2)(viii)(A)(4) defines a qualified eligible person with respect to an exempt pool as "any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for," the exempt pool or the CPO, CTA or investment adviser of the exempt pool, or for an affiliate of any of the foregoing, provided that the employee or agent: (1) Is an Accredited Investor; and (2) has been engaged by the exempt pool, CPO, CTA, investment adviser or affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months. Similarly, Rule 4.7(a)(2)(viii)(B)(4) defines a qualified eligible person with respect to an exempt account as "any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for," the CTA of the exempt account, or for an affiliate of the CTA, provided that the employee or agent: (1) Is an Accredited Investor; and (2) has been engaged by the CTA or the affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months. Consistent with the treatment of employees under Rule 4.7, this definition excludes agents who perform solely clerical, secretarial or administrative functions.

## 3. Restriction on Family Members of Insiders Being Qualified Eligible Persons

Proposed Rule 4.7(a)(2)(i)(H)(5) would have included in the QEP definition the spouse, child, sibling or parent of an Insider, provided that an investment in the exempt pool by any such family member was made with the knowledge and at the direction of the Insider.<sup>30</sup> Proposed Rule 4.7(a)(3)(i)(B)(5) similarly

would have included in the QEC definition the spouse, child, sibling or parent of an Insider, provided that the establishment of an exempt account by any such family member was made with the knowledge and at the direction of the trading advisor.<sup>31</sup> The Commission received no comments on these criteria and, accordingly, has adopted them as proposed in Rules 4.7(a)(2)(viii)(A)(5)(i) with respect to exempt pools and 4.7(a)(2)(viii)(B)(5)(i) with respect to exempt accounts.

The proposed rules also would have strictly limited the application of the QEP and QEC definitions, such that these family members would not have been QEPs or QECs for any other purposes of Rule 4.7—*e.g.*, for the purpose of being a QEP settlor of a trust under proposed Rule 4.7(a)(2)(i)(I). The commenter on this proposed criterion stated that it was unnecessarily opaque, and urged the Commission to treat these family members as QEPs and QECs for all purposes of Rule 4.7. Upon further reflection, the Commission agrees that the proposed limitation may have been overly broad where the source of funds used for participating in an exempt pool or investing in an exempt account was one of the specified family members. Accordingly, Rules 4.7(a)(2)(viii)(A)(5)(ii) with respect to exempt pools and (a)(2)(viii)(B)(5)(ii) with respect to exempt accounts provide that these family members are qualified eligible persons *except for* the purposes of paragraph (a)(3)(xi) of the rule. That paragraph provides that certain collective investment vehicles, such as a pool, are qualified eligible persons if, among other things, they satisfy the Portfolio Requirement, have in excess of \$5,000,000 in total assets and their "participation in the exempt pool or investment in the exempt account is directed by a qualified eligible person." Because the source of funds in a collective investment vehicle such as a pool will always be either in addition to or other than from the family member, the Commission has provided that the family member is not a qualified eligible person for the purposes of Rule 4.7(a)(3)(xi).

## *E. Non-United States Persons as Qualified Eligible Persons for the Purpose of Opening an Exempt Account With a CTA*

Proposed Rule 4.7(a)(3)(i)(A)(2) would have defined Non-United States persons as QECs, provided that the CTA who sought to direct or guide the commodity interest trading account of the Non-United States person: (1) Provided

<sup>27</sup> 17 CFR 270.3c-5 and 3c-6 (1999).

<sup>28</sup> 17 CFR 230.501(a)(5) or (a)(6)(1999), respectively.

<sup>29</sup> 65 FR at 11260.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

commodity interest trading advice exclusively to persons who were QECs (including persons who were Non-United States persons); and (2) had filed a notice of claim for exemption under Rule 4.7. In the Proposing Release, the Commission noted that a CTA who directs or guides the accounts of United States persons who are not QECs would be subject to the Disclosure Document requirements of Rules 4.31, 4.34, 4.35 and 4.36 and the recordkeeping requirements of Rule 4.33. Accordingly, the Commission reasoned that requiring the CTA to comply with requirements to which it already would be subject would not impose any additional burden on the CTA with respect to clients who are Non-United States persons.<sup>32</sup>

Four persons commented on this proposed provision. While they generally expressed support for expanding the QEC definition to include Non-United States persons, they objected to the proposed limitation on permitting CTAs to claim relief under Rule 4.7 where the CTA has both United States and Non-United States persons as clients. Commenters disagreed with the Commission's argument that this framework would not impose any additional burdens on these CTAs because they would already be subject to disclosure and recordkeeping requirements with regard to their (other) Non-QEC clients. One of these commenters further stated that while this may be true where the trading programs and solicitation documents are substantially the same, this frequently will impose a significant burden on CTAs where the trading programs and solicitation documents are different—thereby requiring significant additional work for the CTA in what is likely to be a very different context. In support of permitting CTAs

to treat Non-United States persons as QECs without limitation, commenters noted that a CTA soliciting Non-United States persons is subject to the requirements of applicable foreign law, including any mandatory disclosure requirements. On the whole, then, the commenters on this proposed provision saw no reason why the Commission should treat Non-United States persons differently for the purpose of participating in an exempt pool or opening an exempt account.

Based upon the comments received, and in light of the increasing globalization of the futures markets and competitiveness concerns, the Commission has decided not to adopt the proposed limitation. Thus, Rule 4.7(a)(2)(xi) defines a Non-United States person as a qualified eligible person, without regard to whether the Non-United States person is seeking to participate in an exempt pool or to open an exempt account.<sup>33</sup>

**III. QPs and Knowledgeable Employees as Qualified Eligible Persons**

By the Proposal the Commission proposed to add QPs and knowledgeable employees to the QEP and QEC definitions,<sup>34</sup> and by the Revision the Commission has included QPs and knowledgeable employees in the qualified eligible person definition. As the Commission stated in the Proposing Release:

The Commission intends to follow interpretations issued by the SEC and its staff of the QP and knowledgeable employee definitions. The Commission has the right further to interpret or to amend Rule 4.7 to exclude from the [qualified eligible person definition] any person that the SEC or its staff found to be a QP or knowledgeable employee or to include in the [qualified eligible person definition] any person the SEC or its staff excluded from the QP or knowledgeable employee definition, if such action is found

to be necessary to effectuate the purposes of the Act and the Commission's regulations. The Commission expects that it would exercise this right infrequently.<sup>35</sup>

In particular, the Commission noted that in April of 1999, staff of the SEC's Division of Investment Management responded to a series of inquiries from the Subcommittee on Private Investment Entities of the Federal Regulation of Securities Committee, Section of Business Law of the American Bar Association concerning the scope of both the qualified purchaser and knowledgeable employee definitions.<sup>36</sup> As stated in the SEC staff's letter:

Whether an employee actively participates in the investment activities of a Fund is a factual determination that must be made on a case-by-case basis by the Fund. Nevertheless, as a general matter, with the possible exception of some research analysts (e.g., a research analyst who researches all potential portfolio investments and provides recommendations to the portfolio manager), we believe that the types of employees described \* \* \* [i.e., certain marketing and investor relations professionals, research analysts, attorneys, brokers, traders and financial, compliance, operational and accounting officers of a fund] would not qualify as knowledgeable employees under Rule 3c-5.<sup>37</sup>

**IV. Distribution and Derivation Tables**

The following distribution table indicates where the provisions of former Rule 4.7 can be found in revised Rule 4.7 and the derivation table indicates where the provisions of revised Rule 4.7 can be found in former Rule 4.7. The derivation table indicates by “—” any provision in the revised rule that is not derived from the former rule (i.e., it is an entirely new provision). To avoid what otherwise would be a very lengthy presentation, as appropriate each table groups together certain paragraphs.

**A. DISTRIBUTION TABLE**

Former rule 4.7	Revised rule 4.7
(a)(1) .....	(a)(1)
(a)(1)(i) .....	(a)(1)(iii)
(a)(1)(ii)(A) .....	(a)(2)
(a)(1)(ii)(A)(1)-(4) .....	a)(2)(i)-(iv)
(a)(1)(ii)(A)(5) .....	(a)(2)(viii)(A)(1)
(a)(1)(ii)(B)(1) .....	(a)(1)(v)
(a)(1)(ii)(B)(2)(i)-(xii) .....	(a)(3)(i)-(xii)
(a)(1)(ii)(C) .....	(a)(1)(iv); (a)(1)(vi); (a)(2)(xi)
(a)(1)(ii)(D) .....	(a)(1)(xii)(A)
(a)(2) .....	(b)
(a)(3) .....	(d)

<sup>32</sup> 65 FR at 11261.

<sup>33</sup> CTAs claiming relief under Rule 4.7 are nonetheless required under paragraph (c)(1)(i) of the rule to display a prescribed disclaimer statement on the cover page of any brochure or other disclosure

statement they provide to prospective clients or, if none is provided, immediately above the signature line of the agreement the client must execute before it opens an account. CPOs claiming relief under Rule 4.7 are subject to a similar requirement under paragraph (b)(1)(i).

<sup>34</sup> 65 FR at 11258-59.

<sup>35</sup> 65 FR at 11259 (footnote omitted).

<sup>36</sup> *American Bar Ass'n* [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,548 (Apr. 22, 1999).

<sup>37</sup> *Id.* at 78,746 (footnote omitted).

A. DISTRIBUTION TABLE—Continued

Former rule 4.7	Revised rule 4.7
(b)(1) .....	(a)(1)
(b)(1)(i) .....	(a)(1)(ii)
(b)(1)(ii)(A) .....	(a)(2)(i)–(iv)
(b)(1)(ii)(B)(1) .....	(a)(1)(v)
(b)(1)(ii)(B)(2)(i)–(xii) .....	(a)(3)(i)–(xii)
(b)(1)(ii)(C) .....	(a)(2)(xii)(B)
(b)(1)(ii)(D) .....	(a)(2)(xii)(A)
(b)(1)(ii)(E) .....	(a)(2)(xii)(C)
(b)(2) .....	(c)
(b)(3) .....	(d)
(c) .....	(e)

B. DERIVATION TABLE

Revised rule 4.7	Former rule 4.7
(a) .....	(a)(1)
(a)(1) .....	--
(a)(1)(i) .....	--
(a)(1)(ii) .....	(b)(1)(i)
(a)(1)(iii) .....	(a)(1)(i)
(a)(1)(iv) .....	(a)(1)(ii)(C)
(a)(1)(v) .....	(a)(1)(ii)(b)(1); (b)(1)(ii)(B)(1)
(a)(1)(vi) .....	(a)(1)(ii)(C)
(a)(2) .....	(a)(1)(ii)(A); (b)(1)(ii)(A)
(a)(2)(i)–(iv) .....	(a)(1)(ii)(A)(1)–(4); (b)(1)(ii)(A)
(a)(2)(v)–(vii) .....	--
(a)(2)(viii)(A)(1) .....	(a)(1)(ii)(A)(5)
(a)(2)(viii)(A)(2)–(6) .....	--
(a)(2)(viii)(B) .....	--
(a)(2)(ix)–(x) .....	--
(a)(2)(xi) .....	(a)(1)(ii)(C)
(a)(2)(xii)(A) .....	(a)(1)(ii)(D); (b)(1)(ii)(D)
(a)(2)(xii)(B) .....	(b)(1)(ii)(C)
(a)(2)(xii)(C) .....	(b)(1)(ii)(E)
(a)(3) .....	(a)(1)(ii)(B)(2); (b)(1)(ii)(B)(2)
(a)(3)(i)–(xii) .....	(a)(1)(ii)(B)(2)(i)–(xii); (b)(1)(ii)(B)(2)(i)–(xii)
(b) .....	(a)(2)
(c) .....	(b)(2)
(d) .....	(a)(3); (b)(3)
(e) .....	(c)

V. Technical Revisions to Rules 30.6(b), 140.99(i)(A) and 180.3(b)(2)

A. Rule 30.6(b)

Part 30 of the Commission’s rules governs the offer and sale of foreign futures and foreign options contracts to persons located in the United States. Rule 30.6 sets forth the disclosure requirements that apply to domestic and foreign persons who are registered or required to be registered under Part 30 or who have obtained an exemption from such registration under Rule 30.5. Specifically, Rule 30.6(b) sets forth those requirements with respect to CPOs and CTAs, differentiating between disclosures applicable in the context of participants and clients, respectively, who meet the requirements of Rule 4.7 (Rule 30.6(b)(1)) and those who do not (Rule 30.6(b)(2)).

As discussed above, under the Revision persons who formerly were

termed “qualified eligible participants” or “qualified eligible clients” are now all termed “qualified eligible persons” and the provisions of Rule 4.7 have been reorganized. The Commission accordingly has conformed the nomenclature of Rule 30.6(b) to that of revised Rule 4.7.

B. Rule 140.99(i)(A)

Rule 140.99 governs requests for exemptive, no-action and interpretative letters. Among other things, it sets forth the procedures that an applicant must follow in making a request for a letter. Paragraph (i)(A) makes clear that Rule 140.99 does not affect the requirements of, or is otherwise applicable to, notice filings required to be made to claim relief from the Act or from a Commission rule—e.g., pursuant to Rule 4.7.

As stated above, all claims for relief under Rule 4.7 are now found in

paragraph (d) of the rule. Accordingly, the Commission has revised Rule 140.99(i)(A) such that it similarly refers to Rule 4.7(d).

C. Rule 180.3(b)(2)

Part 180 of the Commission’s rules governs arbitration or other dispute settlement procedures. Rule 180.3(b)(2) concerns the signing of a pre-dispute arbitration agreement and certain endorsement procedures that may be followed by certain persons. The Commission similarly has conformed the nomenclature of Rule 180.3(b)(2)(vi) so that it now refers to “A person who is a ‘qualified eligible person’ under § 4.7(a) of this chapter.”<sup>38</sup>

<sup>38</sup>This action is consistent with the Commission’s recent regulatory reform proposals, which, among other things, would provide in new Rule 166.5 for the use of pre-dispute arbitration agreements for certain customer claims and grievances and which “expands the use of the ‘single-signature format’ for

## VI. Related Matters

### A. Paperwork Reduction Act

Rule 4.7 affects information collection requirements. As required by the Paperwork Reduction Act of 1995, the Commission has submitted a copy of this Rule 4.7 to the Office of Management and Budget (OMB) for its review.<sup>39</sup> The Commission did not receive any comments on any potential paperwork burden associated with the Proposal.

### B. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA")<sup>40</sup> requires each federal agency to consider the impact of proposed rules on small entities. The Commission previously has established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such small entities in accordance with the RFA.<sup>41</sup> The Commission has determined that registered CPOs are not small entities for the purposes of the RFA.<sup>42</sup> With respect to CTAs, the Commission has stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs should be considered to be small entities and, if so, that it would analyze the economic impact on them of any rule.<sup>43</sup>

Rule 4.7 reduces the regulatory burdens on registered CPOs and CTAs by providing exemptive relief from the disclosure, reporting and recordkeeping requirements that are otherwise applicable to these registrants. As revised, Rule 4.7 makes this relief available to more CPOs and CTAs and under more situations. This expanded relief, moreover, is available to all CPOs and CTAs, regardless of size.

### C. Administrative Procedure Act

The Administrative Procedure Act provides that the required publication of a substantive rule shall be made not less than 30 days before its effective date, but provides an exception for "a substantive rule which grants or recognizes an exemption or relieves a restriction."<sup>44</sup> Rule 4.7 makes available

account opening agreements to include \* \* \* 'qualified eligible clients' as defined in Rule 4.7." 65 FR 39008, 39016 n. 31 (June 22, 2000). As footnote 31 states, the Commission has proposed to delete Part 180 in its entirety. If the Commission adopts these regulatory reform proposals, references in Rule 166.5 solely will be to "qualified eligible persons."

<sup>39</sup> 44 U.S.C. 3507(d) (Supp. I 1995).

<sup>40</sup> 5 U.S.C. 601 *et seq.* (1994 & Supp. II 1996).

<sup>41</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>42</sup> *Id.* at 18619-20.

<sup>43</sup> *Id.* at 18620.

<sup>44</sup> 5 U.S.C. 553(d) (1994).

an exemption from certain Part 4 requirements for CPOs who operate commodity pools consisting of qualified eligible persons and for CTAs who direct or guide the commodity interest trading accounts of qualified eligible persons. Accordingly, the Commission has determined to make the proposed amendments to Rule 4.7 effective immediately.

### List of Subjects

#### 17 CFR Part 4

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

#### 17 CFR Part 30

Definitions, Foreign futures, Foreign options, Reporting and recordkeeping requirements, Registration requirements, Risk disclosure statements, Treatment of foreign futures and options secured amount, Customer protection.

#### 17 CFR Part 140

Authority delegations (Government agencies), Organization and functions (Government agencies).

#### 17 CFR Part 180

Arbitration or other dispute settlement procedures, Consumer protection.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act, and in particular, sections 1a(4), 1a(5), 4b, 4l, 4m, 4n, 4o and 8a, 7 U.S.C. 1a, 6b, 6l, 6m, 6n, 6o and 12a, the Commission hereby amends Parts 4, 30, 140 and 180 of Chapter I of Title 17 of the Code of Federal Regulations as follows:

## PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

### Subpart A—General Provisions, Definitions and Exemptions

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 4.7 is revised 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.

This section is organized as follows: Paragraph (a) contains definitions for

the purposes of § 4.7; paragraph (b) contains the relief available to commodity pool operators under § 4.7; paragraph (c) contains the relief available to commodity trading advisors under § 4.7; paragraph (d) concerns the Notice of Claim for Exemption under § 4.7; and paragraph (e) addresses the effect of an insignificant deviation from a term, condition or requirement of § 4.7.

(a) *Definitions.* Paragraph (a)(1) of this section contains general definitions, paragraph (a)(2) of this section contains the definition of the term *qualified eligible person* with respect to those persons who do not need to satisfy the Portfolio Requirement and paragraph (a)(3) of this section contains the definition of the term *qualified eligible person* with respect to those persons who must satisfy the Portfolio Requirement. For the purposes of this section:

#### (1) *In general.*

(i) *Affiliate* of, or a person *affiliated* with, a specified person means a person that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with the specified person.

(ii) *Exempt account* means the account of a qualified eligible person that is directed or guided by a commodity trading advisor pursuant to an effective claim for exemption under § 4.7.

(iii) *Exempt pool* means a pool that is operated pursuant to an effective claim for exemption under § 4.7.

(iv) *Non-United States person* means:

(A) A natural person who is not a resident of the United States;

(B) A partnership, corporation or other entity, other than an entity organized principally for passive investment, organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction;

(C) An estate or trust, the income of which is not subject to United States income tax regardless of source;

(D) An entity organized principally for passive investment such as a pool, investment company or other similar entity; *Provided*, That units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain

requirements of Part 4 of the Commission's regulations by virtue of its participants being Non-United States persons; and

(E) A pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States.

(v) *Portfolio Requirement* means that a person:

(A) Owns securities (including pool participations) of issuers not affiliated with such person and other investments with an aggregate market value of at least \$2,000,000;

(B) Has had on deposit with a futures commission merchant, for its own account at any time during the six-month period preceding either the date of sale to that person of a pool participation in the exempt pool or the date that the person opens an exempt account with the commodity trading advisor, at least \$200,000 in exchange-specified initial margin and option premiums for commodity interest transactions; or

(C) Owns a portfolio comprised of a combination of the funds or property specified in paragraphs (a)(1)(v)(A) and (B) of this section in which the sum of the funds or property includable under paragraph (a)(1)(v)(A), expressed as a percentage of the minimum amount required thereunder, and the amount of futures margin and option premiums includable under paragraph (a)(1)(v)(B), expressed as a percentage of the minimum amount required thereunder, equals at least one hundred percent. An example of a composite portfolio acceptable under this paragraph (a)(1)(v)(C) would consist of \$1,000,000 in securities and other property (50% of paragraph (a)(1)(v)(A)) and \$100,000 in exchange-specified initial margin and option premiums (50% of paragraph (a)(1)(v)(B)).

(vi) *United States* means the United States, its states, territories or possessions, or an enclave of the United States government, its agencies or instrumentalities.

(2) *Persons who do not need to satisfy the Portfolio Requirement to be qualified eligible persons. Qualified eligible person* means any person, acting for its own account or for the account of a qualified eligible person, who the commodity pool operator reasonably believes, at the time of the sale to that person of a pool participation in the exempt pool, or who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, is:

(i) A futures commission merchant registered pursuant to section 4d of the Act, or a principal thereof;

(ii) A broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, or a principal thereof;

(iii) A commodity pool operator registered pursuant to section 4m of the Act, or a principal thereof; *Provided*, That the pool operator:

(A) Has been registered and active as such for two years; or

(B) Operates pools which, in the aggregate, have total assets in excess of \$5,000,000;

(iv) A commodity trading advisor registered pursuant to section 4m of the Act, or a principal thereof; *Provided*, That the trading advisor:

(A) Has been registered and active as such for two years; or

(B) Provides commodity interest trading advice to commodity accounts which, in the aggregate, have total assets in excess of \$5,000,000 deposited at one or more futures commission merchants;

(v) An investment adviser registered pursuant to section 203 of the Investment Advisers Act of 1940 ("Investment Advisers Act") or pursuant to the laws of any state, or a principal thereof; *Provided*, That the investment adviser:

(A) Has been registered and active as such for two years; or

(B) Provides securities investment advice to securities accounts which, in the aggregate, have total assets in excess of \$5,000,000 deposited at one or more registered securities brokers;

(vi) A "qualified purchaser" as defined in section 2(51)(A) of the Investment Company Act of 1940 (the "Investment Company Act");

(vii) A "knowledgeable employee" as defined in § 270.3c-5 of this title;

(viii)(A) With respect to an exempt pool:

(1) The commodity pool operator, commodity trading advisor or investment adviser of the exempt pool offered or sold, or an affiliate of any of the foregoing;

(2) A principal of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or of an affiliate of any of the foregoing;

(3) An employee of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or of an affiliate of any of the foregoing (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the exempt pool, other commodity pools operated

by the pool operator of the exempt pool or other accounts advised by the trading advisor or the investment adviser of the exempt pool, or by the affiliate;

*Provided*, That such employee has been performing such functions and duties for or on behalf of the exempt pool, pool operator, trading advisor, investment adviser or affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(4) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or any other employee of, or agent so engaged by, an affiliate of any of the foregoing (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); *Provided*, That such employee or agent:

(i) Is an accredited investor as defined in § 230.501(a)(5) or (6) of this title; and

(ii) Has been employed or engaged by the exempt pool, commodity pool operator, commodity trading advisor, investment adviser or affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months;

(5) The spouse, child, sibling or parent of a person who satisfies the criteria of paragraph (a)(2)(viii)(A)(1), (2), (3) or (4) of this section; *Provided*, That:

(i) An investment in the exempt pool by any such family member is made with the knowledge and at the direction of the person; and

(ii) The family member is not a qualified eligible person for the purposes of paragraph (a)(3)(xi) of this section;

(6)(i) Any person who acquires a participation in the exempt pool by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section;

(ii) The estate of any person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section; or

(iii) A company established by any person listed in paragraph (a)(2)(viii)(A)(1), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(2)(viii)(A)(6)(i) or (ii) of this section;

(B) With respect to an exempt account:

(1) An affiliate of the commodity trading advisor of the exempt account;

(2) A principal of the commodity trading advisor of the exempt account or of an affiliate of the trading advisor;

(3) An employee of the commodity trading advisor of the exempt account or of an affiliate of the trading advisor (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the trading advisor or the affiliate; *Provided*, That such employee has been performing such functions and duties for or on behalf of the trading advisor or the affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(4) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the commodity trading advisor of the exempt account or any other employee of, or agent so engaged by, an affiliate of the trading advisor (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); *Provided*, That such employee or agent:

(i) Is an accredited investor as defined in § 230.501(a)(5) or (a)(6) of this title; and

(ii) Has been employed or engaged by the commodity trading advisor or the affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months; or

(5) The spouse, child, sibling or parent of the commodity trading advisor of the exempt account or of a person who satisfies the criteria of paragraph (a)(2)(viii)(B)(1), (2), (3) or (4) of this section; *Provided*, That:

(i) The establishment of an exempt account by any such family member is made with the knowledge and at the direction of the person; and

(ii) The family member is not a qualified eligible person for the purposes of paragraph (a)(3)(xi) of this section;

(6)(i) Any person who acquires an interest in an exempt account by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section;

(ii) The estate of any person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section; or

(iii) A company established by any person listed in paragraph (a)(2)(viii)(B)(1), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(2)(viii)(B)(6)(i) or (ii) of this section;

(ix) A trust; *Provided*, That:

(A) The trust was not formed for the specific purpose of either participating in the exempt pool or opening an exempt account; and

(B) The trustee or other person authorized to make investment decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a qualified eligible person;

(x) An organization described in section 501(c)(3) of the Internal Revenue Code (the "IRC"); *Provided*, That the trustee or other person authorized to make investment decisions with respect to the organization, and the person who has established the organization, is a qualified eligible person;

(xi) A Non-United States person;

(xii)(A) An entity in which all of the unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons;

(B) An exempt pool; or

(C) Notwithstanding paragraph (a)(3) of this section, an entity as to which a notice of eligibility has been filed pursuant to § 4.5 which is operated in accordance with such rule and in which all unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons.

(3) *Persons who must satisfy the Portfolio Requirement to be qualified eligible persons. Qualified eligible person* means any person who the commodity pool operator reasonably believes, at the time of the sale to that person of a pool participation in the exempt pool, or any person who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, satisfies the Portfolio Requirement and is:

(i) An investment company registered under the Investment Company Act or a business development company as defined in section 2(a)(48) of such Act not formed for the specific purpose of either investing in the exempt pool or opening an exempt account;

(ii) A bank as defined in section 3(a)(2) of the Securities Act of 1933 (the "Securities Act") or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the

Securities Act acting for its own account or for the account of a qualified eligible person;

(iii) An insurance company as defined in section 2(13) of the Securities Act acting for its own account or for the account of a qualified eligible person;

(iv) A plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of \$5,000,000;

(v) An employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974; *Provided*, That the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is a bank, savings and loan association, insurance company, or registered investment adviser; or that the employee benefit plan has total assets in excess of \$5,000,000; or, if the plan is self-directed, that investment decisions are made solely by persons that are qualified eligible persons;

(vi) A private business development company as defined in section 202(a)(22) of the Investment Advisers Act;

(vii) An organization described in section 501(c)(3) of the IRC, with total assets in excess of \$5,000,000;

(viii) A corporation, Massachusetts or similar business trust, or partnership, other than a pool, which has total assets in excess of \$5,000,000, and is not formed for the specific purpose of either participating in the exempt pool or opening an exempt account;

(ix) A natural person whose individual net worth, or joint net worth with that person's spouse, at the time of either his purchase in the exempt pool or his opening of an exempt account exceeds \$1,000,000;

(x) A natural person who had an individual income in excess of \$200,000 in each of the two most recent years or joint income with that person's spouse in excess of \$300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;

(xi) A pool, trust, insurance company separate account or bank collective trust, with total assets in excess of \$5,000,000, not formed for the specific purpose of either participating in the exempt pool or opening an exempt account, and whose participation in the exempt pool or investment in the exempt account is directed by a qualified eligible person; or

(xii) Except as provided for the governmental entities referenced in paragraph (a)(3)(iv) of this section, if

otherwise authorized by law to engage in such transactions, a governmental entity (including the United States, a state, or a foreign government) or political subdivision thereof, or a multinational or supranational entity or an instrumentality, agency, or department of any of the foregoing.

(b) *Relief available to commodity pool operators.* Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity pool operator who offers or sells participations in a pool solely to qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) of that Act or pursuant to Regulation S, 17 CFR 230.901 *et seq.*, and any bank registered as a commodity pool operator in connection with a pool that is a collective trust fund whose securities are exempt from registration under the Securities Act pursuant to section 3(a)(2) of that Act and are offered or sold, without marketing to the public, solely to qualified eligible persons, may claim any or all of the following relief with respect to such pool:

(1) *Disclosure relief.* (i) Exemption from the specific requirements of §§ 4.21, 4.24, 4.25 and 4.26 with respect to each exempt pool; *Provided*, That if an offering memorandum is distributed in connection with soliciting prospective participants in the exempt pool, such offering memorandum must include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the following statement is prominently disclosed on the cover page of the offering memorandum, or, if none is provided, immediately above the signature line on the subscription agreement or other document that the prospective participant must execute to become a participant in the pool:

“PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH POOLS WHOSE PARTICIPANTS ARE LIMITED TO QUALIFIED ELIGIBLE PERSONS, AN OFFERING MEMORANDUM FOR THIS POOL IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A POOL OR UPON THE ADEQUACY OR ACCURACY OF AN OFFERING MEMORANDUM. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS

OFFERING OR ANY OFFERING MEMORANDUM FOR THIS POOL.”

(ii) Exemption from disclosing the past performance of exempt pools in the Disclosure Document of non-exempt pools except to the extent that such past performance is material to the non-exempt pool being offered; *Provided*, That a pool operator that has claimed exemption hereunder and elects not to disclose any such performance in the Disclosure Document of non-exempt pools shall state in a footnote to the performance disclosure therein that the operator is operating or has operated exempt pools whose performance is not disclosed in this Disclosure Document.

(2) *Periodic reporting relief.* Exemption from the specific requirements of §§ 4.22(a) and (b); *Provided*, That a statement signed and affirmed in accordance with § 4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must indicate:

(i) The net asset value of the exempt pool as of the end of the reporting period;

(ii) The change in net asset value from the end of the previous reporting period; and

(iii) The net asset value per outstanding unit of participation in the exempt pool as of the end of the reporting period.

(3) *Annual report relief.* (i) Exemption from the specific requirements of §§ 4.22(c) and (d); *Provided*, That within 90 calendar days after the end of the exempt pool's fiscal year, the commodity pool operator files with the Commission and with the National Futures Association and distributes to each participant in lieu of the financial information and statements specified by those sections, an annual report for the exempt pool, signed and affirmed in accordance with § 4.22(h) which contains, at a minimum:

(A) A Statement of Financial Condition as of the close of the exempt pool's fiscal year (elected in accordance with § 4.22(g));

(B) A Statement of Income (Loss) for that year; and

(C) Appropriate footnote disclosure and any other material information.

(ii) Such annual report must be presented and computed in accordance with generally accepted accounting principles consistently applied and, if certified by an independent public accountant, so certified in accordance with § 1.16 as applicable.

(iii) Legend. (A) If a claim for exemption has been made pursuant to

this section, the commodity pool operator must make a statement to that effect on the cover page of each annual report.

(B) If the annual report is not certified in accordance with § 1.16, the pool operator must make a statement to that effect on the cover page of each annual report and state that a certified audit will be provided upon the request of the holders of a majority of the units of participation in the pool who are unaffiliated with the commodity pool operator.

(4) *Recordkeeping relief.* Exemption from the specific requirements of § 4.23; *Provided*, That the commodity pool operator must maintain the reports referred to in paragraphs (b)(2) and (b)(3) of this section and all books and records prepared in connection with his activities as the pool operator of the exempt pool (including, without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations) at his main business address and must make such books and records available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of § 1.31.

(c) *Relief available to commodity trading advisors.* Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity trading advisor who anticipates directing or guiding the commodity interest accounts of qualified eligible persons may claim any or all of the following relief with respect to the accounts of qualified eligible persons who have given due consent to their account being an exempt account under § 4.7:

(1) *Disclosure relief.* (i) Exemption from the specific requirements of §§ 4.31, 4.34, 4.35 and 4.36; *Provided*, That if the commodity trading advisor delivers a brochure or other disclosure statement to such qualified eligible persons, such brochure or statement shall include all additional disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the following statement is prominently displayed on the cover page of the brochure or statement or, if none is provided, immediately above the signature line of the agreement that the client must execute before it opens an account with the commodity trading advisor:

"PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH ACCOUNTS OF QUALIFIED ELIGIBLE PERSONS, THIS BROCHURE OR ACCOUNT DOCUMENT IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A TRADING PROGRAM OR UPON THE ADEQUACY OR ACCURACY OF COMMODITY TRADING ADVISOR DISCLOSURE. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS TRADING PROGRAM OR THIS BROCHURE OR ACCOUNT DOCUMENT."

(ii) Exemption from disclosing the past performance of exempt accounts in the Disclosure Document for non-exempt accounts except to the extent that such past performance is material to the non-exempt account being offered; *Provided*, That a commodity trading advisor that has claimed exemption hereunder and elects not to disclose any such performance in the Disclosure Document for non-exempt accounts shall state in a footnote to the performance disclosure therein that the advisor is advising or has advised exempt accounts for qualified eligible persons whose performance is not disclosed in this Disclosure Document.

(2) *Recordkeeping relief.* Exemption from the specific requirements of § 4.33; *Provided*, That the commodity trading advisor must maintain, at its main business office, all books and records prepared in connection with his activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations) and must make such books and records available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of § 1.31.

(d) *Notice of claim for exemption.*

(1) A notice of a claim for exemption under this section must:

(i) Be in writing;

(ii) Provide the name, main business address, main business telephone number and the National Futures Association commodity pool operator or commodity trading advisor identification number of the person claiming the exemption;

(iii)(A) Where the claimant is a commodity pool operator, provide the name(s) of the pool(s) for which the request is made; *Provided*, That a single

notice representing that the pool operator anticipates operating single-investor pools may be filed to claim exemption for single-investor pools and such notice need not name each such pool;

(B) Where the claimant is a commodity trading advisor, contain a representation that the trading advisor anticipates providing commodity interest trading advice to qualified eligible persons;

(iv) Contain representations that:

(A) Neither the commodity pool operator or commodity trading advisor nor any of its principals is subject to any statutory disqualification under section 8a(2) or 8a(3) of the Act unless such disqualification arises from a matter which was previously disclosed in connection with a previous application for registration if such registration was granted or which was disclosed more than thirty days prior to the filing of the notice under this paragraph (d);

(B) The commodity pool operator or commodity trading advisor will comply with the applicable requirements of § 4.7; and

(C) Where the claimant is a commodity pool operator, that the exempt pool will be offered and operated in compliance with the applicable requirements of § 4.7;

(v) Specify the relief claimed under § 4.7;

(vi) Where the claimant is a commodity pool operator, state the closing date of the offering or that the offering will be continuous;

(vii) Be signed by the commodity pool operator or commodity trading advisor as follows: If it is a sole proprietorship, by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer;

(viii) Be filed in duplicate with the Commission at the address specified in § 4.2 and with the National Futures Association at its headquarters office (Attn: Director of Compliance, Compliance Department); and

(ix)(A)(1) Where the claimant is a commodity pool operator, except as provided in paragraph (d)(1)(iii)(A) of this section with respect to single-investor pools and in paragraph (d)(1)(ix)(A)(2) of this section, be received by the Commission:

(i) Before the date the pool first enters into a commodity interest transaction, if the relief claimed is limited to that provided under paragraphs (b)(2), (3) and (4) of this section; or

(ii) Prior to any offer or sale of any participation in the exempt pool if the claimed relief includes that provided under paragraph (b)(1) of this section.

(2) Where participations in a pool have been offered or sold in full compliance with Part 4, the notice of a claim for exemption may be filed with the Commission at any time; *Provided*, That the claim for exemption is otherwise consistent with the duties of the commodity pool operator and the rights of pool participants and that the commodity pool operator notifies the pool participants of his intention, absent objection by the holders of a majority of the units of participation in the pool who are unaffiliated with the commodity pool operator within twenty-one days after the date of the notification, to file a notice of claim for exemption under § 4.7 and such holders have not objected within such period. A commodity pool operator filing a notice under this paragraph (d)(1)(ix)(A)(2) shall either provide disclosure and reporting in accordance with the requirements of Part 4 to those participants objecting to the filing of such notice or allow such participants to redeem their units of participation in the pool within three months of the filing of such notice.

(B) Where the claimant is a commodity trading advisor, be received by the Commission before the date the trading advisor first enters into an agreement to direct or guide the commodity interest account of a qualified eligible person pursuant to § 4.7.

(2) The notice will be effective upon receipt by the Commission with respect to each pool for which it was made where the claimant is a commodity pool operator and otherwise generally where the claimant is a commodity trading advisor; *Provided*, That any notice which does not include all the required information shall not be effective, and that if at the time the Commission receives the notice, an enforcement proceeding brought by the Commission under the Act or the regulations is pending against the pool operator or trading advisor or any of its principals, the exemption will not be effective until twenty-one calendar days after receipt of the notice by the Commission and that in such case an exemption may be denied by the Commission or made subject to such conditions as the Commission may impose.

(3) Any exemption claimed hereunder shall cease to be effective upon any change which would cause the commodity pool operator of an exempt pool to be ineligible for the relief claimed with respect to such pool or which would cause a commodity trading advisor to be ineligible for the relief claimed. The pool operator or trading advisor must promptly file a

notice advising the Commission of such change.

(4)(i) Any exemption from the requirements of § 4.21, 4.22, 4.23, 4.24, 4.25 or 4.26 claimed hereunder with respect to a pool shall not affect the obligation of the commodity pool operator to comply with all other applicable provisions of Part 4, the Act and the Commission's rules and regulations, with respect to the pool and any other pool the pool operator operates or intends to operate.

(ii) Any exemption from the requirements of § 4.31, 4.33, 4.34, 4.35 or 4.36 claimed hereunder shall not affect the obligation of the commodity trading advisor to comply with all other applicable provisions of Part 4, the Act and the Commission's rules and regulations, with respect to any qualified eligible person and any other client to which the commodity trading advisor provides or intends to provide commodity interest trading advice.

(e) *Insignificant deviations from a term, condition or requirement of § 4.7.*

(1) A failure to comply with a term or condition of § 4.7 will not result in the loss of the exemption with respect to a particular pool or client if the commodity pool operator or the commodity trading advisor relying on the exemption shows that:

(i) The failure to comply did not pertain to a term, condition or requirement directly intended to protect that particular qualified eligible person;

(ii) The failure to comply was insignificant with respect to the exempt pool as a whole or to the particular exempt account; and

(iii) A good faith and reasonable attempt was made to comply with all applicable terms, conditions and requirements of § 4.7.

(2) A transaction made in reliance on § 4.7 must comply with all applicable terms, conditions and requirements of § 4.7. Where an exemption is established only through reliance upon paragraph (e)(1) of this section, the failure to comply shall nonetheless be actionable by the Commission.

**PART 30—FOREIGN FUTURES AND OPTIONS TRANSACTIONS**

3. The authority citation for part 30 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 4, 6, 6c and 12a, unless otherwise noted.

4. Section 30.6 is amended by revising paragraph (b) to read as follows:

**§ 30.6 Disclosure.**

\* \* \* \* \*

(b) *Commodity pool operators and commodity trading advisors.* (1) With

respect to persons who satisfy the requirements of qualified eligible persons, as defined in § 4.7(a) of this chapter:

(i) A commodity pool operator registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(c) unless the pool operator, at or before the time it engages in such activities, first provides each prospective qualified eligible person with the Risk Disclosure Statement set forth in § 4.24(b)(2) of this chapter and the statement in § 4.7(b)(1)(i) of this chapter;

(ii) A commodity trading advisor registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(d) unless the trading advisor, at or before the time it engages in such activities, first provides each qualified eligible person with the Risk Disclosure Statement set forth in § 4.34(b)(2) of this chapter and the statement in § 4.7(c)(1)(i) of this chapter.

(2) With respect to persons who do not satisfy the requirements of qualified eligible persons, as defined in § 4.7(a) of this chapter:

(i) A commodity pool operator registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(c) unless the pool operator, at or before the time it engages in such activities, first provides each prospective participant with the Disclosure Document required to be furnished to customers or potential customers pursuant to § 4.21 of this chapter and files the Disclosure Document in accordance with § 4.26 of this chapter;

(ii) A commodity trading advisor registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(d) unless the trading advisor, at or before the time it engages in such activities, first provides each prospective client with the Disclosure Document required to be furnished to customers or potential customers pursuant to § 4.31 of this chapter and files the Disclosure Document in accordance with § 4.36 of this chapter.

\* \* \* \* \*

**PART 140—ORGANIZATION, FUNCTIONS, AND PROCEDURES OF THE COMMISSION**

5. The authority citation for part 140 continues to read as follows:

**Authority:** 7 U.S.C. 4a and 12a.

**§ 140.99 [Amended]**

6. In § 140.99, paragraphs (i)(A) and (B) are correctly designated as paragraphs (i)(1) and (2). In paragraph (i)(1), the phrase “§§ 4.5, 4.7(a), 4.7(b), 4.12(b), 4.13(b) and 4.14(a)(8) of this chapter” is revised to read “§§ 4.5, 4.7(d), 4.12(b), 4.13(b) and 4.14(a)(8) of this chapter”.

**PART 180—ARBITRATION OR OTHER DISPUTE SETTLEMENT PROCEDURES**

7. The authority citation for part 180 continues to read as follows:

**Authority:** 7 U.S.C. 6c, 6d, 6f, 6k, 7a, 12a, and 21, unless otherwise noted.

8. Section 180.3 is amended by revising paragraph (b)(2)(vi) to read as follows:

**§ 180.3 Voluntary procedure and compulsory payments.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(vi) A person who is a “qualified eligible person” as defined in § 4.7(a) of this chapter.

\* \* \* \* \*

Issued in Washington, D.C., on July 27, 2000, by the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 00–19445 Filed 8–3–00; 8:45 am]

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**DEPARTMENT OF JUSTICE**

**28 CFR Part 0**

**[USMS NO. 100F; AG Order No. 2316–2000]**

**RIN 1105–AA64**

**Revision to United States Marshals Service Fees for Services**

**AGENCY:** United States Marshals Service, Justice.

**ACTION:** Final rule.

**SUMMARY:** This rule revises the United States Marshals Service fees to reflect current costs to the United States Marshals Service for service of process in Federal court proceedings. A proposed rule with invitation to comment was published in the Federal Register on December 7, 1999, at 64 FR