Proposed Rules

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

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4
RIN 3038–AC46

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

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing changes to its regulations as they affect certain commodity pool operators (CPOs) of commodity pools whose units of participation are listed and traded on a national securities exchange (Proposal). Specifically, the Proposal would codify the Commission’s regulations as they affect certain commodity pool operators (CPOs), are subject to registration under Section 4b of the Act and Parts 15 and 18 of the Regulations.

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

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

• Federal eRulemaking Portal: http://www.regulations.gov. Follow the instructions for submitting comments.

• E-mail: (e-mail address TBD)

• Mail: Send to David Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, DC 20581.

• Courier: Same as Mail above.

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

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

SUPPLEMENTARY INFORMATION:

I. Background

A. Regulation of CPOs

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

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

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

Part 4 of the Commission’s regulations governs the operations and activities of CPOs.3 Generally, CPOs who are, or who are required to be, registered with the Commission must deliver to prospective pool participants a Disclosure Document containing specified information—e.g., the business background of the CPO and its principals, past performance of the pool being offered, fees and other expenses, and conflicts of interest—and they must distribute to participants in their pools’ operations.4 These CPOs also must make and keep specified books and records at their main business office.5 Additionally, regardless of registration status, all persons who come within the CPO definition are subject to certain operational and advertising requirements6 under Part 4, to all other provisions of the Act and the Commission’s regulations prohibiting fraud that apply to CPOs,7 and to all other relevant provisions of the Act and the Commission’s regulations that apply to all commodity interest market participants, such as the general antifraud provisions, prohibitions against manipulation, and the trade reporting requirements.8

B. Relief From CPO Regulation

1. In General

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

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


3 The Commission’s regulations are found at 17 CFR Ch. I (2010), and, as noted previously, can be accessed through the Commission’s Web site, at:


4 Regulation 4.21.

5 Regulation 4.22.

6 Regulation 4.23.

7 Regulation 4.20.

8 Regulation 4.41.

9 See, e.g., Section 40 of the Act.

10 See, e.g., Section 4b of the Act and Parts 15 and 18 of the Regulations.
subset of the securities underlying the index. More recently, ETFs have been offered that seek to use active management of the fund’s trading. In 2005, registered CPOs began offering commodity pools whose units of participation (“shares”) are publicly-offered and listed for trading on a national securities exchange. These pools have come to be known as “Commodity ETFs” because they are designed to emulate ETFs. Like ETFs, a Commodity ETF may passively seek to track or replicate the performance of a specific commodity index, or it may actively trade commodity interests without regard to an index or benchmark.

CPOs of Commodity ETFs have requested and received from Commission staff exemptive relief from certain of the disclosure, reporting and recordkeeping requirements of Subpart B of Part 4 of the Commission’s regulations (Prior Relief Letters). In each case, the CPO sought exemption from certain of the Disclosure Document delivery and acknowledgment requirements of Regulation 4.21, the periodic Account Statement distribution requirement of Regulation 4.22, and the requirement under Regulation 4.23 to keep the pool’s books and records at the CPO’s main business office. In support of their requests, the CPOs offered substituted compliance with other requirements and various undertakings. The Proposal would codify the exemptions that Commission staff has granted.

These CPOs sought relief from the specific Disclosure Document delivery and acknowledgment requirements of Regulation 4.21 because the prospectus delivery requirements under federal securities laws applicable to registered public offerings of exchange-traded shares (such as units of participation in Commodity ETFs) differ from Commission regulations with respect to timing and other aspects. Thus, the CPOs claimed that requiring simultaneous compliance with both sets of requirements was unnecessarily cumbersome, and would needlessly interfere with the established procedures for conducting a registered public offering of shares to be listed on a national securities exchange. In support of their requests, the CPOs represented that the prospectus required under federal securities laws would contain all of the information required to be included in a Disclosure Document under Regulations 4.24 and 4.25.


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


See Prior Exemption Letters for the particular details of the Commodity ETF structure and offering mechanics, as well as for the exemptive relief and the facts and conditions upon which it was based.
4.25, and that, in addition to being made available in accordance with SEC prospectus delivery requirements, the Disclosure Document would be made readily available at the CPO’s Internet Web site. Further, the CPOs represented that in acquiring Commodity ETF shares, prospective and actual investors would utilize the services of registered broker-dealers, who would be directed by the CPO to either inform investors where they could obtain the current Disclosure Document or to deliver a copy of the Disclosure Document.

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

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

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

As directed by the Sarbanes-Oxley Act of 2002, the SEC has adopted rules requiring national securities exchanges to prohibit the listing of the securities of any issuer (e.g., units of participation in a Commodity ETF) that does not comply with specified requirements for audit or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the Account Statement is accurate and complete.

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

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

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

Regulation 4.12 currently contains paragraph (a), which states the Commission’s power to exempt persons from the provisions of Part 4, consistent with the public interest and subject to appropriate terms and conditions, and paragraph (b), which makes an exemption from certain disclosure, 22 The Commission has said that a prospectus can be used to satisfy the Disclosure Document requirement so long as the prospectus complies with the Commission’s content requirements. See 44 FR 1918, 1922 (Jan. 8, 1979).
23 The CPOs did not seek relief from Regulation 4.21 with respect to sales of pool shares on a national securities exchange (i.e., sales on the secondary market). A CPO’s obligation to deliver a Disclosure Document (and the requirement to obtain a signed acknowledgment of receipt) extends to the direct purchaser of units of participation, and not to persons who subsequently purchase from that purchaser. The Commission has stated that, with respect to the transfer of a participation unit in a commodity pool, the CPO of the pool “is not required to provide a Disclosure Document (Rule 4.21) to a person who purchases a unit of participation or interest in the pool from a pool participant if the pool operator did not solicit the purchase.” 44 FR 25658, 25659 (May 2, 1979).
24 Pursuant to Regulation 4.22(h), a representative duly authorized to bind the CPO must sign an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the Account Statement is accurate and complete. 25 For example, in one case, the alternate recordkeepers were a CPO-affiliated national banking association, a state-regulated bank and a registered broker-dealer. In several other cases, the alternate recordkeepers were a state- and Federal Reserve Board-regulated bank and a registered broker-dealer performing distribution-related services.
26 Pursuant to Regulation 4.22(h), a representative duly authorized to bind the CPO must sign an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the Account Statement is accurate and complete.
27 The requirements, set forth in 15 U.S.C. 78j–1(m)(2) through (6) [2006], concern: Responsibility for appointing, compensating and overseeing the issuer’s public accounting firm; independence of audit committee members; procedures for handling complaints regarding accounting and auditing matters; and the audit committee’s authority to engage outside auditors.
29 Audit committee members may not accept any consulting, advisory or other compensatory fee from the issuer, other than as a member of the board or of a committee thereof, and they may not be affiliated persons of the issuer or any of its subsidiaries. See 17 CFR 240.10A-3(d)(1)(ii) (2010).
reporting and recordkeeping requirements available to registered CPOs whose pools, among other requirements, trade commodity interests in a manner solely incidental to their securities trading activities and do not enter into commodity interest transactions for which the aggregate initial margin and premiums exceed 10 percent of the fair market value of the pool’s assets (after taking into account unrealized profits and losses). To make generally available the relief its staff has issued to the registered CPOs of Commodity ETFs, the Commission is proposing to add a new paragraph (c) to existing Regulation 4.12. The new paragraph would first specify the eligibility requirements for the exemption, and would then set forth the relief that an eligible CPO could claim.

A. Eligibility

Under proposed paragraph (c)(1), a registered CPO, or a person who has applied for CPO registration, would be able to claim the relief available under the rule with respect to any pool that meets the following criteria: that the units of participation be offered and sold pursuant to an effective registration statement under the ’33 Act, and that they be listed for trading on a national securities exchange registered as such under the ’34 Act. Proposed paragraph (c)(2)(i) would provide certain substituted compliance relief from Regulations 4.22(a) and (b). In lieu of compliance with the requirement in the regulation that the CPO distribute a monthly Account Statement to each pool participant, the Proposed paragraph (c)(2)(ii) would state that the CPO may satisfy the requirement of Regulation 4.26(b) to attach to the Disclosure Document a copy of the pool’s most current Account Statement and Annual Report by making the same readily accessible on an Internet Web site maintained by the CPO.

B. The Proposed Relief

Proposed paragraph (c)(2)(ii) would provide certain relief from the Disclosure Document delivery requirement of Regulation 4.21. Proposed paragraph (c)(2)(iii) would provide certain substituted compliance relief from Regulations 4.22(a) and (b). In lieu of compliance with the requirement in the regulation that the CPO distribute a monthly Account Statement to each pool participant, the Proposed paragraph (c)(2)(iv)(A) would require that the CPO’s statement containing the certification required by Regulation 4.22(h), readily accessible on a Web site operated by the CPO. This relief, however, would be subject to the CPO: (1) Keeping the Account Statement readily accessible on the Web site for a period of 30 days following the date the Account Statement is first posted on the Web site; (2) indicating in the Disclosure Document that the CPO must also comply with the requirements of Regulation 4.26 to keep the Disclosure Document current and to correct the Disclosure Document as necessary. The CPO must clearly inform prospective pool participants of the availability of the Disclosure Document and the Internet address for accessing it, and to direct any selling agent to whom the pool operator sells units of participation to so inform prospective participants. Finally, the CPO must comply with all other requirements in Part 4 applicable to Disclosure Documents, which includes the form and content requirements of Regulations 4.24 and 4.25.

Proposed paragraph (c)(2)(v)(B) would require that the CPO’s statement containing the certification required by Regulation 4.22(h), readily accessible on a Web site, contain representations from the CPO that: (1) The CPO is not required to distribute an Annual Report to pool participants is outweighed by the burden involved in distributing an Annual Report to pool participants is outweighed by the benefit to the participants of receiving certified financial statements at least annually.

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

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

The CPO would be required to file a separate claim of exemption and accompanying statement if additional required books and records are subsequently kept at a location other than the CPO’s main business address, or if the CPO chooses to keep books and records subsequently at an additional location other than its main business address.
III. CPO Registration Relief for Certain Directors or Trustees of Commodity ETFs: New Regulation 4.13(a)(5)

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

IV. Effect of Final Rulemaking on Prior Relief Letters

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

V. Related Matters

A. Regulatory Flexibility Act

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

B. Paperwork Reduction Act

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

If adopted, the Proposal will require existing and new CPO registrants that operate pools whose units of participation are listed on a national securities exchange, and that wish to claim the exemptive relief provided by the proposed amended regulations, to submit certain filings to the Commission that had not been required previously. As registered CPOs, persons claiming exemption under the Proposal will also be subject to the same information collection requirements under Regulations 4.22 and 4.23 as other registered CPOs, and the burden previously approved by OMB for Collection 3038–0005 will be adjusted to account for the additional registrants. Because the information required under Regulation 4.21 will already have been collected under the requirements of the Federal securities laws for which Paperwork Reduction Act collections and burdens have already been established, the burden attributable to Commission Regulation 4.21 will not be affected.

Collection of Information


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

Estimated number of respondents: 35.
Annual responses by each respondent: 1.
Estimated average hours per response: .5.
Annual reporting burden: 17.5.
This annual reporting burden of 17.5 hours represents an increase of 5 hours as a result of the proposed amendments to Regulation 4.12.

The burden associated with Commission Regulations 4.22(a) and (b) is expected to be increased by 1,039.5 hours, due solely to additional, new registrants:
Estimated number of respondents: 519.
Pools by each respondent: 3
Annual responses by each respondent: 9.
Estimated average hours per response: 3.85.
Annual reporting burden: 53,950.05.
This annual reporting burden of 53,950.05 hours represents an increase of 1,039.5 hours as a result of the proposed amendments to Regulation 4.12.

The burden associated with Commission Rule 4.23 is expected to be increased by 520 hours:
Estimated number of respondents: 516.
Annual responses by each respondent: 1.
Estimated average hours per response: 52.
Annual reporting burden: 26,832.
This annual reporting burden of 26,832 hours represents an increase of 520 hours as a result of the proposed amendments to Regulation 4.12.

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

The Commission considers comments by the public on this proposed collection of information in—
- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;
- Evaluating the accuracy of the Commission’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting delivery of information via Internet Web sites.

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

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

C. Cost-Benefit Analysis

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

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

Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

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

1. Protection of Market Participants and the Public

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

2. Efficiency and Competition

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

3. Financial Integrity of Futures Markets and Price Discovery

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

4. Sound Risk Management Practices

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

5. Other Public Interest Considerations

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

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

List of Subjects in 17 CFR Part 4

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

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

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:
Authority: 7 U.S.C. 1a, 2, 4, 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23.

2. Section 4.12 is amended by:
(a) Revising the heading of paragraph (b);
(b) Revising the introductory text of paragraph (b)(1); and
(c) Adding new paragraph (c), to read as follows:

§ 4.12 Exemption from provisions of part 4.

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

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

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

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

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

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

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

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

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

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

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

(iii) In the case of § 4.23, exemption from the requirement to keep the books and records specified by that section at the pool operator’s main business office; Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator’s main business offices within seventy-two hours of a request; and

(iv) It will disclose in the pool’s Disclosure Document a copy of the pool’s most current Account Statement and Annual Report if the pool operator makes such Account Statement and Annual Report readily accessible on an Internet Web site maintained by the pool operator.

(d) Compliance with other requirements. (1) Cause the pool’s Disclosure Documents to be readily accessible on an Internet Web site maintained by the pool operator. Provided, however, that the pool operator:

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

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

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

(2) It will promptly amend the disclosure in the pool’s Disclosure Document the location of its books and records that such person will be keeping; and

(3) Contains representations from the pool operator that:

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

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

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

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

(d)(1) Notice of claim for exemption. Any registered commodity pool operator, or applicant for commodity pool operator registration, who desires to claim the relief available under paragraph (b) or (c) of this section must file electronically a claim of exemption...
with the National Futures Association through its electronic exemption filing system. Such claim must:

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

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

(iii) Contain representations, as appropriate, that:

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

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

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

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

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

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

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

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

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

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

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

(ii) The effectiveness of such claim shall not affect the obligations of the commodity pool operator to comply with all other applicable provisions of this part 4, the Act and the Commission’s regulations issued thereunder with respect to the pool and any other pool the pool operator operates or intends to operate.

3. Section 4.13 is amended by:

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

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

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

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

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

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

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

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

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

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

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

* * * * *

(b)(1) * * *

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

* * * * *

(2) The person must file the notice by no later than the time that the pool operator delivers a subscription agreement for the pool to a prospective participant in the pool; Provided, however, that in the case of a claim for relief under §4.13(a)(5), the person must file the notice by the later of the effective date of the pool’s registration statement under the Securities Act of 1933 or the date on which the person first becomes a director or trustee; and Provided, further, that where a person registered with the Commission as a commodity pool operator intends to withdraw from registration in order to claim exemption hereunder, the person must notify its pool’s participants in written communication physically delivered or delivered through electronic transmission that it intends to withdraw from registration and claim the exemption, and it must provide each such participant with a right to redeem its interest in the pool prior to the person filing a notice of exemption from registration.

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

David Stawick,
Secretary of the Commission.

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