

## AREA DEFINITIONS (Cont'd)

## AREA 1: (Cont'd)

Thence southerly to the S.E. corner of township 41 south, range 2 west;

Thence westerly to the S.E. corner of township 41 south, range 3 west;

Thence southerly along the easterly line of range 3 west to the Utah/Arizona border;

Thence westerly along the Utah/Arizona border to the Utah/Arizona/Nevada border;

Thence northerly along the Utah/Nevada border to the point of beginning. Commencing at the intersection of the Utah/Colorado border and the southerly line of township 34 south;

Thence westerly to the S.W. corner of township 34 south, range 21 east;

Thence northerly to the S.W. corner of township 29 south, range 21 east;

Thence westerly to the S.W. corner of township 29 south, range 19 east;

Thence northerly to the N.W. corner of township 23 south, range 19 east;

Thence easterly to the N.W. corner of township 23 south, range 22 east;

Thence northerly to the N.W. corner of township 21 south, range 22 east;

Thence easterly to the N.E. corner of township 21 south, range 24 east;

Thence southerly to the N.E. corner of township 31 south, range 24 east;

Thence easterly along the northerly line of township 31 south, to the Utah/Colorado border;

Thence southerly along the Utah/Colorado border to the point of beginning.

AREA 2: All areas not included in Area 1 as defined.

# **federal register**

---

Friday,  
May 8, 1981

---

**Part IV**

## **Commodity Futures Trading Commission**

---

**Monthly and Confirmation Statements**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 1

#### Monthly and Confirmation Statements

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission has revised paragraph (c) of § 1.33, 17 CFR 1.33(c), which relates to the trading information that futures commission merchants ("FCMs") must furnish their customers. The revision requires FCMs to furnish to a person that controls a client's account, confirmations, purchase and sale statements and monthly statements for the account. Revised § 1.33(c) supplements and strengthens the customer protection provisions under the Commission's existing regulatory scheme by ensuring that timely trading information is furnished to persons that control clients' accounts.

**EFFECTIVE DATE:** July 1, 1981.

**FOR FURTHER INFORMATION CONTACT:** Barbara R. Stern, Special Counsel, Front Office Audit Unit, Division of Trading and Markets, 2033 K Street, NW., Washington, D.C. 20581. Telephone: (202) 254-8955.

**SUPPLEMENTARY INFORMATION:** On August 4, 1980, the Commission published for comment in the *Federal Register* proposed revisions to § 1.33(c), 45 FR 51598. The proposed revisions would have required FCMs to furnish (1) to a person that controls a client's account, monthly and confirmation statements for the account, and (2) to the individual participants in a commodity pool operated by a commodity pool operator ("CPO") that is not registered as such under the Act, monthly statements for the pool's account.

The Commission received ten comment letters on the proposals: six from FCMs; two from futures industry trade associations; one from an investment adviser registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940; and one from a law firm.

The Commission has carefully considered all of the comments received in response to the proposed revisions and, based in part upon those comments, has determined to make certain changes in revised § 1.33(c) as adopted.

*I. Proposed § 1.33(c)(1): Reporting to persons that control clients' accounts.*—The Commission proposed to revise

§ 1.33(c) to require each FCM to furnish to a person that controls the account of the FCM's customer the same information that the FCM must furnish to the customer under that rule. As the Commission noted in proposing the requirement, without such data such person lacks critical and timely information about its client's account—information that tells him what trades were in fact executed for the client and their execution prices. See 45 FR 51598.

The Commission received generally favorable comments on the proposal. Commenters stated that the proposal would codify a common FCM practice and that it would conform with sound business practice. The Commission has thus adopted the proposal in revised § 1.33(c). And, in furtherance of the purposes of the proposal and in light of the comments on it, the Commission also has revised § 1.33(c) to require each FCM to furnish to the controller of the account of the FCM's customer a copy of the purchase and sale statement that the FCM must provide the customer under § 1.46.

*II. Proposed § 1.33(c)(2): Reporting to participants in pools operated by CPOs that are not registered as such under the Act.*—The Commission also proposed to revise § 1.33(c) to require FCMs to furnish to the participants in a commodity pool operated by a CPO that is not registered as such under the Act monthly statements for the pool's account. The Commission proposed this revision to ensure that "all pool participants, regardless of the size or composition of their pool, [would] receive timely information on their pool's trading activities." 45 FR 51599.<sup>1</sup>

Most of the persons commenting on the proposal did not question its purpose. They did, however, strongly object to the proposed requirement being placed on FCMs. Among other things, these commenters stated that an FCM should not be responsible for determining if a CPO was registered (or was required to be registered) and for obtaining, and constantly updating, a list of participants in each pool operated by the CPO. These commenters recommended that the proposed requirement should apply, instead, to the CPO.

<sup>1</sup> Sections 4.22(a) and 4.22(c) of the Commission's regulations require each CPO that is "registered or required to be registered" to furnish periodic Account Statements and an Annual Report to each participant in each pool it operates. Under § 4.13, CPOs who operate pools of a certain size or composition are not required to register as such. If a CPO is exempt from registration, then, that CPO is not required to distribute trading information to the participants in its pool.

The Commission has considered these views and believes that its regulatory objectives can be met in a less burdensome manner. Thus, in lieu of proposed § 1.33(c)(2), the Commission has adopted a rule that requires a CPO who is exempt from registration as such and who has not registered as such pursuant to the exemption to furnish to its participants certain information received for its pool from an FCM. This requirement is specified in new § 4.13(b)(2)(i), announced in a separate *Federal Register* release issued today.<sup>2</sup>

In consideration of the foregoing and pursuant to the authority in Sections 2(a)(1), 4b, 4c, 4f, 4m, 4n, 4o, 8a and 19 of the Commodity Exchange Act, 7 U.S.C. 2, 6b, 6c, 6f, 6m, 6n, 6o, 12a and 23, as amended, 92 Stat. 865 *et seq.*, the Commission hereby revises part 1 of Chapter 1 of 17 CFR. In revising § 1.33, the Commission has taken into consideration the public interest to be protected by the antitrust laws and has endeavored to take the least anticompetitive means of achieving the regulatory objectives of the Commodity Exchange Act.

1. By revising § 1.33 to read as follows:

#### § 1.33 Monthly and confirmation statements.

(a) *General requirements.* Except as provided in paragraph (b) of this section, each futures commission merchant shall promptly furnish in writing directly to each customer—

(1) As of the close of the last business day of each calendar month or as of any regular monthly date selected: (i) A statement which clearly shows the open contracts with prices at which acquired, and the ledger balance carried for the customer's account; (ii) a statement which clearly shows the net unrealized profit or loss in all open contracts marked to the market; and (iii) a statement which clearly shows any money, securities or other property which the customer has deposited with the futures commission merchant to margin, guarantee, or secure the account; and

<sup>2</sup> Specifically, new § 4.13(b)(2)(i) provides:

(2) Each person who is exempt from registration as a commodity pool operator under § 4.13(a)(1) or § 4.13(a)(2) and who is not registered as such pursuant to that exemption must:

(i)(A) Promptly furnish to each participant in each pool that it operates a copy of the monthly statement for the pool that such person received from a futures commission merchant pursuant to § 1.33, and

(B) Clearly show on such statement, or on an accompanying supplemental statement, the net profit or loss on all contracts closed since the date of the previous statement; \* \* \*

(2) A confirmation of each commodity futures transaction caused to be executed by it for the customer. A commodity futures transaction that is caused to be executed for a commodity pool need be confirmed only to the operator of the commodity pool and not to the participants in the pool.

(b) *Exemptions.* The requirements of paragraphs (a)(1)(i), (a)(1)(ii), and (a)(2) of this section shall not apply to the following: (1) Any account carried for a person who is a member of any contract market; (2) any omnibus account carried for another futures commission merchant; and (3) any account containing only bona fide hedge positions, except that confirmations must be furnished to accounts

containing only bona fide hedge positions.

(c) *Controlled accounts.* With respect to any account controlled by any person other than the customer for whom such account is carried, each futures commission merchant: (i) Shall promptly furnish in writing to such other person the information required by paragraph (a) of this section; (ii) shall clearly show on each monthly statement furnished to the customer as required by paragraph (a) of this section and to such other person as required by this paragraph (c), or on an accompanying supplemental statement, the net profit or loss on all contracts closed since the date of the previous statement; and (iii) shall promptly furnish in writing to such other

person a copy of the purchase and sale statement required by § 1.46; *Provided, however,* That the provisions of this paragraph shall not apply to an account controlled by the spouse, parent or child of the customer for whom such account is carried.

(d) *Recordkeeping.* Each futures commission merchant shall retain, in accordance with § 1.31, a copy of each document required by this § 1.33 to be sent.

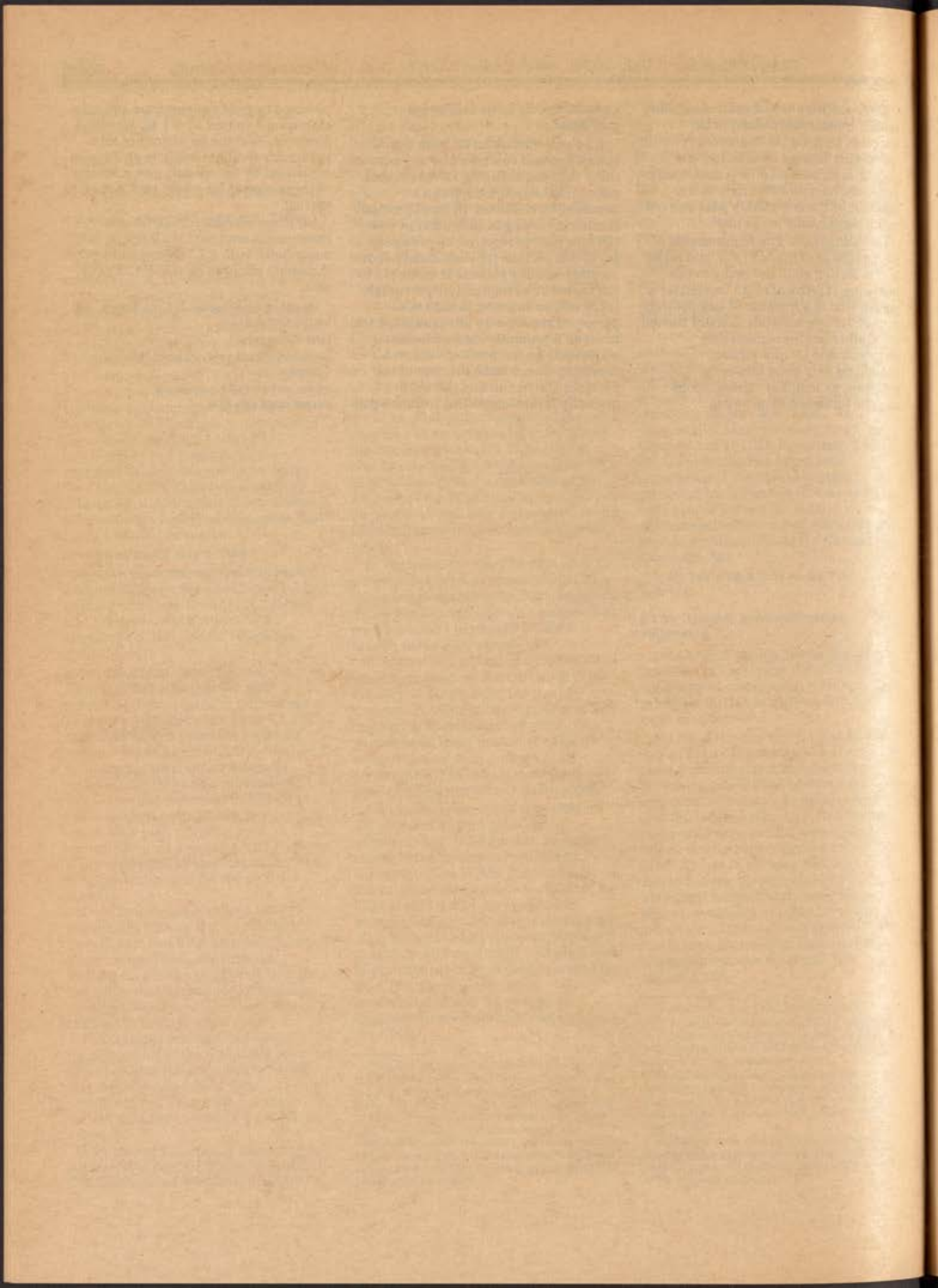
Issued in Washington, D.C. on May 1, 1981 by the Commission.

**Jane K. Stuckey,**

*Secretary, Commodity Futures Trading Commission.*

[FR Doc. 81-13782 Filed 5-7-81; 8:45 am]

BILLING CODE 8351-01-M



# **federal register**

---

Friday,  
May 8, 1981

---

**Part V**

## **Commodity Futures Trading Commission**

---

**Revisions of Commodity Pool Operator  
and Commodity Trading Advisor  
Regulations; Delegation of Authority**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Parts 4 and 140

#### Revisions of Commodity Pool Operator and Commodity Trading Advisor Regulations; Delegation of Authority

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final rules.

**SUMMARY:** The Commodity Futures Trading Commission has revised Part 4 of its regulations, 17 CFR Part 4, which relates to the operations and activities of commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") (the "Part 4 rules").

Under the revisions, the Part 4 rules continue to exempt certain persons from registration as a CPO or as a CTA; to require CPOs and certain CTAs that must register to give prospective customers a written Disclosure Document containing specified information and to keep specified trading and other records; to require CPOs that must register to provide pool participants with periodic Account Statements and Annual Reports; and to prohibit CPOs from commingling the property of a pool they operate with their own property or the property of any other person.

Under the revisions, the Part 4 rules also make available to more persons an exemption from registration as a CPO or as a CTA; they require CPOs and CTAs to specifically respond to items of information that the Disclosure Document must include; they amend the specified format for presenting past performance of commodity interest accounts in the Document and revise the categories of accounts for which performance must be disclosed; they require CPOs and CTAs to make and keep available for inspection additional books and records of their activities; and they substantially amend the information that the Account Statements and Annual Reports must contain.

The new regulations under Part 4 also specify the manner of preparation for Disclosure Documents and Annual Reports; they require Disclosure Documents to be filed with the Commission at least 21 calendar days prior to their intended use; they specifically prohibit CPOs and CTAs from engaging in certain activities; and, under new Subpart D, establish minimum advertising standards for CPOs, CTAs, and their principals.

The revisions to Part 4 are intended to make the information CPOs and CTAs

furnish customers more meaningful and to effectuate the Commission's intent that such information be presented in a uniform format. These revisions also are intended to ensure that CPOs and CTAs are dealing fairly with their customers and maintaining adequate records of those dealings; to facilitate the Commission's inspections of the operations and activities of CPOs and CTAs; and to relieve certain regulatory burdens and streamline and simplify reporting and record-keeping requirements for CPOs and CTAs.

Also, under new § 140.93, the Commission has delegated to the Director of the Division of Trading and Markets, and to such members of the Commission staff acting under his direction as he may designate from time to time, the authority to perform certain functions reserved to the Commission under Part 4. Specifically, the Commission has delegated the authority to grant exemptions from the requirements of Part 4; to grant an extension of time to distribute the Annual Report; and to approve a change in a pool's fiscal year.

**EFFECTIVE DATES:** The revisions to Part 4 shall become effective July 1, 1981. Section 140.93 is effective May 8, 1981.

**FOR FURTHER INFORMATION CONTACT:** Barbara R. Stern, Special Counsel, Front Office Audit Unit, or David S. Mitchell, Attorney, Legal Section, Division of Trading and Markets, Commodity Futures Trading Commission, 2033 K Street NW., Washington, D.C. 20581. Telephone (202) 254-8955.

#### SUPPLEMENTARY INFORMATION:

##### I. Introduction

**A. Background.** On August 4, 1980 the Commission proposed substantial revisions to the Part 4 rules, 45 FR 51600. The comment period on the proposed revisions was originally due to expire on September 30, 1980, to maximize public participation in the rulemaking process, the Commission twice extended the comment period on the proposed revisions: first, to October 15, 1980 and second, to November 4, 1980, 45 FR 65257 (October 2, 1980) and 45 FR 69248 (October 20, 1980), respectively.<sup>1</sup>

The Commission received ninety-four comment letters on the proposed revisions to part 4: eleven from CPOs; twenty-eight from CTAs; seventeen from persons registered as both a CPO and as a CTA; four from futures commission merchants ("FCMs"); two from persons

registered as both a CPO and as an FCM; one from a person registered as both a CTA and as an FCM; eight from commodity account management customers; two from futures industry trade associations; one from the Staff of the Division of Corporation Finance of the Securities and Exchange Commission ("SEC"); eight from state regulatory agencies; eight from law firms; one from a certified public accountant; and three from investment advisers registered with the SEC under the Investment Advisors Act of 1940.

The Commission has carefully considered all of the comments received in response to the proposed revisions and, based in part upon those comments, has determined to make certain changes in the proposed rules.<sup>2</sup>

**B. Major differences between proposed and final rules.** On the whole, the changes lessen the regulatory burdens that would have been placed on CPOs and CTAs if the Part 4 rules had been revised as proposed. Based upon the comments and its own further review of the proposals, the Commission believes that this can be done without a reduction of safeguards for customers of CPOs and of CTAs; however, the Commission will carefully monitor the operation of these revised regulations to determine whether further rulemaking is necessary.

The changes in the proposals are discussed in detail below at Part II of this Federal Register release. Among the major differences between the proposed and final rules are: an increase in the availability of exemption from registration as a CPO or as a CTA; a further streamlining of past performance disclosure; a shortening of the Disclosure Document pre-filing period; and the establishment of minimum standards, in lieu of prescribed and proscribed activity, for advertising past performance.

The Commission recognizes that there may be uncertainty with respect to the application of the revisions to the Part 4 rules pending the effective date of those revisions. For example, this uncertainty might arise as to the registration status

<sup>2</sup> In addition, the Commission has considered as public comments on the proposed revisions to Part 4 the "Guidelines for Registration of Commodity Pool Programs" proposed by the North American Securities Administrators Association on September 17, 1980, although the Commission is vested with exclusive jurisdiction over the full range of activities related to commodity pools, it believes that the States should have an important role in connection with the Commission's adoption of standards governing CPO's and commodity pools. The Commission, however, has determined at this time not to adopt any revisions to the Part 4 rules based on the proposed guidelines.

<sup>1</sup> The Commission notes that to encourage such participation, its Division of Trading and Markets sent a copy of the Federal Register release announcing the proposed revisions to all registered CPOs and CTAs.

of a person who would qualify for an exemption from registration under the revised rules but who is required to register under the current rules. Or, it might arise as to the disclosures required in a Disclosure Document that is intended to be distributed for a period during which first the current, and then the revised, rules would be applicable. To alleviate that uncertainty, the Commission has determined that it will not take enforcement action against any person solely on the basis of such person's compliance with the revised Part 4 rules prior to their effective date in lieu of his compliance with the current rules. Of course, this position requires a total, and not selective, compliance with the revised rules.

In addition, the Commission will not take enforcement action against a registrant who prepares its disclosure Document in accordance with the existing Part 4 rules prior to the effective date of the revised Part 4 rules and who utilizes such document following the effective date of the revised rules. A document prepared under the existing rules can only be used for six months after the effective date of the revised rules, however. See § 4.21(e) for CPOs and § 4.31(e) for CTAs.

## II. Summary Analysis of the Final rules

**A. General Provisions.** As proposed, § 4.1 would have specified paper, size, type and reproduction standards for Disclosure Documents and Annual reports. The purpose of this proposal was to ensure that these documents were prepared in a readable format and that all of the pages of a document were, in fact, distributed as required. While many of the commenters on the proposed rule agreed that certain minimum standards should be adopted for Part 4 documents, they argued that the proposed standards were unnecessarily restrictive and, in some cases, inappropriate. The Commission has considered these comments and further analyzed its proposal. As a result of these further considerations, the Commission believes that certain revisions can be made to the proposal without sacrificing its regulatory objectives.

As adopted, § 4.1(a) requires that each document distributed pursuant to Part 4 must be clear and legible, paginated, and fastened in a secure manner. A CPO or CTA which complies with these requirements may thus choose the manner of preparation of documents required under Part 4. For example, a CPO or CTA may choose to have these documents printed, typewritten, mimeographed, photocopied, or the like, so long as the original and each copy of

the document are clear and legible. Similarly, documents with more than one page may be securely fastened by stapling, binding or other means. As adopted, § 4.1(b) specified that information required to be prominently disclosed under Part 4 must be displayed in capital letters and in boldface type. Unlike the proposal, this rule does not also specify the style and leading of that type.

Finally, it should be noted that the Commission has expanded the scope of § 4.1. As proposed, the rule would have applied only to Disclosure Documents and Annual Reports. As adopted, it applies to all documents distributed pursuant to Part 4. Therefore, such documents as the Account Statements that CPOs must prepare and distribute pursuant to § 4.22(a) must be prepared in accordance with § 4.1.

As proposed and as adopted, § 4.2 specifies the address where Part 4 documents must be filed with the Commission and provides that a document will be considered filed when received at that address. Although the rule does not also impose a requirement that Part 4 documents be delivered by registered mail, by hand, or other similar means, a CPO or a CTA may use any such means of delivery if it wishes to be certain whether or upon what date a document was filed.

**B. Definitions.** The Commission has made certain revisions to those of the proposed rules which define terms for purposes of Part 4. Those revisions have been made to § 4.10(e), which defines the term "principal", § 4.10(f), which defines the term "direct" and § 4.10(g), which defines the term "trading program."

The term "principal" is defined in § 4.10(e) to correspond to the definition of that term in recently adopted § 3.1(a). That rule defines "principal" for purposes of Part 3 of the Commission's regulations, which relates to the registration of, among other persons, CPOs and CTAs. See 45 FR 80485, 80492 (December 5, 1980). Because the term "principal" is employed in both Part 3 and Part 4 to obtain similar critical information about certain persons associated with a CPO or a CTA, the Commission has determined to use the same term in both parts. To serve the objectives of Part 4, however, the term "principal" does not need to be defined as broadly as it is in § 3.1(a). Therefore, § 4.10(e) does not include within its scope such persons as a "branch office manager or designated supervisor."

As proposed, § 4.10(f) would have defined the term "control", and § 4.10(g), the term "managed account program." Several commenters noted that these

same terms are defined differently in §§ 1.3(j) and 15.00(i), respectively, of the Commission's regulations. These commenters stated that multiple definitions of the same term are potentially confusing. To avoid such potential confusion, § 4.10(f) as adopted employs the term "direct" to define the subject matter of the regulation, and § 4.10(g) employs the term "trading program."<sup>3</sup> The Commission also wishes to make clear that, because these terms speak in terms of *clients*, as used in the context of the past performance disclosure requirements these terms apply to persons other than the CPO or the CTA (or the principals thereof) who presents that past performance in its Disclosure Document. See §§ 4.21(a)(4) and 4.21(a)(5) for CPOs and § 4.31(a)(3) for CTAs.

One commenter also suggested that the rules would be clearer if the definition of the term "formed" in proposed § 4.10(h) were transferred to § 4.22, which pertains to the Account Statements and the Annual Report that CPOs must distribute. This person suggested that because the term "formed" is of special significance with respect to these reports, it would be more appropriate to define the term in § 4.22 than in § 4.10, the general definition section of Part 4. The Commission agrees and has added the definition of the term "formed" to § 4.22(g) in lieu of adopting proposed § 4.10(h).

As proposed and as adopted, § 4.10(d) narrows the definition of the term "pool" by specifying that it is an entity "operated for the purpose" of trading commodity interests. While all of the persons who commented on the proposal agreed with the Commission's objective of clarifying the scope of the term, they argued that the proposed definition was still overly broad. One person suggested that an entity whose assets committed to trading commodity interests do not exceed a specified percentage—e.g., 10%—should be outside the definition of the term "pool." The Commission finds this approach deficient because it fails to take into account the fact that such an entity might, nonetheless, be marketed and sold as a commodity pool, so that the participants therein should not be denied the protections of the Part 4 rules. Several other persons suggested that the term "pool" be defined as "an

<sup>3</sup> It should be noted that § 4.10(g) defines the term "trading program" much more narrowly than § 15.00(f) defines the term "customer trading program."

entity organized and operated for the principal purpose of acquiring or trading commodity interests." The Commission similarly finds this suggestion unsatisfactory, because it does not recognize that an entity may commence operations in one line of business and subsequently may engage in another line of business—i.e., a commodity pool. Also, the Commission believes that the phrase "principal purpose" is too narrow. It could inappropriately exclude from the scope of the Part 4 rules certain persons who are, in fact, operating commodity pools. The Commission therefore has determined to adopt § 4.10(d) as proposed.

Depending on the facts of a particular case, an entity may or may not be a "pool" within the scope of § 4.10(d). For example, the Commission is aware of the arguments advanced by such persons as pension funds and limited partnerships registered as broker-dealers under the Securities Exchange Act of 1934 that they are not "pools." Among other reasons, these persons state that they only occasionally trade commodity interests, that they commit a limited amount of assets to such trading, that they are hedging those assets as opposed to speculating with them, and that their "participants" are knowledgeable in business matters and financially secure. Whether a particular entity is operated "for the purpose" of trading commodity interests, and thus is a pool within the scope of § 4.10(d), depends on an evaluation of all the facts relevant to the entity's operation. The Commission recognizes that in the past its staff has issued interpretations of the Part 4 rules. Consistent with that practice, the Commission invites interested persons to seek such staff interpretations of § 4.10(d) and of all the other Part 4 rules.

*C. Exemption from registration.* The Commission has reorganized into two separate rules the exemptions from registration under Part 4 and has increased the availability of certain of those exemptions. Section 4.13 for CPOs and § 4.14 for CTAs. As a result of the comments received and the Commission's further deliberations on the proposed revisions to these rules, certain changes have been made to the proposals as adopted.

1. *CPOs.* Sections 4.13(a)(1) and 4.13(a)(2) specify the conditions under which a person is exempt from registration as a CPO. Section 4.13(a)(1) continues to exempt from registration as a CPO persons who operate only one pool under the conditions specified in the rule. The Commission received no specific comments on § 4.13(a)(1), and

has made no revisions to that rule. Section 4.13(a)(2), however, has been revised from the proposal in two significant ways. Under the proposal, a person would have been exempt from registration as a CPO if it accepted no more than \$100,000 in gross receipts for the purchase of interests in the only pool it operated, or \$200,000 in such gross receipts for all the pools it operated, so long as each pool had no more than 15 participants. Under the rule as adopted, there is not tiering of the exemption. Also, the term "capital contributions" has replaced that of "receipts". Thus, under § 4.13(a)(2), a person is exempt from registration as a CPO if the total gross capital contributions it receives for all of the pools it operates do not exceed \$200,000, so long as each pool it operates has no more than 15 participants. The Commission has adopted without change the manner of computing the number of participants in § 4.13(a)(2)(ii). This revision makes the exemption available to more persons by excluding from the computation of participants the principals of the pool's CPO and CTA and certain persons who would have immediate access to the principals. And, as one commenter suggested, the Commission intends to reevaluate the dollar amount of the exemption from time to time to assure that it remains realistic.

Section 4.13(b) imposes certain minimal requirements on persons who are exempt from registration as a CPO. Some persons commenting on the proposal stated that the Commission should not impose any requirements on persons exempt from registration. The Commission believes, however, that the benefits to participants in pools operated by such persons far outweigh the slight burdens imposed on these persons by the rule. As proposed, § 4.13(b) would have required a person exempt from registration as a CPO to furnish a prescribed statement stating that the person was exempt from registration and that it was not required to furnish a Disclosure Document, Account Statements and an Annual Report to participants in its pool. One commenter suggested that the prescribed statement should take into account the fact that the person may contractually obligate itself to provide such documents. The Commission finds this suggestion sensible, and has incorporated it into § 4.13(b)(1). Under both the proposed and adopted rule, the person must describe in the statement the exemption pursuant to which it is not registered as a CPO and must manually sign the statement. Under new § 4.13(b)(2)(i), the person must promptly

furnish to each of its participants a copy of the monthly information received for the pool from an FCM pursuant to § 1.33<sup>4</sup> and a statement of net profit or loss from trading futures contracts, and under new § 4.13(b)(2)(ii), the person must keep all of the books and records generated in connection with operating its pool for a period of five years and must make these books and records available for inspection by a Commission representative. The Commission wishes to make clear that § 4.13(b)(2)(ii) does not specifically require the keeping of all of the books and records that registered CPOs must keep under § 4.23. The rule only requires the keeping of those books and records

<sup>4</sup> In a separate Federal Register notice issued today, the Commission announced the revision of § 1.33(c). The complete text of § 1.33 as revised is as follows:

§ 1.33 Monthly and confirmation statements.

(a) *General requirements.* Except as provided in paragraph (b) of this section, each futures commission merchant shall promptly furnish in writing directly to each customer—

(1) As of the close of the last business day of each calendar month or as of any regular monthly date selected: (i) A statement which clearly shows the open contracts with prices at which acquired, and the ledger balance carried for the customer's account; (ii) a statement which clearly shows the net unrealized profit or loss in all open contracts marked to the market; and (iii) a statement which clearly shows any money, securities or other property which the customer has deposited with the futures commission merchant to margin, guarantee, or secure the account; and

(2) A confirmation of each commodity futures transaction caused to be executed by it for the customer. A commodity futures transaction that is caused to be executed for a commodity pool need be confirmed only to the operator of the commodity pool and not to the participants in the pool.

(b) *Exemptions.* The requirements of paragraphs (a)(1)(i), (a)(1)(ii), and (a)(2) of this section shall not apply to the following: (1) Any account carried for a person who is a member of any contract market; (2) any omnibus account carried for another futures commission merchant; and (3) any account containing only bona fide hedge positions, except that confirmations must be furnished to accounts containing only bona fide hedge positions.

(c) *Controlled accounts.* With respect to any account controlled by any person other than the customer for whom such account is carried, each futures commission merchant: (i) Shall promptly furnish in writing to such other person the information required by paragraph (a) of this section; (ii) shall clearly show on each monthly statement furnished to the customer as required by paragraph (a) of this section and to such other person as required by this paragraph (c), or on an accompanying supplemental statement, the net profit or loss on all contracts closed since the date of the previous statement; and (iii) shall promptly furnish in writing to such other person a copy of the purchase and sale statement required by § 1.46. *Provided, however,* That the provisions of this paragraph shall not apply to an account controlled by the spouse, parent or child of the customer for whom such account is carried.

(d) *Recordkeeping.* Each futures commission merchant shall retain, in accordance with § 1.31, a copy of each document required by this § 1.33 to be sent.

which are generated in the ordinary course of operating the pool.

As proposed and as adopted, § 4.13(c) requires that each person who applies for registration as a CPO must include with its initial application the information required by §§ 4.22(c) (1) through (5), which pertain to the financial statements and other information that the Annual Report must contain. Most of the persons who commented on the proposal argued against it. These persons stated, among other things, that the proposal could disrupt the operations of smaller pools and that it would be inconsistent with the purposes of the broadened exemption from registration under § 4.13(a)(2). In response to this concern, the Commission has determined not to adopt the proposed requirement that the information be audited by an independent public accountant. This will considerably lessen any burden that might be imposed by the rule, but will continue to enable the Commission to verify that the person has been acting as a CPO without being registered as such pursuant to a bona fide exemption.

As proposed and as adopted, § 4.13(d) specifies that if a person who is exempt from registration as a CPO registers as such, that person must comply with the Part 4 rules as if it were not so exempt. The one comment received on this proposal supported it, stating that it clarifies the reach of the Part 4 rules to all registered CPOs.

2. *CTAs.* Section 4.14 now contains the rules applicable to exemption from registration as a CTA. The Commission has made two changes in these rules as proposed.

First, the Commission has increased the availability of an exemption from registration as a CTA. New § 4.14(a)(5), which incorporates the recommendation of a commenter on the proposal, exempts a person from registration as a CTA if the person is exempt from registration as a CPO and the person's commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt.

Second, and again in response to the recommendation of a commenter, new § 4.14(c) specifies that if a person who is exempt from registration as a CTA registers as such, that person must comply with the Part 4 rules as if it were not so exempt. This rule parallels the provisions of § 4.13(d), applicable to persons registered as CPOs.

D. *Disclosure.* Sections 4.21(a) and 4.31(a), respectively, require all CPOs who must register under the Act and certain CTAs who must register to furnish a Disclosure Document to prospective customers. The Commission

proposed to amend the existing rules applicable to Disclosure Documents and to add new disclosure rules to Part 4. Based on the comments it received on those proposals, the Commission has made certain revisions to them and by this *Federal Register* release is making certain clarifications of them. Also, the Commission notes that it is still considering the proposed requirement that FCMs furnish a Disclosure Document to prospective customers and therefore it has not adopted at this time any such requirement.<sup>5</sup>

Prior to specifically discussing the revisions to the rules applicable to Disclosure Documents the Commission wishes to note that under revised § 4.21(a) a CPO must deliver a Disclosure Document for the specific pool for which it is soliciting participants and under revised § 4.31(a) a CTA must deliver a Disclosure Document for the specific trading program for which it is soliciting clients.

#### 1. *Revision to existing rules.*

a. *Technical revisions.* As proposed and as adopted, the texts of the disclosure rules specifically itemize the information that the Disclosure Document must contain. Sections 4.21(a) (1), (2), (3), (6), (9), (10), (12), (13) and (15) for CPOs and §§ 4.31(a) (1), (2), (5), (6) and (7) for CTAs. For example, §§ 4.21(a)(1) and 4.31(a)(1) specifically itemize the persons for whom information must be furnished thereunder.

Many commenters argued that if this information were not known at the time the Disclosure Document was first delivered, compliance with these rules would not be possible. In response, the Commission wishes to note that under § 4.12 such person may petition for an exemption from the requirement to disclose such information. If granted, the exemption might be conditioned on, among other things, the Document (1) clearly indicating that the information is not known at the time, and (2) being amended as necessary or required to disclose the information when it is known. See § 4.21(b) for CPOs and § 4.31(b) for CTAs.

As proposed and as adopted, the rules require a response, whether in the affirmative or in the negative, to certain items of information that the Disclosure Document must contain. Sections 4.21(a) (3), (6), (8), (10), (13) and (15) for CPOs and §§ 4.31(a) (5), (6) and (7) for CTAs.

<sup>5</sup> In proposing revisions to the Part 4 rules, the Commission stated that it was considering "requiring those FCMs that offer [trading] programs to individual customers to furnish Disclosure Documents" and invited interested persons "to submit comments which will assist in the determination of this issue." 45 FR 51800, 51801.

Thus, for example, a CPO under § 4.21(a)(3) and a CTA under § 4.31(a)(5) is required to state whether or not a conflict of interest exists on the part of each person specified in the rule. Judging from the comments received on the proposals, the Commission believes certain clarifications of them are necessary.

First the Commission wishes to emphasize that responses may be aggregated. It is not the Commission's intent, as many commenters seemed to believe, to require a specific response for each person for whom information must be provided under the rules. As these commenters noted, such a requirement could make for unnecessarily lengthy and cumbersome disclosure. Responses may be grouped according to whether they are in the affirmative or in the negative, so long as each person for whom information must be provided is specifically covered in one or the other of the groups.<sup>6</sup>

The Commission also wishes to specify the standard of knowledge applicable to disclosures made under these rules, and under all of the Part 4 rules. That standard is one of "knows or should know." Under this standard, a CPO or a CTA would be able to make required disclosures about persons other than itself based on information that such other persons provided, so long as the CPO or the CTA does not or should not know that the information is inaccurate. It also should be noted that under this standard the required information could not be preceded by a disclaimer such as "To the best of my knowledge and belief, . . .", as some commenters suggested.<sup>7</sup>

Many persons commented that where disclosures were proposed for principals, and in particular for principals of a pool's FCM, it would be time-consuming to acquire and difficult to verify the required information. The first concern has been addressed in the revised definition of the term "principal"

<sup>6</sup> For example, under § 4.21(a)(15) a CPO must provide information on whether trading for its own account will be done or is intended to be done by the CPO, the pool's CTA, or any principal thereof. Assuming that only the CPO intends to trade commodity interests for its own account, the rule could be complied with as follows: "The CPO intends to trade commodity interests for its own account. The CPO's principals and the pool's CTA and its principals do not intend to trade commodity interests for their own accounts."

<sup>7</sup> To comply with § 4.21(a)(15), the CPO must make inquiries of its principals and of the pool's CTA and its principals as to whether they intend to trade commodity interests for their own account. The CPO may use the information obtained through the inquiries in complying with § 4.21(a)(15); so long as the CPO does not or should not know that any of that information is not accurate.

in § 4.10(e) which, among other things, narrows the scope of the term and therefore decreases the number of persons who are "principals" for purposes of the Part 4 rules. The second concern has been addressed by the Commission's preceding discussion of the standard of knowledge required under the rules.

Several commenters requested clarification of the term "material administrative, civil or criminal action" as used in §§ 4.21(a)(13) and 4.31(a)(7). The term encompasses actions about which an average prospective customer should be informed before becoming a participant in a CPO's pool or a client in a CTA's trading program. As such, the term "material administrative, civil or criminal action" must be defined in the context of each particular factual situation. Depending on each such situation, it may include (1) technical as well as substantive violations of the Act and the rules thereunder; (2) reparations proceedings; (3) technical and substantive violations of the securities laws; (4) civil actions unrelated to the commodities laws; (5) actions which have been successfully defended; or (6) actions which are still pending. Thus, while the rules would not necessarily require disclosure of a material action against a firm of which a person specified in the rules was (or is) a principal, depending on the particular factual situation, such disclosure might be required. For example, where the person was (or is) the sole proprietor or the only principal of the firm disclosure of a material action against the firm might, depending on the facts, be required. On the other hand, where the person was (or is) one of several hundred principals of the firm, such disclosure might not be required.

Finally, the Commission has proposed and has adopted revisions that amplify the texts of the disclosure rules. Sections 4.21(a) (1), (2), (3), (6), (7), (9) and (10) for CPOs and §§ 4.31(a) (1), (2), (4) and (5) for CTAs. Based in part on the comments the Commission received on the proposed revisions, certain changes have been made in the rules as adopted.

Proposed § 4.21(a)(1) would have required a CPO to disclose the capital structures of the pool and of the CPO and proposed § 4.31(a)(1) would have required a CTA to disclose its capital structure. Some persons commented that this information would not be useful and material to a prospective customer. The Commission believes these comments have merit, and has deleted the proposed requirements from these rules as adopted. Section 4.21(a)(1) does,

however, retain the proposed requirement that the form of organization of the pool must be disclosed.

Proposed § 4.21(a)(7)(i) would have required a CPO to disclose, wherever possible, the dollar amount of each expense incurred by the pool in its preceding and current fiscal years. One commenter noted that a CPO may not know the actual dollar amount of those expenses during the pool's current fiscal year and recommended that the proposal be redrafted to take this fact into account. The Commission has specifically incorporated this suggestion into the final rule. As adopted § 4.21(a)(7)(i) requires a CPO to disclose the actual dollar amount of the pool's expenses for its preceding fiscal year and, wherever possible, the estimated dollar amount of those expenses for the pool's current fiscal year.

New provisions also have been added to § 4.21(a)(9). Specifically, new § 4.21(a)(9)(iii) requires that if pool funds not deposited as margin will be held outside of the United States, its territories or possessions, the CPO must specify where those funds will be held. The Commission has adopted this rule in lieu of adopting at this time the proposed rule which would have required a CPO to keep within the United States all of the assets of its pool not committed to trading outside of the United States.\*

Finally, in response to comments received, the Commission has clarified the scope of the disclosures on Federal income tax effects of distributions to pool participants required under § 4.21(a)(12). As revised, § 4.21(a)(12)(ii) specifies that disclosure of such effects must include a discussion of the Federal income tax laws applicable to the form of organization of the pool and to such payments therefrom. The rule further requires that if a pool specifically is structured to accomplish certain Federal income tax objectives, the CPO must disclose that information and explain those objectives.

b. *Substantive revisions.* The Commission proposed to amend certain of the Disclosure Document rules to require that the information specified thereunder be disclosed for certain additional persons. Sections 4.21(a) (1) and (13) for CPOs and §§ 4.31(a) (1) and (7) for CTAs. Subject to the exceptions

\*In proposing revisions to the Part 4 rules, the Commission stated that it was "actively considering requiring a CPO to maintain all of the assets of its pool . . . in the United States" and invited interested persons "to submit comments which will assist in the determination of this issue." 45 FR 51600, 51601.

discussed below, the Commission has adopted the amendments as proposed.

Proposed § 4.21(a)(13)(i)(g) would have required a CPO to state, affirmatively or negatively, whether there had been any material administrative, civil or criminal action within the five years preceding the date of the Disclosure Document against any person who solicited prospective participants in the pool. Proposed § 4.31(a)(7)(i)(e) would have required a CTA to make such statement with respect to any person who solicited clients for the trading program. In lieu of these proposals, the Commission is continuing to consider the adoption of registration requirements for these persons.\*

Significant revisions to the existing Disclosure Document rules under Part 4 concern the presentation of past performance of commodity interest accounts. Sections 4.21(a) (4) and (5) for CPOs and § 4.31(a)(3) for CTAs. The revisions change both the manner of presenting past performance and the commodity interest accounts for which that performance must be disclosed. And, as is stated in the rules, the format the Commission has adopted for the presentation of past performance is a minimum disclosure standard which CPOs and CTAs must meet. More comprehensive or more frequent disclosure could thus be made as needed—e.g., where the format potentially could mislead prospective customers.

As proposed, the past performance of a commodity interest account would have been required to be displayed in a table showing at least quarterly: (A) beginning net asset value; (B) all additions; (C) all withdrawals and redemptions; (D) net performance; (E) ending net asset value; and (F) the rate of return, calculated by dividing net performance by beginning net asset value. As a result of generally favorable comments, the Commission has determined to adopt this proposal for presenting the past performance of a CTA and its principals in both CPO and CTA Disclosure Documents. Section 4.21(a)(5)(ii) for CPOs and § 4.31(a)(3)(ii) for CTAs. And, in response to one of those comments, the Commission has added a requirement to the past performance disclosure of pools operated by a CPO and its principals.

\*In proposing revisions to the Part 4 rules the Commission also stated that it was considering "adopting rules that would implement and facilitate the registration of non-clerical employees and agents of CPOs and CTAs" and requested interested persons "to submit comments which will assist in the formulation of such rules." *Id.*

Under new § 4.21(a)(4)(ii)(G), a CPO must also include in the prescribed table the number of units outstanding at the end of each period for which past performance is disclosed.

While commenters generally supported the proposal, many expressed the concern that, in certain circumstances, the format would err on the side of simplicity by omitting information material to prospective customers. One commenter suggested that the performance table should be combined with the expense information required to be presented under §§ 4.21(a)(7) and 4.31(a)(4), resulting in the following additional column headings for the table: gross realized profits (losses); net realized profits (losses); net interest income; increase (decrease) in unrealized profits; and increase (decrease) in accrued commissions or open positions. Other commenters stated that the table also should include more information on the rate of return, such as a cumulative or a compounded rate. As the Commission noted above, such supplementary performance information may be presented in the Disclosure Document, so long as the prescribed table is presented in accordance with the applicable rules. In fact, such information may indeed be needed to fulfill the obligation "to disclose all material information to existing or prospective [customers] even if the information is not specifically required by this section." See § 4.21(h) for CPOs and § 4.31(g) for CTAs.

The second area of revision to the past performance rules concerns the commodity interest accounts for which past performance must be disclosed. With respect to CPOs, the proposed revisions would have required a CPO to disclose the past performance of all pools operated by the CPO and its principals and would have given the CPO discretion to disclose the past performance of (1) all pools operated by the pool's CTA and its principals, and (2) all other accounts directed by the CPO and its principals and by the CTA and its principals. Several persons who commented on these proposals stated that, because a CTA is so critical to a pool's performance, a CPO should be required to disclose the past performance of the pool's CTA. The Commission agrees with these comments and has incorporated them into the rules as adopted. Thus, under § 4.21(a)(4)(i), a CPO must disclose the past performance of all pools operated by the CPO and its principals and under § 4.21(a)(5)(i), the past performance of all accounts (including pools) directed

by the pool's CTA and its principals. And, while a CPO continues to have discretion to disclose the past performance of accounts other than pools directed by it and its principals, the rules no longer specifically make reference to that discretion.

With respect to CTAs, as proposed and as adopted, a CTA must disclose the past performance of all accounts (including pools) directed by the CTA and its principals. Section 4.31(a)(3)(i). The comments the Commission received on the proposal were mixed. Those persons who supported the proposal stated that, among other things, they agreed with harmonizing the past performance disclosure required of CTAs with that required of CPOs. Those who opposed the proposal stated that, among other things, it could lead to cumbersome and unnecessarily lengthy performance tables. This concern has been addressed, in part, in the rules on compositing past performance, discussed below. Moreover, the Commission believes that to fulfill the purposes of the Disclosure Document rules, it is essential that this performance be disclosed. The Disclosure Document is intended to provide protections for commodity customers—particularly those who are unsophisticated in financial matters—by ensuring that they are informed about material facts before committing their funds. See 44 FR 1918, 1920 (January 8, 1979). Because a CTA's past performance is a material fact about which a prospective client should be informed, the record of that past performance should be disclosed. It also should be noted that the new rule will provide essential assistance to CPOs in preparing their Disclosure Documents. A CPO must present in its pool's Disclosure Document the past performance of the pool's CTA in the same manner that the CTA must present its past performance in the Disclosure Document that the CTA employed to solicit the pool's account. As a result of the new rule, a CPO will be able to use this same information in its Disclosure Document.

As noted above, and in response to generally favorable comments, the amended rules specifically allow for presenting past performance on a composite basis under the requirements set forth therein. Sections 4.21(a)(4)(iv) and 4.21(a)(5)(iii) for CPOs and § 4.31(a)(3)(iii) for CTAs. With respect to pools operated by the CPO and its principals, (1) the performance of the pool for which the CPO is soliciting participants may not, however, be included in the composite, and (2) the

performance of all other pools operated by the CPO and directed by the pool's CTA and its principals must be presented in a composite separate and apart from any other composite. All accounts (including pools) directed by a CTA and its principals may be presented in a single composite. And, with respect to any composite, there must be included a description of how it was developed and disclosure of material information from which it was drawn. For example, the CPO or the CTA would be required to disclose the number of accounts involved in the composite and the number of accounts with net profits and the number with net losses. Other material information might include (depending upon the circumstances of each composite) the largest profit and loss among the accounts, both on a percentage and dollar amount basis, and the average of percentage net gains among the accounts as well as the average of percentage net losses. The Commission wishes to emphasize that, as with all of the other disclosure rules, the rules pertaining to compositing establish minimum standards to be followed. Supplemental disclosure may be necessary in certain circumstances—for example, where compositing would tend to obscure poor performance.

In presenting past performance CPOs must describe the material differences among the pools for which performance is presented. Section 4.21(a)(4)(iii). Such material differences could include, among other things, differences in the fees and commissions charged each pool, the trading philosophies (such as technical or fundamental) pursuant to which each pool was directed, and the commodities underlying the commodity interests which each pool traded.

The proposed rules on past performance disclosure would have prescribed certain statements to be made on the lack of performance history for the persons for whom that performance was required to be disclosed. The Commission did not receive any specific comments on these statements and, accordingly, has adopted them substantially as proposed. Sections 4.21(a)(4)(i) and 4.21(a)(5)(i) for CPOs and § 4.31(a)(3)(i) for CTAs.

The Commission also proposed and has adopted revisions to the prescribed Risk Disclosure Statement that the Disclosure Document must contain. Section 4.21(a)(17) for CPOs and § 4.31(a)(8) for CTAs. The main objection of commenters on these proposals concerned the language "In some cases [pools or accounts] are subject to substantial charges. . . ."

These commenters stated, among other things, that this language was inappropriate because it was theoretical and subjective and could thus be misleading. The Commission does not agree. The language specifically is phrased to alert prospective customers to the fact that such charges are indeed made to some pools and accounts but that this may not be the case with respect to the pool or trading program for which the Disclosure Document is being delivered. Further language in the prescribed statement informs prospective customers that the Disclosure Document contains "a complete description" of the applicable charges—from which the prospective customer may determine whether the charges will in fact be substantial.

The comments received on the proposed revisions to the Cautionary Statement that the Disclosure Document must contain were favorable, and the Commission has adopted the revisions to the Statement as proposed. Section 4.21(a)(18) for CPOs and § 4.31(a)(9) for CTAs.

Similarly, several commenters supported the proposal to increase to 21 days from 5 days the period of time within which a materially inaccurate or incomplete Disclosure Document must be corrected, and the Commission has adopted the revision as proposed. Section 4.21(b) for CPOs and § 4.31(b) for CTAs. Corrections may be made by way of an amended Document, a sticker on the Document, or other similar means—such as by letter or, in the case of a pool, by the next periodic Account Statement for the pool. For example, if a CPO subsequent to the delivery of the Disclosure Document for a pool it intended to operate hired a CTA for the pool, that information would have to be distributed pursuant to § 4.21(b). Because of the wide range of possible fact situations, the Commission cannot, however, specify each circumstance that would come within the scope of the requirement, as one commenter requested.

2. *New rules.* As noted, in addition to proposing revisions to the existing disclosure rules the Commission also proposed to add several new rules to Part 4. Based on the comments received on those proposed new rules, and the Commission's additional considerations of them, changes have been made in some of those rules as adopted.

First, the Commission has made certain changes in the proposals requiring a receipt for the Disclosure Document. Section 4.21(d) for CPOs and § 4.31(d) for CTAs. As adopted, the rules specify that a CPO may not accept or receive funds from a prospective

participant and that a CTA may not enter into an agreement to direct a prospective client's account unless the CPO or the CTA, as the case may be, first receives an acknowledgement from the prospective participant or client that he has received the Disclosure Document. As proposed, the rules also would have required the prospective customer to acknowledge that the CPO or the CTA had not delivered to it "any other information on . . . trading commodity interests prior to receipt of the Document." As certain commenters noted, those proposals might have prohibited even brief contacts with persons who might become customers. By deleting these proposals the Commission is not, however, sanctioning any practice which would undermine the purpose of the Disclosure Document—to ensure that prospective customers are fully informed in advance about all material facts before committing their funds.

In the adopted rules, the Commission also has reduced to 21 days from 45 days the minimum period of time a Disclosure Document must be pre-filed before its intended use. Section 4.21(g)(1) for CPOs and § 4.31(f)(1) for CTAs. While the Commission did not adopt the proposed specific requirement that the Document could not be delivered if the Commission gave notice that it did not comply with the disclosure rules, the Act or the other regulations thereunder, the Commission does intend to give notice of any such deficiencies it identifies. One commenter suggested that the Commission's staff should work with the CPO or the CTA to cure those deficiencies. The Commission agrees, and by this Federal Register release the Commission is instructing its staff, to the extent practicable consistent with other commitments and resource availability, to do so.

Amendments to the Disclosure Document must be distributed, and filed with the Commission, within 21 days after the date upon which a CPO or a CTA knows or should know of the defect requiring the amendment. Section 4.21(g)(2) for CPOs and § 4.31(f)(2) for CTAs. In response to several questions, the Commission wishes to make clear that the pre-filing requirement only applies to the initial Disclosure Document and not to any amendments thereto. Thus, such amendments which change the date of the Document or update the performance information disclosed therein would not have to be pre-filed. Of course, if an amendment substantially revises the Disclosure Document, the CPO or the CTA might

find it advisable to pre-file it with the Commission.

The Commission has adopted as proposed new rules that require the Disclosure Document to be dated, that specify the currentness of information in the Document and, for CPOs, that require the Document to be accompanied by the most current Account Statement and Annual Report of the pool for which the CPO is soliciting prospective participants. Sections 4.21(c), 4.21(e) and 4.21(f) for CPOs and §§ 4.31(c) and 4.31(e) for CTAs. The comments were generally supportive of these proposals; however, judging from certain of them on the proposals concerning the currentness of required information in the Disclosure Document, the Commission believes that three clarifications of them are needed.

First, the intent of these rules is to allow the Disclosure Document, including the performance information disclosed therein, to be used for six months after the date thereof. Because performance information must be current "as of a date not more than three months preceding the date of the Document," solicitations may therefore be made using a Document containing a performance record for a period ending up to nine months before those solicitations are made. More frequent updating of the Disclosure Document may be necessary, however, pursuant to the requirement "to disclose all material information . . . even if the information is not specifically required." For example, if the pool or trading program for which a Disclosure Document was being delivered suffered a material drop in performance, the Document might have to be amended to disclose that information, the six-month rule notwithstanding.

Second, the Commission wishes to make clear that a new Disclosure Document does not have to be prepared at the end of each six-month period. Subject to the requirement that a material deficiency be corrected within 21 days, the Document only needs to be revised at the end of the six months to indicate the information that has changed during that period. For example, if the only information that had changed was performance information, the Document would only need to be revised to show that new information, and the new date of the Document. And, as with amendments to the Document, these revisions may be supplied by sticker or other similar means.

Third, it should be noted that the rules only require an updating of a Disclosure Document if the Document is being used

to solicit prospective customers. If no solicitations are being made, there is no need to update the Document. When solicitations resumed, the Document would be required to be updated at that time.

The Commission has determined not to adopt at this time the proposed prohibition on including promotional material in the Disclosure Document. Proposed § 4.21(d) for CPOs and proposed § 4.31(d) for CTAs. Because the term "promotional material" could include information of which a prospective customer should be aware, the Commission is not specifically prohibiting the inclusion of such material in the Disclosure Document.

**E. CPO reporting requirements.** The Commission proposed to make significant revisions to the periodic Account Statements and Annual Reports that all CPOs registered or required to be registered must distribute. Sections 4.22(a) and 4.22(c), respectively. The Commission proposed no change in the required frequency of distribution of the Account Statement. Section 4.22(b). Since the comments on the revisions were on the whole in favor of them, the Commission has adopted the revisions substantially as proposed.

Both the Account Statement and the Annual Report must contain a prescribed affirmation signed by the CPO. Section 4.22(h). Several commenters asked whether each report must contain a manual signature. The Commission believes that a facsimile signature would be appropriate, provided the CPO retains the Account Statement or Annual Report containing the manual signature from which the facsimile was made in accordance with the recordkeeping requirements of § 4.23 and that at least one of the three Annual Reports required to be filed with the Commission is manually signed. One commenter recommended that the rules prescribing the Account Statement and the Annual Report alert CPOs to the affirmation requirement. The Commission believes that this is a useful suggestion and has incorporated it into §§ 4.22(a) and 4.22(c).

Two persons recommended that the Commission prescribe a specific form for the Account Statement. The Commission is declining at this time to take such action, because it may not be possible to specify in such a form all of the variables applicable to the Account Statement. Instead, the Commission invites interested CPOs to submit their Account Statements to its staff for review of the form thereof.

The financial statements that the Annual Report must contain must be certified by an independent public

accountant. Section 4.22(d). Under the former rules, these statements were not required to be certified if (1) the pool had less than \$50,000 in average net asset values for the first six months of its fiscal year, or (2) there were no more than 15 participants in the pool at any time during its fiscal year. The revised rules, as proposed and as adopted, do not contain such exemptions from the certification requirement. Many commenters argued that deleting these exemptions could subject small pools to disproportionately large accounting fees. The Commission believes this concern has been adequately addressed by the increase in the availability of an exemption from registration as a CPO—*i.e.*, a person can accept up to \$200,000 in gross capital contributions for the purchase of interests in the one pool (or in all the pools) it operates before registration as a CPO is required of it. Until registration is required, the person is not required to prepare and distribute an Annual Report.

The Commission recognizes that adopting a requirement that all Annual Reports be certified could work a hardship on those operators of small pools who previously qualified for an exemption from the certification requirement. To avoid any such hardship, the Commission has determined that it will not take enforcement action against any such person for failure to distribute and file a certified Annual Report, provided such person qualifies for an exemption from registration as a CPO under the new rules and does not apply for re-registration as a CPO at the end of the current registration period. That person must, however, distribute and file an uncertified Annual Report for each pool it operates within 90 days after the end of each such pool's fiscal year. This position applies to any fiscal year which commenced on a date from July 1, 1980 through June 30, 1981.

Several commenters asked the Commission to specify what information should be contained in the footnotes to the financial statements required in the Annual Report. Those footnotes must contain all of the information specifically required by generally accepted accounting principles as well as any other information necessary to make the financial statements not misleading. For example, if the pool was not being operated in accordance with the information on fees, commissions and other expenses as stated in the pool's Disclosure Document, such information should be fully disclosed in a footnote. Because of the many variables involved and because

circumstances may change, the Commission cannot specifically prescribe in this Federal Register release all of the information that the footnotes must contain.

The Commission also has adopted as proposed an increase to 90 days from 60 days after the close of the pool's fiscal year within which the Annual Report must be filed and a procedure for requesting an extension of time within which to file the Annual Report. Sections 4.22(c) and 4.22(f), respectively. The Commission cautions, however, that any such extension will be granted only in the most extenuating of circumstances.

Finally, to assist in monitoring compliance with the Annual Report requirement, the Commission has added a new provision that requires each registered CPO that has not operated a pool during any calendar year to file a statement to that effect within 30 days after the end of such calendar year. Section 4.22(c).

**F. Record-keeping.** The Commission also proposed certain revisions to the record-keeping requirements under Part 4. Section 4.23 for CPOs and § 4.32 for CTAs. With the exception of certain changes discussed below, the Commission has adopted those revisions as proposed.

First, the Commission has increased the amount of time within which a CPO or a CTA whose main business office is located outside of the United States must produce required records within the United States. Section 4.23 for CPOs and § 4.32 for CTAs. The amount of that time as proposed was 24 hours after receipt of such a request from a Commission representative. Several commenters stated that the proposed time did not recognize the logistical problems that the transmittal of such records could present. As adopted, the record-keeping rules take these problems into account by requiring that the requested books and records be produced in the United States within 72 hours after receipt of a request for them.

Second, the Commission has deleted the requirement that trading records be kept "in the form of a journal of original entry or other equivalent record." Sections 4.23(a)(1) and 4.23(b)(1) for CPOs and §§ 4.32(a)(5) and 4.32(b)(1) for CTAs. The Commission has taken this action to allow the keeping of trading records by the maintenance, in an orderly and chronological manner, of confirmations, purchase and sale statements and monthly statements received from an FCM. It should be noted that the revised record-keeping rules specifically require the keeping of

confirmation and monthly statements received from an FCM. Sections 4.23(a)(7) and 4.23(b)(2) for CPOs and §§ 4.32(a)(6) and 4.32(b)(2) for CTAs.<sup>10</sup>

Third, the Commission has amended those record-keeping rules that require the maintenance of the original or a copy of all material that a CPO or a CTA distributes. Section 4.23(a)(9) for CPOs and § 4.32(a)(7) for CTAs. Specifically, the Commission has incorporated into these rules the suggestion of one commenter that the material show the "first date of distribution." This amendment makes clear that the rules require the keeping of the original or a copy of the first piece of material so distributed, and not the keeping of a copy each subsequent time the same material is distributed. In response to other comments, the Commission also wishes to make clear that where material is distributed through "television, seminar or similar mass media presentations", the rules only require the keeping of the texts of those presentations. They do not require, as one commenter thought, the keeping of video tapes or other similar memorializations of such presentations.

While the Commission has adopted as proposed new rules that require CPOs and CTAs to keep books and records on their other business activities, in light of the comments received on the proposals the Commission believes the following explanation of them is appropriate. Section 4.23(b)(3) for CPOs and § 4.32(b)(3) for CTAs. Several commenters questioned the Commission's authority to adopt such requirements. This authority is clearly found in Section 4n(3)(A) of the Act, which specifies that each registered CPO and CTA "shall maintain books and records and file such reports in such form and manner as may be prescribed by the Commission." These persons also argued that the additional record-keeping requirements could conflict with those of other regulatory agencies. The Commission does not agree with this argument. To the contrary, the Commission finds that these new rules only require what may already be required by such other agencies. Finally, the Commission wishes to emphasize that it does not intend to make routine inspections of the additional records required by the rules. These records are intended to be inspected only where the other required books and records indicate that such additional inspection

is necessary. For example, if in inspecting the books and records that a CPO must keep for its pool the Commission finds a deficiency in the assets of the pool, the Commission would then inspect the books and records of the CPO's other activities to determine whether the missing assets were placed into them.

**G. Advertising of past performance results.** In proposing revisions to the Part 4 rules the Commission proposed to add a new Part D thereunder, pertaining to the advertising of actual, simulated or hypothetical past performance results of CPOs, CTAs, and their principals. While the Commission has adopted a new Part D, its provisions have been revised from those proposed.

With respect to the advertising of past performance results, the Commission has determined not to adopt at this time a rule that would specify a uniform manner of presentation of those results. Instead, the Commission has adopted a rule that leaves to the discretion of the person advertising performance results—whether actual, simulated or hypothetical—the format of that presentation, so long as that format is not false, misleading or deceptive. Section 4.41(a). While it is not possible to identify every advertisement that is prohibited by the rule, the Commission wishes to give notice, however, that it considers the following advertisements, among others, to be prohibited: (1) references only to successful trades, if during the same time period, trades which were unsuccessful were also recommended or executed; (2) references to the results during a specific time period, if the results claimed were not fairly representative of results achieved for comparable periods; (3) suggestions, assurances or claims of profit potential that do not also fairly present the possibility of loss; (4) statements of opinions or predictions which are not clearly labeled as such or which have no reasonable basis in fact; and (5) failure to disclose whether, and to what extent, fees, commissions and other expenses are reflected in the past performance results. The Commission emphasizes that the foregoing is offered by way of guidance and should not be taken as an all-inclusive list of the advertisements proscribed by § 4.41(a).

Also with respect to the advertising of simulated or hypothetical past performance results, the Commission has determined not to adopt at this time a rule that would prohibit such advertising. Instead, the Commission has adopted a rule that allows the presentation of those results, provided that the presentation is accompanied by

the statement prescribed in the rule. Section 4.41(b). This statement is intended to alert prospective customers to the limitations inherent in simulated and hypothetical past performance results.

Finally, the scope of these new rules on advertising should be noted. Section 4.41(c). First, they apply to both oral and written material (including Disclosure Documents). Second, the fact that the CPO or the CTA (or the principals thereof) for whom past performance is presented is not registered as such does not affect the applicability of the rules to that presentation.

**H. Prohibited activities.** The Commission also proposed, and has adopted, new rules that prohibit CPOs and CTAs from engaging in certain activities.

Under section 4o(2) of the Act, CPOs and CTAs are prohibited from representing that they have been approved or that their qualifications or abilities have been passed upon by the Federal government or any agency or officer thereof. The Commission has adopted as proposed a new rule that extends this prohibition to the principals of CPOs and CTAs and to persons who solicit on behalf of CPOs and CTAs. Section 4.16. Two commenters noted that section 4o(2) does, however, allow a person to state that it is registered as a CPO or as a CTA, if such statement is true in fact and if the effect of such registration is not misrepresented. The Commission wishes to make clear that the adoption of § 4.16 does not diminish in any way the right to make such statement under the terms and conditions specified in section 4o(2).

The Commission also has adopted as proposed new rules that require a CPO to operate its pool as a separate legal entity, that require pool funds to be received in the pool's name, and that prohibit a CPO from commingling pool property with the property of any other person. Sections 4.20(a), 4.20(b) and 4.20(c), respectively. While the comments received on the proposed rules generally supported them, certain persons requested additional clarifications of them. Specifically, these persons asked the Commission to clarify the application of the requirement that a CPO operate its pool as a separate legal entity to a commodity pool organized as a corporation. The CPO of a pool organized as a corporation might be the members of the corporation's Board of Directors or the chief executive and financial officers of the corporation. But because the answer to this question depends on the particular facts of each case the Commission cannot specify

<sup>10</sup> Formerly, FCMs were not required to send this information to a CTA for each account the CTA advised. Under revised § 1.33(c), announced in a separate Federal Register release issued today, FCMs now are required to provide CTAs with this information for those accounts.

without exception who the CPO of a corporate pool is. The Commission does believe, however, as is stated in § 4.20(a), that the corporation itself is not the CPO. Also, it should be noted that because § 4.20(b) requires that all funds a CPO receives for the purchase of, or as an assessment on, an interest in the CPO's pool must specifically be made payable to that pool, the rule prohibits a CPO from accepting or receiving funds made payable to the CPO for the account of the pool or to an account denominated as the CPO's "customers' segregated fund."

Finally, the Commission proposed and has adopted a rule that similarly prohibits a CTA from accepting money or extending credit in its own name to margin, guarantee or secure a commodity interest unless registered as an FCM under the Act. Section 4.30. Two commenters on the proposal recommended that it take into account the fact that, absent any other specific registration requirements, some leverage transaction merchants have registered with the Commission as CTAs. The Commission finds this recommendation a sensible one, and the rule as adopted also excludes leverage transaction merchants from its application.

### III. Delegation of Authority

The Commission also is amending Part 140 of its regulations to provide a new § 140.93. This new rule delegates to the Director of the Division of Trading and Markets, and to such members of the Commission's staff acting under his direction as he may designate, the authority to perform certain functions reserved to the Commission under §§ 4.12, 4.22(f) and 4.22(g). It should be noted that § 140.93 empowers the Director of the Division of Trading and Markets to submit any matter which has been delegated to him under this rule to the Commission for its consideration whenever such action is deemed to be appropriate and specifically reserves to the Commission the right to exercise the authority delegated under the rule.

Section 4.12 provides that the Commission may exempt any person or any class or classes of persons from any provision of Part 4 if it finds that the exemption is not contrary to the public interest and the purpose of the provision from which the exemption is sought. Section 4.12 further provides that the Commission may grant the exemption subject to such terms and conditions as it may find appropriate.<sup>11</sup>

As discussed above, § 4.22(c) provides that each CPO registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must file three copies of the Report with the Commission, within 90 days after the end of the pool's fiscal year. Section 4.22(f)(1) provides that in the event the CPO finds that it cannot distribute the Annual Report within the time specified in § 4.22(c) without substantial undue hardship, it may file with the Commission an application for extension of time to a specified date not more than 90 days after the date as of which the Annual Report was to have been distributed. Section 4.22(f)(3) requires the Commission to notify the CPO of the grant or denial of the requested extension, or to indicate to the CPO that additional time is required to analyze the request.

Section 4.22(g)(1) permits a CPO to initially elect any fiscal year for a pool, so long as the first fiscal year does not end more than one year after the pool's formation. Section 4.22(g)(2) provides that if a CPO elects a fiscal year other than the calendar year, it must give written notice of the election to all participants and must file the notice with the Commission within 90 days after the date of the pool's formation. If this notice is not given, the CPO will be deemed to have elected the calendar year as the pool's fiscal year. Section 4.22(g)(3) requires the CPO to continue to use the elected fiscal year for the pool unless it provides written notice of any proposed change to all participants and files such notice with the Commission at least 90 days before the change and the Commission does not disapprove the change within 30 days after the filing of the notice.

The Commission has adopted § 140.93 because it finds that the actions authorized under §§ 4.12, 4.22(f)(3) and 4.22(g)(3) can be performed most efficiently and expeditiously by Commission staff. Section 140.93 is effective immediately. The Commission finds that the rule relates solely to agency practice and procedure and that notice of proposed rulemaking and opportunity for public participation are not required. The foregoing is in accordance with the Administrative Procedure Act, as codified, 5 U.S.C. 553.

In consideration of the foregoing and pursuant to the authority contained in sections 2(a)(1), 4b, 4c, 4f, 4m, 4n, 4o, 8a and 19 of the Commodity Exchange Act, 7 U.S.C. 2, 6b, 6c, 6f, 6m, 6n, 6o, 12a and

23, as amended, 92 Stat. 865 *et seq.*, the Commission hereby revises Part 4 and Part 140 of Chapter 1 of 17 CFR. In adopting these rules, the Commission has taken into consideration the public interest to be protected by the antitrust laws and has endeavored to take the least anticompetitive means of achieving the regulatory objectives of the Commodity Exchange Act.

1. Part 4 is revised to read as follows:

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

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

#### Sec.

- 4.1 Requirements as to form.
- 4.2 Requirements as to filing.
- 4.3-9 [Reserved]
- 4.10 Definitions.
- 4.11 Exemption from section 4n(3)(B).
- 4.12 Exemption from provisions of Part 4.
- 4.13 Exemption from registration as a commodity pool operator.
- 4.14 Exemption from registration as a commodity trading advisor.
- 4.15 Continued applicability of antifraud and reparation sections.
- 4.16 Prohibited representations.

### Subpart B—Commodity Pool Operators

- 4.20 Prohibited activities.
- 4.21 Disclosure to prospective pool participants.
- 4.22 Reporting to pool participants.
- 4.23 Record-keeping.

### Subpart C—Commodity Trading Advisors

- 4.30 Prohibited activities.
- 4.31 Disclosure to prospective clients.
- 4.32 Record-keeping.

### Subpart D—Advertising

- 4.40 [Reserved]
- 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.

Authority: Secs. 2(a)(1), 4b, 4c, 4f, 4m, 4n, 4o, 8a and 19 of the Commodity Exchange Act, 7 U.S.C. 2, 6b, 6c, 6f, 6m, 6n, 6o, 12a and 23, as amended, 92 Stat. 865 *et seq.*

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

#### § 4.1 Requirements as to form.

(a) Each document distributed pursuant to this Part 4 must be:

- (1) Clear and legible;
- (2) Paginated; and
- (3) Fastened in a secure manner.

(b) Information that is required to be "prominently" disclosed under this Part 4 must be displayed in capital letters and in boldface type.

#### § 4.2 Requirements as to filing.

(a) All material filed with the Commission under this Part 4 must be

<sup>11</sup>Of course, the delegation of authority to exempt under § 4.12 could not be used to broaden the exemptions from registration contained in Part 4. See § 4.13 for CPOs and § 4.14 for CTAs. This

delegation of authority only applies to the requirements imposed under the provisions of Part 4.

filed with the Commission at its Washington, D.C. office (Att: Special Counsel, Front Office Audit Unit, Division of Trading and Markets, C.F.T.C., 2033 K Street N.W., Washington, D.C. 20581).

(b) All such material shall be considered filed when received by the Commission at the address specified in paragraph (a) of this section.

#### § 4.3-9 [Reserved]

#### § 4.10 Definitions.

For purposes of this part:

(a) "Commodity interest" means:

(1) Any contract for the purchase or sale of a commodity for future delivery; and

(2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act.

(b) "Net asset value" means total assets minus total liabilities, determined in accord with generally accepted accounting principles, with each position in a commodity interest accounted for at fair market value.

(c) "Participant" means any person that has any direct financial interest in a pool (e.g., a limited partner).

(d) "Pool" means any investment trust, syndicate or similar form of enterprise operated for the purpose of trading commodity interests.

(e) "Principal," when referring to a person that is a principal of a particular entity, means:

(1) Any person including, but not limited to, a sole proprietor, general partner, officer or director, or person occupying a similar status or performing similar functions, having the power, directly or indirectly, through agreement or otherwise, to exercise a controlling influence over the activities of the entity;

(2) Any holder of more than ten percent of the outstanding shares of any class of stock of the entity; and

(3) Any person who has contributed more than ten percent of the capital of the entity.

(f) "Direct," as used in the context of trading commodity interest accounts, refers to agreements whereby a person is authorized to cause transactions to be effected for a client's commodity interest account without the client's specific authorization.

(g) "Trading program" refers to the program pursuant to which a person (1) directs a client's commodity interest account, or (2) guides the client's commodity interest trading by means of a systematic program that recommends specific transactions.

#### § 4.11 Exemption from section 4n(3)(B).

The provisions of section 4n(3)(B) of the Act shall not apply to any commodity pool operator or commodity trading advisor that is registered under the Act as such or that is exempt from such registration.

#### § 4.12 Exemption from provisions of Part 4.

The Commission may exempt any person or any class or classes of persons from any provision of this Part 4 if it finds that the exemption is not contrary to the public interest and the purposes of the provision from which the exemption is sought. The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

#### § 4.13 Exemption from registration as a commodity pool operator.

(a) A person is not required to register under the Act as a commodity pool operator if:

(1) (i) It does not receive any compensation or other payment, directly or indirectly, for operating the pool, except reimbursement for the ordinary administrative expenses of operating the pool;

(ii) It operates only one commodity pool at any time;

(iii) It is not otherwise required to register with the Commission and is not a business affiliate of any person required to register with the Commission; and

(iv) Neither the person nor any other person involved with the pool does any advertising in connection with the pool (for purposes of this section, advertising includes the systematic solicitation of prospective participants by telephone or seminar presentation); or

(2) (i) The total gross capital contributions it receives for units of participation in all of the pools that it operates or that it intends to operate do not in the aggregate exceed \$200,000; and

(ii) None of the pools operated by it has more than 15 participants at any time. For purposes of computing the number of participants for paragraph (a)(2)(ii) of this section, the following participants shall be excluded:

(A) The pool's operator, commodity trading advisor, and the principals thereof; and

(B) Any relative, spouse or relative of such spouse living in the same household as such participant.

(b) (1) No person who is exempt from registration as a commodity pool operator under paragraph (a)(1) or (a)(2) of this section and who is not registered as such pursuant to that exemption may,

directly or indirectly, solicit, accept or receive funds, securities or other property from any prospective participant in a pool that it operates or that it intends to operate unless, on or before the date it engages in that activity, the person delivers or causes to be delivered to the prospective participant a written statement that must disclose this fact as follows: "The commodity pool operator of this pool is not required to register, and has not registered, with the Commodity Futures Trading Commission. Therefore, unlike a registered commodity pool operator, this commodity pool operator is not required by the Commission to furnish a Disclosure Document, periodic Account Statements, and an Annual Report to participants in the pool." The person must describe in the statement the exemption pursuant to which it is not registered as a commodity pool operator and must manually sign the statement.

(2) Each person who is exempt from registration as a commodity pool operator under paragraph (a)(1) or (a)(2) of this section and who is not registered as such pursuant to that exemption must:

(i) (A) Promptly furnish to each participant in each pool that it operates a copy of the monthly statement for the pool that such person received from a futures commission merchant pursuant to § 1.33, and

(B) Clearly show on such statement, or on an accompanying supplemental statement, the net profit or loss on all contracts closed since the date of the previous statement; and

(ii) (A) Maintain all books and records prepared in connection with its activities as a commodity pool operator for a period of five years from the date of preparation, and

(B) Keep such books and records readily accessible during the first two years of the five-year period. All such books and records shall be open to inspection by any representative of the Commission or the United States Department of Justice.

(c) Each person who applies for registration as a commodity pool operator must include with its initial application the financial statements and other information required by § 4.22(c)(1) through (5) for each pool it operates when such application is made. That information must be presented and computed in accordance with generally accepted accounting principles consistently applied. If the person is granted registration as a commodity pool operator, it must comply with this Part 4 with respect to each pool it operates. The provisions of this

paragraph (c) shall apply even though such person was exempt from registration as a commodity pool operator pursuant to the provisions of paragraph (a) of this section at the time it applied for registration.

(d) If a person exempt from registration under the Act as a commodity pool operator under paragraph (a)(1) or (a)(2) of this section registers as a commodity pool operator, that person must comply with this Part 4 as if such person were not exempt from registration as a commodity pool operator.

#### § 4.14 Exemption from registration as a commodity trading advisor.

(a) A person is not required to register under the Act as a commodity trading advisor if:

(1) It is a dealer, processor, broker, or seller in cash market transactions of any commodity (or product thereof) and the person's commodity trading advice is solely incidental to the conduct of its cash market business;

(2) It is a non-profit, voluntary membership, trade association or farm organization and the person's commodity trading advice is solely incidental to the conduct of its business as such association or organization;

(3) It is registered under the Act as an associated person and the person's commodity trading advice is issued solely in connection with its employment as an associated person;

(4) It is registered under the Act as a commodity pool operator and the person's commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it has so registered; or

(5) It is exempt from registration as a commodity pool operator and the person's commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt.

(b) For purposes of this section, "cash market transactions" shall not include transactions involving contracts for the purchase or sale of a commodity for future delivery or transactions subject to Commission regulation under section 4c or 19 of the Act.

(c) If a person exempt from registration under the Act as a commodity trading advisor under paragraph (a) of this section registers as a commodity trading advisor, that person must comply with this Part 4 as if such person were not exempt from registration as a commodity trading advisor.

#### § 4.15 Continued applicability of antifraud and reparation sections.

The provisions of sections 4c and 14 of the Act shall apply to any person even though such person is exempt from registration under this Part 4, and it shall continue to be unlawful for any such person to violate section 4c of the Act.

#### § 4.16 Prohibited representations.

It shall be unlawful for any commodity pool operator, commodity trading advisor, principal thereof or person who solicits therefor to represent or imply in any manner whatsoever that such commodity pool operator or commodity trading advisor has been sponsored, recommended or approved, or that its abilities or qualifications have in any respect been passed upon, by the Commission, the Federal government or any agency thereof.

#### Subpart B—Commodity Pool Operators

##### § 4.20 Prohibited activities.

(a) A commodity pool operator must operate its pool as an entity cognizable as a legal entity separate from that of the pool operator.

(b) All funds, securities or other property received by a commodity pool operator from an existing or prospective pool participant for the purchase of an interest or as an assessment (whether voluntary or involuntary) on an interest in a pool that it operates or that it intends to operate must be received in the pool's name.

(c) No commodity pool operator may commingle the property of any pool that it operates or that it intends to operate with the property of any other person.

##### § 4.21 Disclosure to prospective pool participants.

(a) No commodity pool operator registered or required to be registered under the Act may, directly or indirectly, solicit, accept or receive funds, securities or other property from a prospective participant in a pool that it operates or that it intends to operate unless, on or before that date it engages in that activity, the commodity pool operator delivers or causes to be delivered to the prospective participant a Disclosure Document for the pool, in such form as the Commission may prescribe, containing the following information:

(1)(i) The name, address of the main business office, main business telephone number and form of organization of the pool. If the address of the main business office is a post office box number, the pool operator must state where the pool's books and records will be kept;

(ii) The name, address of the main business office, main business telephone number and form of organization of the commodity pool operator. If the address of the main business office is a post office box number, the pool operator must state where its books and records will be kept;

(iii) The name of each principal of the pool operator;

(iv) The name of the pool's commodity trading advisor;

(v) The name of each principal of the trading advisor;

(vi) The name of the person who will make the trading decisions for the pool; and

(vii) If known, the name of the futures commission merchant through which the pool will execute its trades.

(2) The business background, for the five years preceding the date of the Document, of:

(i) The commodity pool operator;

(ii) Each principal of the pool operator;

(iii) The pool's commodity trading advisor; and

(iv) Each principal of the pool's commodity trading advisor.

The pool operator must include in the description of the business background of each such person the name and main business of that person's employers, business associations or business ventures and the nature of the person's duties performed for the employers or in connection with the associations or ventures.

(3)(i) Any actual or potential conflict of interest regarding any aspect of the pool on the part of:

(A) The commodity pool operator;  
(B) Any principal of the pool operator;  
(C) The pool's commodity trading advisor;

(D) Any principal of the trading advisor;

(E) Any futures commission merchant through which the pool's trades will be executed; or

(F) Any principal of the futures commission merchant.

Included in the description of such conflict shall be any arrangement whereby the commodity pool operator, commodity trading advisor, or the principals thereof may benefit, directly or indirectly, from the maintenance of the pool's account with a futures commission merchant.

(ii) If there is any such actual or potential conflict of interest, the pool operator must fully describe the nature of the conflict.

(iii) If there is no such actual or potential conflict of interest on the part

of any of the foregoing persons, the pool operator must make a statement to that effect with respect to each such person.

(4) The actual performance record of the commodity pool operator and of each of its principals as specified below; *Provided, however,* That nothing in this § 4.21(a)(4) shall be construed to prohibit a commodity pool operator from disclosing additional information on such performance record so long as the pool operator complies with each of the specified requirements of this § 4.21(a)(4).

(i) The commodity pool operator must comply with this § 4.21(a)(4) as follows: If commodity interests have been traded by the pool for which the commodity pool operator is soliciting participants, the pool operator must comply with paragraph (a)(4)(i)(A) of this section if that trading has been for 12 months or more preceding the date of the Disclosure Document, or with paragraph (a)(4)(i)(B) of this section if that trading has been for less than 12 months preceding the date of the Document. If commodity interests have not been traded by the pool for which the commodity pool operator is soliciting participants, the pool operator must comply with paragraph (a)(4)(i)(C) of this section.

(A) If the pool for which the commodity pool operator is soliciting participants has traded commodity interests for 12 months or more preceding the date of the Document, the pool operator must disclose the actual performance of the pool for its entire operating history; *Provided, however,* That if the pool has traded commodity interests for more than three years preceding the date of the Document, the pool operator need only disclose the actual performance for such preceding three years.

(B) If the pool for which the commodity pool operator is soliciting participants has traded commodity interests for less than 12 months preceding the date of the Document, the pool operator must disclose the actual performance of the pool for its entire operating history and also must present the actual performance for the three years preceding the date of the Document of each other pool operated by it and by each of its principals; *Provided, however,* That if the pool operator and its principals previously have not operated any other pool, the pool operator must disclose these facts with a prominent statement as follows: "THE COMMODITY FUTURES TRADING COMMISSION REQUIRES THE OPERATOR OF A POOL THAT HAS TRADED COMMODITY INTERESTS FOR LESS THAN 12 MONTHS TO DISCLOSE THE ACTUAL PERFORMANCE RECORD OF THE POOL FOR ITS ENTIRE OPERATING

HISTORY AND THE ACTUAL PERFORMANCE RECORD OF EACH OTHER POOL OPERATED BY THE POOL OPERATOR AND ITS PRINCIPALS. YOU SHOULD NOTE THAT THE ACTUAL PERFORMANCE RECORD OF THIS POOL REPRESENTS ITS ENTIRE OPERATING HISTORY, A PERIOD OF ONLY— MONTHS. YOU ALSO SHOULD NOTE THAT THIS POOL OPERATOR AND ITS PRINCIPALS PREVIOUSLY HAVE NOT OPERATED ANY OTHER COMMODITY POOL." If the commodity pool operator is a sole proprietorship, reference to its principals may be deleted from the prescribed statement.

(C) If the pool for which the commodity pool operator is soliciting participants has not commenced trading commodity interests, the pool operator must disclose this fact with a prominent statement as follows: "THE COMMODITY FUTURES TRADING COMMISSION REQUIRES A COMMODITY POOL OPERATOR TO DISCLOSE TO PROSPECTIVE POOL PARTICIPANTS THE ACTUAL PERFORMANCE RECORD OF THE POOL FOR WHICH THE OPERATOR IS SOLICITING PARTICIPANTS. YOU SHOULD NOTE THAT THIS POOL HAS NOT BEGUN TRADING AND DOES NOT HAVE ANY PERFORMANCE HISTORY." The pool operator also must present the actual performance for the three years preceding the date of the Document of each other pool operated by it and by each of its principals; *Provided, however,* That if the pool operator and its principals previously have not operated any other pool, the pool operator must disclose this fact with a prominent statement as follows: "WHERE THE POOL FOR WHICH THE POOL OPERATOR IS SOLICITING PARTICIPANTS HAS NOT BEGUN TRADING, THE COMMISSION REQUIRES THE POOL OPERATOR TO DISCLOSE TO PROSPECTIVE PARTICIPANTS THE ACTUAL PERFORMANCE RECORD OF EACH OTHER POOL OPERATED BY THE POOL OPERATOR AND ITS PRINCIPALS. YOU ALSO SHOULD NOTE THAT THIS POOL OPERATOR AND ITS PRINCIPALS PREVIOUSLY HAVE NOT OPERATED A COMMODITY POOL." If the commodity pool operator is a sole proprietorship, reference to its principals may be deleted from the prescribed statement.

(ii) The presentation of actual performance must be displayed in a table showing at least quarterly the following information, current as of a date not more than three months preceding the date of the Document:

(A) The beginning net asset value for

the period, which shall represent the previous period's ending net asset value;

(B) All additions, whether voluntary or involuntary, during the period;

(C) All withdrawals and redemptions, whether voluntary or involuntary, during the period;

(D) The net performance for the period, which shall represent the change in the net asset value net of additions, withdrawals and redemptions;

(E) The ending net asset value for the period, which shall represent the beginning net asset value plus or minus additions, withdrawals and redemptions, and net performance;

(F) The rate of return for the period, which shall be calculated by dividing the net performance by the beginning net asset value; and

(G) The number of units outstanding at the end of the period.

(iii) The commodity pool operator must describe the material differences among the pools for which past performance is disclosed pursuant to paragraph (a)(4)(i) of this section.

(iv) The commodity pool operator may present the actual performance of the pools operated by each such person for whom such performance is disclosed pursuant to paragraph (a)(4)(i) of this section on an individual basis or on a composite basis; *Provided, however,* That if the commodity pool operator presents that performance on a composite basis, it must:

(A) Separately disclose the actual performance of the pool for which it is soliciting participants;

(B) Present in a composite separate and apart from any other composite the actual performance of all other pools operated by the commodity pool operator and directed by the pool's commodity trading advisor and by any principals of the trading advisor; and

(C) Describe how each composite was developed and disclose material information from which the composite was drawn.

(5) The actual performance record of the pool's commodity trading advisor and of each of its principals as specified below; *Provided, however,* That nothing in paragraph (a)(5) of this section shall be construed to prohibit a commodity pool operator from disclosing additional information on such performance record so long as the pool operator complies with each of the specified requirements of this paragraph (a)(5).

(i) The commodity pool operator must disclose the actual performance for the three years preceding the date of the Document of all accounts other than the pool directed by the pool's commodity trading advisor and by each of its principals; *Provided, however,* That if the pool for which the pool operator is soliciting participants has not

commenced trading commodity interests and the pool's trading advisor and its principals previously have not directed an account, the pool operator must disclose this fact with a prominent statement as follows: "THE COMMISSION ALSO REQUIRES THE POOL OPERATOR TO DISCLOSE THE ACTUAL PERFORMANCE RECORD OF ALL ACCOUNTS FOR WHICH THE POOL'S TRADING ADVISOR AND ITS PRINCIPALS HAVE HAD THE AUTHORITY TO CAUSE TRANSACTIONS TO BE EFFECTED WITHOUT CLIENTS' SPECIFIC AUTHORIZATION. YOU ALSO SHOULD NOTE THAT THIS POOL'S TRADING ADVISOR AND ITS PRINCIPALS PREVIOUSLY HAVE NOT HAD SUCH AUTHORITY." If the pool's commodity trading advisor is a sole proprietorship, reference to its principals may be deleted from the prescribed statement.

(ii) The presentation of actual performance must be displayed in a table showing at least quarterly the information required under paragraph (a)(4)(ii) (A) through (F) of this section, current as of a date not more than three months preceding the date of the Document.

(iii) In presenting actual performance the commodity pool operator may present the actual performance of the accounts directed by each such person for whom such performance is disclosed pursuant to paragraph (a)(5)(i) of this section on an individual basis or on a composite basis.

(A) The commodity pool operator must describe the material differences among those accounts, and

(B) If that performance is presented on a composite basis, the pool operator must describe how each composite was developed and must disclose material information from which the composite was drawn.

(6)(i) The extent of any ownership or beneficial interest in the pool held by:

(A) The commodity pool operator;  
(B) Any principal of the pool operator;  
(C) The pool's commodity trading advisor; or

(D) Any principal of the trading advisor.

(ii) If any of the foregoing persons does not own any such interest in the pool, the pool operator must make a statement to that effect with respect to each such person.

(7) A complete description of each kind of expense which the commodity pool operator knows or should know has been incurred by the pool for its preceding fiscal year or is expected to be incurred by the pool in its current fiscal year, including, but not limited to, fees for management, trading advice, brokerage commissions, legal advice,

accounting services and organizational services; *Provided, however,* That if any such information is contained in an Annual Report which accompanies the Disclosure Document pursuant to paragraph (f) of this section, the pool operator need not also include that information in the Disclosure Document.

(i) The pool operator must specify the actual dollar amount of each such expense for the pool's preceding fiscal year and, wherever possible, the estimated dollar amount of each such expense for the pool's current fiscal year.

(ii) Where any expense is determined by reference to a base amount term including, but not limited to, "net assets," "gross profits," "net profits" or "net gains," the pool operator must specifically define each such term.

(iii) Where any fee is based on an increase in the value of the pool, the pool operator must specify how the increase is calculated, the period of time during which the increase is calculated, the fee to be charged at the end of that period and the value of the pool at which payment of the fee commences.

(iv) Where any expense of the pool has been paid or is to be paid by a person other than the pool, the pool operator must disclose the nature and amount of that expense and the person who paid or who is expected to pay it.

(8)(i)(A) The minimum aggregate amount of funds that will be necessary for the pool to commence trading commodity interests, or

(B) If there is no such minimum amount, the pool operator must make a statement to that effect; and

(ii)(A) The maximum aggregate amount of funds that may be contributed to the pool, or

(B) If there is no such maximum amount, the pool operator must make a statement to that effect.

(iii)(A) The maximum period of time for which the pool will hold funds prior to the commencement of trading commodity interests, or

(B) If there is no such period of time, the pool operator must make a statement to that effect.

(iv) The disposition of those funds if the pool does not receive the necessary amount to commence trading, including the period of time within which the disposition will be made; and

(v) Where the pool operator will deposit or invest funds received prior to the commencement of trading by the pool. If the pool operator intends to place those funds in an income-generating account or obligation, it must disclose the person to whom that income will be paid.

(9) (i) The manner in which the pool will fulfill its margin requirements. If the pool will fulfill its margin requirements

with other than cash, the pool operator must disclose:

(A) The nature of such non-cash items, and

(B) If those items generate income, the person to whom that income will be paid.

(ii) The form in which pool funds not deposited as margin will be held after the commencement of trading by the pool. If those funds will be held in assets other than cash, the pool operator must disclose:

(A) The nature of such non-cash assets, and

(B) If those assets generate income, the person to whom that income will be paid.

(iii) If pool funds not deposited as margin will be held outside of the United States, its territories or possessions, the pool operator must specify where those funds will be held.

(10) (i) (A) A complete description of any restrictions upon the transferability of a participant's interest in the pool.

(B) If there are no such restrictions, the pool operator must make a statement to that effect.

(ii) A complete description of the manner in which a participant may redeem its interest in the pool. That description must specify:

(A) How the redemption value of a participant's interest will be calculated, including the cost associated therewith;

(B) The conditions under which a participant may redeem its interest, including the terms of any notification required; and

(C)(1) Any restrictions on the redemption of a participant's interest, or  
(2) If there are no such restrictions, the pool operator must make a statement to that effect.

(11) The extent to which a participant may be held liable for obligations of the pool in excess of the funds contributed by the participant for the purchase of an interest in the pool.

(12) (i) (A) The pool's policies with respect to the payment of distributions from profits or capital.

(B) The pool's policies with respect to the frequency of such payments.

(ii) The Federal income tax effects of such payments for a participant, including a discussion of the Federal income tax laws applicable to the form of organization of the pool and to such payments therefrom. If a pool specifically is structured to accomplish certain Federal income tax objectives, the commodity pool operator must disclose that information and explain those objectives

(13) (i) Any material administrative, civil or criminal action within the five years preceding the date of the Document against:

(A) The commodity pool operator;  
 (B) Any principal of the pool operator;  
 (C) The pool's commodity trading advisor;

(D) Any principal of the trading advisor;

(E) The pool's futures commission merchant; or

(F) Any principal of the pool's futures commission merchant.

(ii) If there has been no such action against any of the foregoing persons, the pool operator must make a statement to that effect with respect to each such person.

(14) Any commission or other fee that is paid or may be paid, directly or indirectly, by the pool, the pool's operator, commodity trading advisor, or the principals thereof, to any person in connection with the solicitation of funds, securities or other property for the pool.

(15) (i) A statement whether trading in commodity interests will be done or is intended to be done for its own account by:

(A) the commodity pool operator;  
 (B) Any principal of the pool operator;  
 (C) The pool's commodity trading advisor; or

(D) Any principal of the trading advisor.

(ii) If any of the foregoing persons will trade or intends to trade for its own account, for each such person the pool operator must further disclose whether participant will be permitted to inspect the records of that person's trades.

(iii) If any of the foregoing persons will not trade or does not intend to trade for its own account, the pool operator must make a statement to that effect with respect to each such person.

(16) A statement that the commodity pool operator must provide all participants with monthly or quarterly (whichever applies) statements of account and with a certified annual report of financial condition.

(17) (i) The following Risk Disclosure Statement, to be prominently disclosed as, and the only language on, the first page of the Disclosure Document:

#### Risk Disclosure Statement

You should carefully consider whether your financial condition permits you to participate in a commodity pool. You may lose a substantial portion or even all of the money you place in the pool.

In considering whether to participate in a commodity pool, you should be aware that trading commodity contracts can quickly lead to large losses as well as gains. Such trading losses can sharply reduce the net asset value of the pool and consequently the value of your interest in the pool. Also, market conditions may make it difficult or impossible for the pool to liquidate a position.

In some cases, commodity pools are subject to substantial charges for

management, advisory and brokerage fees. It may be necessary for those pools that are subject to these charges to make substantial trading profits to avoid depletion or exhaustion of their assets. This disclosure document contains a complete description of each expense to be charged this pool.

This brief statement cannot disclose all the risks and other significant aspects of participating in a commodity pool. You should therefore carefully study this disclosure document and commodity trading before you decide to participate in a commodity pool.

(ii) If the potential liability of a participant in the pool is greater than the amount of the participant's contribution for the purchase of an interest in the pool and profits earned thereon, whether distributed or not, the commodity pool operator must make the additional following statement in the Risk Disclosure Statement, to be prominently disclosed as the last paragraph thereof:

Also, before you decide to participate in this pool, you should note that your potential liability as a participant in this pool for trading losses and other expenses of the pool is not limited to the amount of your contribution for the purchase of an interest in the pool and any profits earned thereon. A complete description of the liability of a participant in this pool is explained more fully in this disclosure document.

(18) The following Cautionary Statement, to be prominently disclosed on the cover page of the Document: "The Commodity Futures Trading Commission has not passed upon the merits of participating in this pool nor has the Commission passed on the adequacy or accuracy of this disclosure document."

(b)(1) If the commodity pool operator knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:

(i) All existing pool participants within 21 calendar days of the date upon which the pool operator first knows or has reason to know of the defect, and

(ii) Each previously solicited prospective pool participant prior to accepting or receiving funds, securities or other property from any such prospective participant.

The pool operator may furnish the correction by way of an amended Document, a sticker on the Document, or other similar means.

(2) The pool operator may not use the Document until such correction has been made.

(c) The commodity pool operator must date each Disclosure Document and amendment thereto as of the date it is first used.

(d) The commodity pool operator may not accept or receive funds, securities or other property from the prospective participant unless the pool operator first receives from the prospective participant an acknowledgement signed and dated by the prospective participant stating that the participant received a Disclosure Document for the pool.

(e)(1) Subject to paragraph (b) of this section, all information contained in the Disclosure Document must be current as of the date of the Document; *Provided, however*, Performance information may be current as of a date not more than three months preceding the date of the Document.

(2) No commodity pool operator may use a Disclosure Document dated more than six months preceding the date of its use.

(f) The commodity pool operator must attach to the Document the most current Account Statement and Annual Report for the pool required to be distributed in accordance with § 4.22.

(g)(1) The commodity pool operator must file with the Commission three copies of the Disclosure Document for each pool that it operates or that it intends to operate not less than 21 calendar days prior to the date the pool operator first intends to deliver the Document to a prospective participant in the pool. The pool operator must specify with the filing the date it first intends to deliver the Document to a prospective participant.

(2) The commodity pool operator must file with the Commission three copies of all subsequent amendments to the Disclosure Document for each pool that it operates or that it intends to operate within 21 calendar days of the date upon which the pool operator first knows or has reason to know of the defect requiring the amendment.

(h) This section does not relieve a commodity pool operator from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective pool participants even if the information is not specifically required by this section.

#### § 4.22 Reporting to pool participants.

(a) Each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Income (Loss) and a

Statement of Changes in Net Asset Value, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (h) of this section.

(1) The portion of the Account Statement which must be presented in the form of a Statement of Income (Loss) must separately itemize the following information:

(i) The total amount of realized net gain or loss on commodity interest positions liquidated during the reporting period;

(ii) The change in unrealized net gain or loss on commodity interest positions during the reporting period;

(iii) The total amount of net gain or loss from all other transactions in which the pool engaged during the reporting period, including interest and dividends paid on funds not committed to margin the pool's commodity interest positions;

(iv) The total amount of all management fees during the reporting period;

(v) The total amount of all advisory fees during the reporting period;

(vi) The total amount of all brokerage commissions during the reporting period;

(vii) The total amount of other fees for commodity interest and other investment transactions during the reporting period; and

(viii) The total amount of all other expenses incurred or accrued by the pool during the reporting period.

(2) The portion of the Account Statement that must be presented in the form of a Statement of Changes in Net Asset Value must separately itemize the following information:

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

(ii) The total amount of additions to the pool, whether voluntary or involuntary, made during the reporting period;

(iii) The total amount of withdrawals from and redemption of participation units in the pool, whether voluntary or involuntary, for the reporting period;

(iv) The total net income or loss of the pool during the reporting period;

(v) The net asset value of the pool as of the end of the reporting period; and

(vi)(A) The net asset value per outstanding participation unit in the pool as of the end of the reporting period, or

(B) The total value of the participant's interest or share in the pool as of the end of the reporting period.

(3) The Account Statement must also disclose any material business dealings between the pool, the pool's operator,

commodity trading advisor, futures commission merchant, or the principals thereof that previously have not been disclosed in the pool's Disclosure Document or any amendment thereto, other Account Statements or Annual Reports.

(b) The Account Statement must be distributed at least monthly in the case of pools with net assets of more than \$500,000 at the beginning of the pool's fiscal year, and otherwise at least quarterly; *Provided, however*, That an Account Statement for the last reporting period of the pool's fiscal year need not be distributed if the Annual Report required by paragraph (c) of this section is sent to pool participants within 45 calendar days after the end of the fiscal year. The requirement to distribute an Account Statement shall commence as of the date the pool is formed as specified in paragraph (g)(1) of this section.

(c) Each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must file three copies of the Report with the Commission, within 90 calendar days after the end of the pool's fiscal year; *Provided, however*, That if during any calendar year the commodity pool operator did not operate a commodity pool, the pool operator must so notify the Commission within 30 calendar days after the end of such calendar year. The first fiscal year for which an Annual Report is due shall be the first fiscal year that begins on or after January 1, 1979. The Annual Report must be signed pursuant to paragraph (h) of this section and must contain the following:

(1) The net asset value of the pool as of the end of each of the pool's two preceding fiscal years.

(2)(i) The net asset value per outstanding participation unit in the pool as of the end of each of the pool's two preceding fiscal years, or

(ii) The total value of the participant's interest or share in the pool as of the end of each of the pool's two preceding fiscal years.

(3) A Statement of Financial Condition as of the close of the pool's fiscal year and preceding fiscal year.

(4) Statements of Income (Loss), Changes in Financial Position, and Changes in Ownership Equity, for the period between (i) the later of: (A) the date of the most recent Statement of Financial Condition delivered to the Commission pursuant to this paragraph (c), (B) January 1, 1979, or (C) the date of the formation of the pool, and (ii) the close of the pool's fiscal year, together with Statements of Income (Loss),

Changes in Financial Position, and Changes in Ownership Equity for the corresponding period of the previous fiscal year.

(5) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading.

(d) The financial statements in the Annual Report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be certified by an independent public accountant. The certification must be in accordance with § 1.16, except that the following requirements of that section shall not apply:

(1) The audit objectives of § 1.16(d)(1) concerning the periodic computation of minimum capital and property in segregation;

(2) All other references in § 1.16 to the segregation requirements; and

(3) Sections 1.16(c)(5), (d)(2), (e)(2), and (f).

(e) The Statement of Income (Loss) required by this section must itemize brokerage commissions, management fees, advisory fees, incentive fees, interest income and expense, total realized net gain or loss from commodity interest trading, and change in unrealized net gain or loss on commodity interest positions during the pool's fiscal year. Gains and losses on commodity interests need not be itemized by commodity or by specific delivery or expiration date.

(f)(1) In the event the commodity pool operator finds that it cannot distribute the Annual Report for a pool that it operates within the time specified in paragraph (c) of this section without substantial undue hardship, it may file with the Commission an application for extension of time to a specified date not more than 90 calendar days after the date as of which the Annual Report was to have been distributed. The application must be made by the pool operator and must:

(i) State the name of the pool for which the application is being made;

(ii) State the reasons for the requested extension;

(iii) Indicate that the inability to make a timely filing is due to circumstances beyond the control of the pool operator, if such is the case, and describe briefly the nature of such circumstances;

(iv) Contain an undertaking to file the Annual Report on or before the date specified in the application; and

(v) Be filed with the Commission prior to the date on which the Annual Report is due.

(2) The application must be accompanied by a letter from the independent public accountant answering the following questions:

(i) What specifically are the reasons for the extension request?

(ii) Do you have any indication from the part of your audit completed to date that would lead you to believe that the commodity pool operator was or is not meeting the segregation or recordkeeping requirements of this Part 4?

(3) Within ten calendar days after receipt of an application for an extension of time, the Commission shall:

(i) Notify the commodity pool operator of the grant or denial of the requested extension, or

(ii) Indicate to the pool operator that additional time is required to analyze the request, in which case the amount of time needed will be specified.

(g)(1) A commodity pool operator may initially elect any fiscal year for a pool, but the first fiscal year may not end more than one year after the pool's formation. For purposes of this section, a pool shall be deemed to be formed as of the date the pool operator first receives funds, securities or other property for the purchase of an interest in the pool.

(2) If a commodity pool operator elects a fiscal year other than the calendar year, it must give written notice of the election to all participants and must file the notice with the Commission within 90 calendar days after the date of the pool's formation. If this notice is not given, the pool operator will be deemed to have elected the calendar year as the pool's fiscal year.

(3) The commodity pool operator must continue to use the elected fiscal year for the pool unless it provides written notice of any proposed change to all participants and files such notice with the Commission at least 90 days before the change and the Commission does not disapprove the change within 30 days after the filing of the notice.

(h)(1) Each Account Statement and Annual Report must contain a signed 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 document is accurate and complete; *Provided, however,* That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete.

(2) There must be typed beneath the signed oath or affirmation:

(i) The name of the individual signing the document;

(ii) The capacity in which he is signing;

(iii) The name of the commodity pool operator for whom he is signing; and

(iv) The name of the commodity pool for which the document is being distributed.

(3) If the commodity pool operator is a sole proprietorship, the oath or affirmation must be made by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer.

#### § 4.23 Record-keeping.

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with § 1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) must be made available to participants for inspection and copying during normal business hours at the main business office of the pool operator. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant. If the commodity pool operator's main business office is outside of the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

(a) Concerning the commodity pool:  
(1) An itemized daily record of each commodity interest transaction of the pool, showing the date, price, quantity, commodity interest, delivery or expiration month, the futures commission merchant carrying the account, whether the interest was purchased or sold, and, if the transaction liquidated an open position, the gain or loss realized.

(2) A journal of original entry or other equivalent record showing all receipts and disbursements of money, securities and other property.

(3) The acknowledgement specified in § 4.21(d) for each participant in the pool.

(4) A subsidiary ledger or other equivalent record for each participant in the pool showing the participant's name and address and all funds, securities and other property that the pool received from or distributed to the participant.

(5) Adjusting entries and any other records of original entry or their equivalent forming the basis of entries in any ledger.

(6) A general ledger or other equivalent record containing details of all asset, liability, capital, income and expense accounts.

(7) Copies of each confirmation of a commodity futures transaction of the pool, each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant.

(8) Cancelled checks, bank statements, journals, ledgers, invoices, computer generated records, and all other records, data and memoranda prepared or received in connection with the operation of the pool.

(9) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity pool operator to any existing or prospective pool participant or received by the pool operator from any commodity trading advisor of the pool, showing the first date of distribution or receipt if not otherwise shown on the document.

(10) A Statement of Financial Condition as of the close of (i) each regular monthly period if the pool had net assets of \$500,000 or more at the beginning of the pool's fiscal year, or (ii) each regular quarterly period for all other pools. The Statement must be completed within 30 days after the end of that period.

(11) A Statement of Income (Loss) for the period between (i) the later of: (A) the date of the most recent Statement of Financial Condition furnished to the Commission pursuant to § 4.22(c), (B) April 1, 1979 or (C) the formation of the pool, and (ii) the date of the Statement of Financial Condition required by paragraph (a)(10) of this section. The Statement must be completed within 30 days after the end of that period.

(b) Concerning the commodity pool operator:

(1) An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the date, price, quantity, commodity interest, delivery or expiration month, person for whom the transaction was effected, the futures commission merchant carrying the account, and whether the interest was purchased or sold.

(2) Each confirmation of a commodity futures transaction, each purchase and sale statement and each monthly statement furnished by a futures commission merchant to (i) the commodity pool operator relating to a personal account of the pool operator, and (ii) each principal of the pool operator relating to a personal account of such principal.

(3) Books and records of all other transactions in all other activities in which the pool operator engages. Those books and records must include cancelled checks, bank statements, journals, ledgers, invoices, computer generated records and all other records, data and memoranda which have been prepared in the course of engaging in those activities.

#### Subpart C—Commodity Trading Advisors

##### § 4.30 Prohibited activities.

No commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor's name (or extend credit in lieu thereof) to margin, guarantee or secure any commodity interest of the client; *Provided, however,* That this section shall not apply to a futures commission merchant that is registered as such under the Act or to a leverage transaction merchant that is registered as a commodity trading advisor under the Act.

##### § 4.31 Disclosure to prospective clients.

(a) No commodity trading advisor registered or required to be registered under the Act may solicit or enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading by means of a systematic program that recommends specific transactions, unless the commodity trading advisor, at or before the time it engages in the solicitation or enters into the agreement (whichever is earlier), delivers or causes to be delivered to the prospective client a Disclosure Document for the trading program pursuant to which the trading advisor seeks to direct the client's account or to guide the client's trading, in such form as the Commission may prescribe, containing the following information:

(1)(i) The name, address of the main business office, main business telephone number and form of organization of the commodity trading advisor. If the address of the main business office is a post office box number, the trading advisor must state where its books and records will be kept;

(ii) The name of each principal of the trading advisor;

(iii) A description of the trading program; and

(iv)(A) The name of the futures commission merchant with which the client will be required to maintain its account, or

(B) If the client is free to choose the futures commission merchant with which it will maintain its account, the trading advisor must make a statement to that effect.

(2) The business background, for the five years preceding the date of the Document, of:

(i) The commodity trading advisor; and

(ii) Each principal of the trading advisor.

The trading advisor must include in the description of the business background of each such person the name and main business of that person's employers, business associations or business ventures and the nature of the person's duties performed for the employers or in connection with the associations or ventures.

(3) The actual performance record of the commodity trading advisor and of each of its principals as specified below; *Provided, however,* That nothing in this paragraph (a)(3) shall be construed to prohibit a commodity trading advisor from disclosing additional information on such performance record so long as the trading advisor complies with each of the specified requirements of this paragraph (a)(3).

(i) The commodity trading advisor must disclose the actual performance for the three years preceding the date of the Document of all accounts directed by the commodity trading advisor and by each of its principals; *Provided, however,* That if the trading advisor and its principals previously have not directed an account, the trading advisor must disclose this fact with a prominent statement as follows: "THE COMMODITY FUTURES TRADING COMMISSION REQUIRES A COMMODITY TRADING ADVISOR TO DISCLOSE TO PROSPECTIVE CLIENTS THE ACTUAL PERFORMANCE RECORD OF ALL ACCOUNTS FOR WHICH THE TRADING ADVISOR AND ITS PRINCIPALS HAVE HAD THE AUTHORITY TO CAUSE TRANSACTIONS TO BE EFFECTED WITHOUT CLIENTS' SPECIFIC AUTHORIZATION. YOU SHOULD NOTE THAT THIS TRADING ADVISOR AND ITS PRINCIPALS PREVIOUSLY HAVE NOT HAD SUCH AUTHORITY." If the commodity trading advisor is a sole proprietorship, reference to its

principals may be deleted from the prescribed statement.

(ii) The presentation of actual performance must be displayed in a table showing at least quarterly the information required under § 4.21(a)(4)(ii)(A) through (F), current as of a date not more than three months preceding the date of the Document.

(iii) In presenting actual performance the commodity trading advisor may present the performance of the accounts directed by each such person for whom such performance is disclosed pursuant to paragraph (a)(3)(i) of this section on an individual basis or on a composite basis.

(A) The commodity trading advisor must describe the material differences among those accounts, and

(B) If that performance is presented on a composite basis, the trading advisor must describe how each composite was developed and must disclose material information from which the composite was drawn.

(4) A complete description of each fee which the commodity trading advisor will charge the client.

(i) Wherever possible, the trading advisor must specify the dollar amount of each such fee.

(ii) Where any fee is determined by reference to a base amount term including, but not limited to, "net assets," "gross profits," "net profits" or "net gains," the trading advisor must specifically define each such term.

(iii) Where any fee is based on an increase in the value of the client's commodity interest account, the trading advisor must specify how that increase is calculated, the period of time during which the increase is calculated, the fee to be charged at the end of that period and the value of the account at which payment of the fee commences.

(5)(i) Any actual or potential conflict of interest regarding any aspect of the trading program on the part of:

(A) The commodity trading advisor;

(B) Any principal of the trading advisor;

(C) Any futures commission merchant with which the client will be required to maintain its commodity interest account; or

(D) Any principal of the futures commission merchant. Included in the description of such conflict shall be any arrangement whereby the trading advisor or any principal thereof may benefit, directly or indirectly, from the maintenance of the client's commodity interest account with a futures commission merchant.

(ii) If there is any such actual or potential conflict of interest, the trading advisor must fully describe the nature of the conflict.

(iii) If any of the foregoing persons does not have any such actual or potential conflict of interest, the trading advisor must make a statement to that effect with respect to each such person.

(6)(i) A statement whether trading in commodity interests will be done or is intended to be done for its own account by:

(A) The commodity trading advisor; or  
(B) Any principal of the trading advisor.

(ii) If any of the foregoing persons will trade or intends to trade for its own account, for each such person the commodity trading advisor must further disclose whether clients will be permitted to inspect the records of that person's trades.

(iii) If any of the foregoing persons will not trade or does not intend to trade in commodity interests for its own account, the trading advisor must make a statement to that effect with respect to each such person.

(7)(i) Any material administrative, civil or criminal action within the five years preceding the date of the Document against:

(A) The commodity trading advisor;  
(B) Any principal of the trading advisor;

(C) The futures commission merchant with which the client will be required to maintain its commodity interest account; or

(D) Any principal of the futures commission merchant.

(ii) If there has been no such action against any of the foregoing persons, the trading advisor must make a statement to that effect with respect to each such person.

(8)(i) The following Risk Disclosure Statement to be prominently disclosed as, and the only language on, the first page of the Disclosure Document:

#### Risk Disclosure Statement

The risk of loss in trading commodity contracts can be substantial. You should therefore carefully consider whether such trading is suitable for you in light of your financial condition. In considering whether to trade or to authorize someone else to trade for you, you should be aware of the following:

(1) You may sustain a total loss of the initial margin funds and any additional funds that you deposit with your broker to establish or maintain a position in the Commodity Futures Market. If the market moves against your position, you may be called upon by your broker to deposit a substantial amount of additional margin funds, on short notice, in order to maintain your position. If you do not provide the required funds within the prescribed time, your position may be liquidated at a loss, and you will be liable for any resulting deficit in your account.

(2) Under certain market conditions, you may find it difficult or impossible to liquidate

a position. This can occur, for example, when the market makes a "limit move."

(3) The placement of contingent orders by you or your trading advisor, such as a "stop-loss" or "stop-limit" order, will not necessarily limit your losses to the intended amounts, since market conditions may make it impossible to execute such orders.

(4) A "spread" position may not be less risky than a simple "long" or "short" position.

(5) The high degree of leverage that is often obtainable in futures trading because of the small margin requirements can work against you as well as for you. The use of leverage can lead to large losses as well as gains.

In some cases, managed commodity accounts are subject to substantial charges for management and advisory fees. It may be necessary for those accounts that are subject to these charges to make substantial trading profits to avoid depletion or exhaustion of their assets. This Disclosure Document contains a complete description of each fee to be charged to your account by the commodity trading advisor.

This brief statement cannot disclose all the risks and other significant aspects of the Commodity Futures Market. You should therefore carefully study this disclosure document and futures trading before you trade.

(ii) If the commodity trading advisor is not also a registered futures commission merchant, the trading advisor must make the additional following statement in the Risk Disclosure Statement, to be prominently disclosed as the last paragraph thereof:

This commodity trading advisor is prohibited by law from accepting funds in the trading advisor's name from a client for trading commodity interests. You must place all funds for trading in this trading program directly with a futures commission merchant.

(9) The following Cautionary Statement, to be prominently disclosed on the cover page of the Document: "The Commodity Futures Trading Commission has not passed upon the merits of participating in this trading program nor has the Commission passed upon the adequacy or accuracy of this Disclosure Document."

(b)(1) If the commodity trading advisor knows or should know that the Disclosure Document is materially inaccurate or incomplete in any respect, it must correct that defect and must distribute the correction to:

(i) All existing clients in the trading program within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect, and

(ii) Each previously solicited prospective client for the trading program prior to entering into an agreement to direct or to guide such prospective client's commodity interest account pursuant to the program.

The trading advisor may furnish the correction by way of an amended Document, a sticker on the Document, or other similar means.

(2) The trading advisor may not use the Document until such correction is made.

(c) The commodity trading advisor must date each Disclosure Document and amendment thereto as of the date it is first used.

(d) The commodity trading advisor may not enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading unless the trading advisor first receives from the prospective client an acknowledgement signed and dated by the prospective client stating that the client received a Disclosure Document for the trading program pursuant to which the trading advisor will direct his account or will guide his trading.

(e)(1) Subject to paragraph (b) of this section, all information contained in the Disclosure Document must be current as of the date of the Document; *Provided, however*, That performance information must be current as of a date not more than three months preceding the date of the Document.

(2) The commodity trading advisor may not use a Disclosure Document dated more than six months preceding the date of its use.

(f)(1)(i) The commodity trading advisor must file with the Commission three copies of the Disclosure Document for each trading program that it offers or that it intends to offer not less than 21 calendar days prior to the date the trading advisor first intends to give the Document to a prospective client in the trading program. The trading advisor must specify with the filing the date it first intends to deliver the Document to a prospective client.

(2) The commodity trading advisor must file with the Commission three copies of all subsequent amendments to the Disclosure Document for each trading program that it offers or that it intends to offer not less than 21 calendar days after the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

(g) This section does not relieve a commodity trading advisor from any obligation under the Act or the regulations thereunder, including the obligation to disclose all material information to existing or prospective clients even if the information is not specifically required by this section.

**§ 4.32 Record-keeping.**

Each commodity trading advisor registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner at its main business office and in accordance with § 1.31. If the commodity trading advisor's main business office is located outside the United States, its territories or possessions, then upon the request of a Commission representative the trading advisor must provide such books and records as requested at the place designated by the representative in the United States, its territories or possessions within 72 hours after receipt of the request.

(a) Concerning the clients and subscribers of the commodity trading advisor:

(1) The name and address of each client and each subscriber.

(2) The acknowledgement specified in § 4.31(d).

(3) All powers of attorney and other documents, or copies thereof, authorizing the commodity trading advisor to direct the commodity interest account of a client or subscriber.

(4) All other written agreements, or copies thereof, entered into by the commodity trading advisor with any client or subscriber.

(5) A list or other record of all commodity interest accounts of clients directed by the commodity trading advisor and of all transactions effected therefor.

(6) Copies of each confirmation of a commodity futures transaction, each purchase and sale statement and each monthly statement received from a futures commission merchant.

(7) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity trading advisor to any existing or prospective client or subscriber, showing the first date of distribution if not otherwise shown on the document.

(b) Concerning the commodity trading advisor:

(1) An itemized daily record of each commodity interest transaction of the commodity trading advisor and each principal thereof, showing the date, price, quantity, commodity interest, delivery or expiration month, person for whom the transaction was effected, the

futures commission merchant carrying the account, and whether the commodity interest was purchased or sold.

(2) Each confirmation of a commodity futures transaction, each purchase and sale statement and each monthly statement furnished by a futures commission merchant to (i) the commodity trading advisor relating to a personal account of the trading advisor, and (ii) each principal of the trading advisor relating to a personal account of such principal.

(3) Books and records of all other transactions in all other business dealings in trading commodity interests and of all cash market transactions in which the commodity trading advisor and each principal thereof engages. Those books and records must include, as applicable, books and records of the type specified in paragraphs (a)(1) through (a)(7) of this section and in paragraphs (a)(1) through (a)(8) of § 4.23.

**Subpart D—Advertising****§ 4.40 [Reserved]**

**§ 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.**

(a) No commodity pool operator, commodity trading advisor, or any principal thereof, may advertise in a manner which:

(1) Employs any device, scheme or artifice to defraud any participant or client or prospective participant or client; or

(2) Involves any transaction, practice or course of business which operates as a fraud or deceit upon any participant or client or any prospective participant or client.

(b)(1) No person may present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, commodity trading advisor, or any principal thereof, unless such performance is accompanied by the following statement: "Hypothetical or simulated performance results have certain inherent limitations. Unlike an actual performance record, simulated results do not represent actual trading. Also, since the trades have not actually been executed, the results may have under-or-over compensated for the impact, if any, of certain market factors, such as lack of liquidity. Simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any

account will or is likely to achieve profits or losses similar to those shown."

(2) If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed.

(c) The provisions of this section shall apply:

(1) To any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations, and

(2) Regardless of whether the commodity pool operator or commodity trading advisor is exempt from registration under the Act.

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

2. Part 140 is amended to add § 140.93 to read as follows:

**§ 140.93 Delegation of Authority to the Director of the Division of Trading and Markets.**

(a) The Commission hereby delegates, until such time as the Commission orders otherwise, the following functions to the Director of the Division of Trading and Markets and to such members of the Commission's staff acting under his direction as he may designate from time to time:

(1) All functions reserved to the Commission in § 4.12 of this chapter;

(2) All functions reserved to the Commission in § 4.22(f)(3) of this chapter; and

(3) All functions reserved to the Commission in § 4.22(g)(3) of this chapter.

(b) The Director of the Division of Trading and Markets may submit any matter which has been delegated to him under paragraph (a) of this section to the Commission for its consideration.

(c) Nothing in this section may prohibit the Commission, at its election, from exercising the authority delegated to the Director of the Division of Trading and Markets under paragraph (a) of this section.

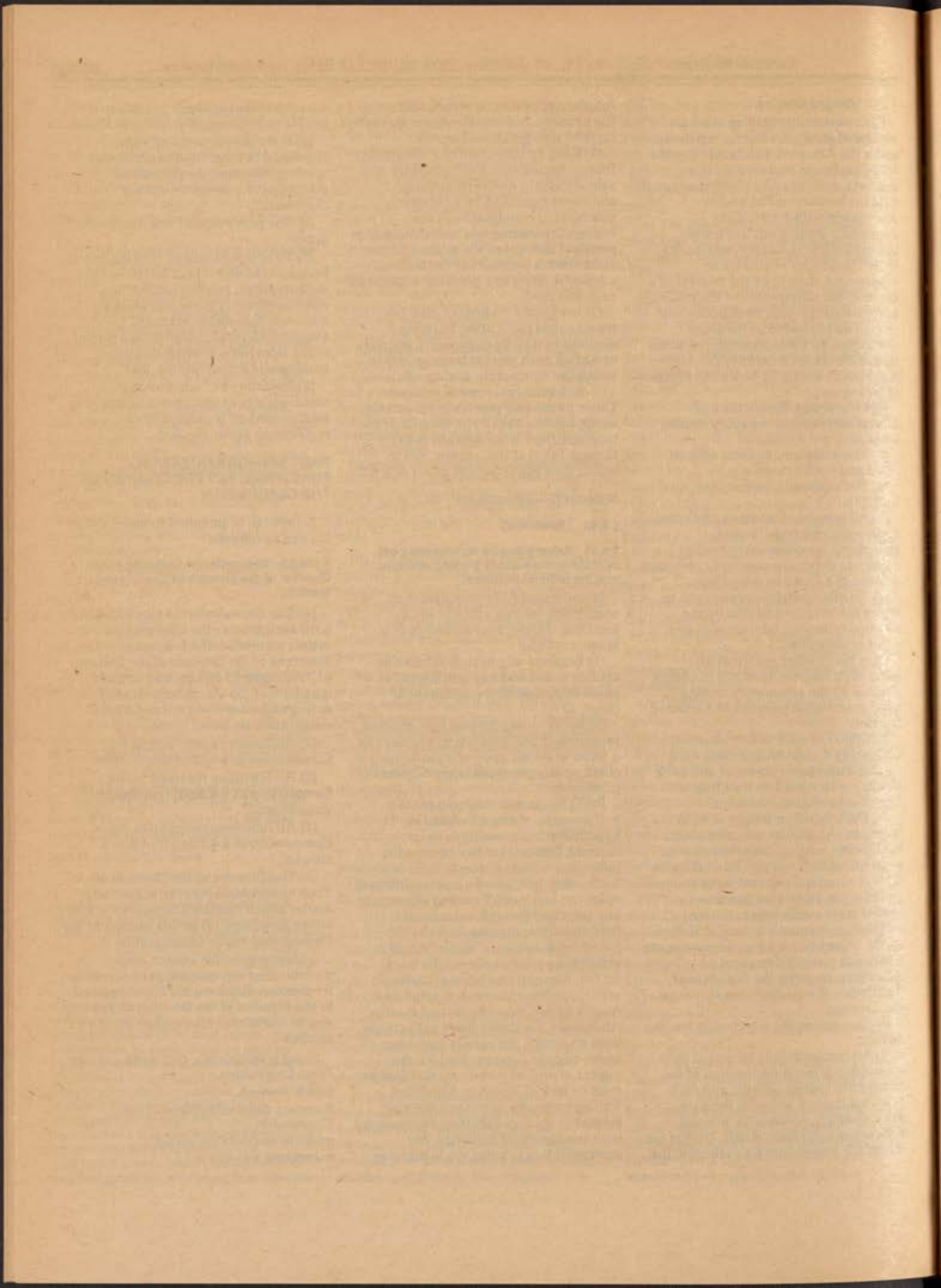
Issued in Washington, D.C. on May 1, 1981 by the Commission.

**Jane K. Stuckey,**

*Secretary, Commodity Futures Trading Commission.*

[FR Doc. 81-13985 Filed 5-7-81; 8:45 am]

**BILLING CODE 6351-01-M**



# **federal register**

---

Friday  
May 8, 1981

---

**Part VI**

## **Department of Energy**

---

**Plan of Action To Implement the  
International Energy Program; Request  
for Comments on Draft**

## DEPARTMENT OF ENERGY

## Plan of Action To Implement the International Energy Program

**AGENCY:** Department of Energy.

**ACTION:** Request for comments on the draft "Plan of Action to Implement the International Energy Program".

**SUMMARY:** The Department of Energy requests written comments on a draft "Plan of Action to Implement the International Energy Program". The draft document describes the types of substantive actions which participants in the Voluntary Agreement and Plan of Action to Implement the International Energy Program (Voluntary Agreement) may take during implementation of emergency oil sharing as provided in the Agreement on an International Energy Program (IEP), TIAS 8278. The IEP emergency oil sharing system, operated by the International Energy Agency (IEA), can be activated only to deal with an oil supply emergency involving at least a seven percent supply shortfall.

Section 252 of the Energy Policy and Conservation Act (EPCA) makes available a limited antitrust defense in respect to actions taken by U.S. oil companies to implement the information and allocation provisions of the IEP, provided such actions are described in a voluntary agreement or plan of action. Any plan of action is required to be as specific in its description of proposed substantive actions as is reasonable in light of known circumstances.

The draft "Plan of Action to Implement the International Energy Program" has been prepared by the Departments of Energy and Justice, in consultation with the Department of State and the staff of the Federal Trade Commission. Following review of submitted comments and possible revision of the draft plan of action in light thereof, the draft will be furnished to the companies participating in the Voluntary Agreement for their consideration. Any plan of action adopted by them is subject to approval by the Secretary of Energy, and by the Attorney General after consultation with the Federal Trade Commission.

If adopted and approved, the "Plan of Action to Implement the International Energy Program" would go into effect only if the President makes a finding that an "international energy supply emergency" exists.

**DATE:** All comments received by July 10, 1981, will be considered.

**ADDRESS:** Comments should be submitted to: Craig S. Bamberger, Assistant General Counsel,

International Trade and Emergency Preparedness (GC-11), Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, Telephone: (202) 252-2900.

**FOR FURTHER INFORMATION CONTACT THE ABOVE OR:**

George G. Dowd, International Affairs (IA-12), Department of Energy, 1000 Independence Avenue SW., Washington, D.C. 20585, Telephone: (202) 252-6777;

Patrick A. Mulloy, Antitrust Division (Energy Section), Department of Justice, P.O. Box 14141, Washington, D.C. 20044, Telephone: (202) 724-6639.

**SUPPLEMENTARY INFORMATION:**

- I. Background
- II. Subject of Comments
- III. Specific Comments Requested
- IV. Comment Procedures

**I. Background**

Following the oil embargo of 1973, the United States and certain other members of the Organization for Economic Cooperation and Development (OECD) entered into the IEP Agreement, which provides for the international sharing of oil during supply emergencies. Pursuant to the IEP, the IEA has been established as an autonomous institution within the OECD to operate the IEP emergency sharing system. The IEP emergency sharing system may be activated only when the IEA group of twenty-one member countries as a whole or an individual IEA country experiences a seven percent or greater shortfall of available petroleum supplies, measured against a specified base period.

U.S. and other IEA country oil companies would play a vital role in the implementation of the emergency sharing system, providing essential information, advising the IEA on supply and logistical matters, and actually effectuating international oil allocation. To facilitate U.S. company participation in the IEA, the Congress in 1975 enacted Section 252 of EPCA, which authorizes the development of voluntary agreements and plans of action to implement the allocation and information provisions of the IEP, and makes available a limited antitrust defense in respect to actions taken to develop or carry out voluntary agreements and plans of action.

The Voluntary Agreement and Plan of Action to Implement the International Energy Program was agreed to in 1976 by a number of U.S. oil companies. See 41 FR 14998. At the present time the following twenty-one companies are participants in the Voluntary Agreement:

Amerada Hess Corporation  
Ashland Oil Inc.  
Atlantic Richfield Company  
Caltex Petroleum Corporation  
Champlin Petroleum Company  
Cities Service Company  
Continental Oil Company  
Exxon Corporation  
Getty Oil Company  
Gulf Oil Corporation  
Mobil Oil Corporation  
Murphy Oil Company  
Occidental Petroleum Corporation  
Phillips Petroleum Company  
Shell Oil Company  
Standard Oil Company of California  
Standard Oil Company (Indiana)  
Standard Oil Company of Ohio  
Sun Company  
Texaco, Inc.  
Union Oil Company of California

Section 6(c)(1) of the Voluntary Agreement provides for the development of plans of action elaborating and applying IEA allocation principles and measures, and describing the types of substantive actions which may be taken under the plan, in the event that the sharing system is triggered by an oil supply emergency. Section 6(c)(1) and EPCA Section 252(d)(3) require that such a plan of action be as specific in its description of proposed substantive actions as is reasonable in light of known circumstances. Approval of the Secretary of Energy, and of the Attorney General after consultation with the Federal Trade Commission, is required before a plan of action may be carried out.

The purpose of this request is to obtain comments on a draft "Plan of Action to Implement the International Energy Program" which has been prepared by the Departments of Energy and Justice, in consultation with the Department of State and the Staff of the Federal Trade Commission. Comments submitted will be considered in reviewing and possibly revising this draft plan of action, prior to its consideration by industry.

The Department of Energy, with the approval of the Attorney General, then may convene a working party consisting of U.S. companies participating in the Voluntary Agreement, for the purpose of considering and to the extent necessary further developing a draft "Plan of Action to Implement the International Energy Program." Any meeting of such a working party will be open to public attendance; preceded by timely and adequate Federal Register notice; and initiated and chaired by a regular full-time Federal employee. Interested persons will be afforded an opportunity

at such a meeting to present views and arguments. A verbatim transcript will be kept, and made available for public inspection.

If adopted by the Voluntary Agreement participants and approved by the Secretary of Energy and by the Attorney General after consultation with the Federal Trade Commission, the "Plan of Action to Implement the International Energy Program" would go into effect only if the President finds that an "international energy supply emergency" exists. EPCA Section 252(e)(1) defines this term as meaning a period when the President determines that oil allocation to IEA countries is required by the IEP.

## II. Subject of Comments

### *Plan of Action To Implement the International Energy Program*

#### 1.0 Introduction.

1.1 This Plan of Action is adopted pursuant to Section 252 of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. 6272, and Sections 5 and 6 of the Voluntary Agreement and Plan of Action to Implement the International Energy Program, 41 FR 14998 (April 1, 1976), as amended, as a supplement to the existing Voluntary Agreement and Plan of Action, to enable United States oil companies and their employees to participate in the International Energy Program and in advisory bodies created by the International Energy Agency.

1.2 Section 252(f) of EPCA provides that persons engaged in activities pursuant to a Plan of Action shall have as a defense to any civil or criminal action brought under the antitrust laws of the United States, or under any similar state laws, that challenged actions were taken in the course of carrying out a Plan of Action and were in compliance with the requirements of Section 252 of EPCA and rules promulgated thereunder.

#### 2.0 Activation.

This Plan of Action as well as the existing Plan of Action shall enter into effect upon a determination by the President that an international energy supply emergency exists, and notification of the participants in the Voluntary Agreement.

#### 3.0 Deactivation.

After a determination by the President that an international energy supply emergency no longer exists and publication thereof in the Federal Register, no further action shall be initiated pursuant to this Plan of Action or the existing Plan of Action, and action previously initiated shall be completed as promptly as possible, and not later than 90 days after notification,

provided that upon specific application the Secretary of Energy, with the concurrence of the Attorney General after consultation with the Federal Trade Commission, may approve extensions of such 90 day period.

#### 4.0 Definitions.

For purposes of this Plan of Action:

"Allocation meeting" includes the following group meetings held at the allocation site (with or without IEA Secretariat participation):

(a) Meetings of the entire Industry Supply Advisory Group;

(b) Meetings of the Industry Supply Advisory Group's Country Supply, Supply Coordination or Supply Analysis subgroups;

(c) Meetings of the Industry Supply Advisory Group Manager or Deputy Manager and Industry Supply Advisory Group subgroup heads; and

(d) Meetings of the Industry Supply Advisory Group Manager or other Industry Supply Advisory Group personnel with members of the Industry Advisory Board.

"Allocation site" is that space in IEA headquarters or elsewhere designated by the Allocation Coordinator as the work area in which the Emergency Management Organization shall conduct its operations.

"Confidential or proprietary information or data" is information or data relating to a firm or group of firms that (a) may tend to cause harm to competition or to the competitive position of that firm or group of firms if disclosed and (b) customarily (i) is not disclosed by that firm or group of firms to other persons or (ii) is disclosed to other persons pursuant to a restriction on further disclosure of such information or data.

"Communication" is any disclosure, provision or exchange of data or other information relating to the carrying out of the emergency allocation.

"Emergency Management Organization" is all of the functional offices or groups at the allocation site which will supervise the allocation process, and includes the Standing Group on Emergency Questions, the Allocation Coordinator, various task forces on the IEA Secretariat, and the Industry Supply Advisory Group.

"Emergency reserve drawdown obligation" is that volume of oil taken out of emergency reserves for the IEA countries as a group to bridge the gap between the group's permissible consumption and available supplies; a particular IEA country's percentage share in that obligation is equal to its percentage share of the aggregate emergency reserve commitment of the group.

"EMM" is the Emergency Management Manual issued by the IEA as in effect during an international energy supply emergency.

"EPCA" is the Energy Policy and Conservation Act, 42 U.S.C. 6201 et seq., as amended.

"Firm" is any association, company, corporation, estate, individual, joint venture, partnership or sole proprietorship, or any other entity however organized, including charitable, educational or other eleemosynary institutions.

"IEA" is the International Energy Agency established to implement the Agreement on an International Energy Program.

"IEA country" is a participating country of the IEA including Norway.

"IEP" is the International Energy Program established pursuant to the Agreement on an International Energy Program signed on November 18, 1974, TIAS 8278, including (a) the Annex entitled "Emergency Reserves", (b) any amendment to such Agreement that includes another nation as a party to such Agreement, and (c) any technical or clerical amendment to such Agreement.

"International energy supply emergency" is any period (a) beginning on any date on which the President determines that allocation of petroleum products to nations participating in the IEP is required by Chapters III and IV of the IEP and (b) ending on a date on which he determines that such allocation no longer is required.

"ISOM" is the Industry Supply Advisory Group/IEA Secretariat Operations Manual describing activities of the Industry Supply Advisory Group and the IEA Secretariat during a period when the Secretariat and the Industry Supply Advisory Group are assisting the Allocation Coordinator in the international allocation of oil pursuant to Chapters III and IV of the IEP.

"Oil" is crude oil, petroleum products, refinery feedstocks and finished products produced in association with natural gas and crude oil, which are or may be owned or controlled by a firm, including any oil destined directly or indirectly for import into the United States or any foreign country, or produced or refined in the United States.

"Participant" is an oil firm which has joined the Voluntary Agreement, and whose participation therein has been approved by the Secretary of Energy (or the Administrator of the Federal Energy Administration) and the Attorney General in accordance with Section 9 of the Voluntary Agreement.

"Person" is an individual, firm, estate, trust, sole proprietorship, partnership, association, company, joint-venture, corporation, or a charitable, educational or other eleemosynary institution, and includes any officer, director, owner or duly authorized representative thereof.

"Questionnaire A" means the monthly data submission by a Reporting Company to the IEA which provides for the current month, the two prior months and the two following months, specified data on imports, exports, indigenous production, stocks at sea and inventories to, from or in IEA countries as prescribed in the EMM and denominated therein as "Questionnaire A".

"Questionnaire B" means the monthly data submission by the National Emergency Sharing Organization or other governmental agency of an IEA country which provides for the current month, the two prior months and the two following months, specified data on imports, exports, indigenous production, stocks at sea and inventories for all oil firms engaged in such activities in the country concerned, as prescribed in the EMM and denominated therein as "Questionnaire B".

"Type 2 activities" include those activities of Reporting Companies defined or described as "Type 2 activities" in the EMM. In general, these include submission of data to National Emergency Sharing Organizations or other governmental agencies of IEA countries and to the IEA, communications with National Emergency Sharing Organizations, the IEA and other Reporting Companies in connection with the making of "voluntary offers" to reallocate or redirect oil supplies in response to a request of the Emergency Management Organization, and implementation of transactions pursuant to those voluntary offers which have been accepted by the Allocation Coordinator.

"Type 3 activities" include those activities defined or described as "Type 3 activities" in the EMM. Generally, these will include all actions to implement international oil allocation mandated by governments of IEA countries, pursuant to the IEP.

"Voluntary Agreement" means the Voluntary Agreement and Plan of Action to Implement the International Energy Program, 41 FR 13998 (April 1, 1976), as amended.

#### 5.0 Scope of Coverage.

5.1 This Plan of Action is a supplement to the existing Voluntary Agreement and to the more general existing Plan of Action, which remains in effect. This Supplemental Plan of

Action describes in greater detail the activities of U.S. companies and persons, which it presently is anticipated would take place during an international energy supply emergency, in advising and assisting the IEA in implementing Chapters III and IV of the IEP. Actions and communications comprehended within these activities come within the coverage of this Plan of Action and, if carried out in accordance with the terms of Section 252 of EPCA, applicable regulations implementing Section 252, the Voluntary Agreement, and the conditions set forth in this Plan of Action, are entitled to the antitrust defense accorded under Section 252(f) of EPCA.

5.2 Specifically excluded from coverage of this Plan of Action and the antitrust defense are the following activities: (a) those defined or described in the EMM as "Type 1" activities, which are undertaken voluntarily and independently of any request by the IEA during a period of international energy supply emergency and which may be considered to constitute usual commercial activities by U.S. oil companies in both domestic and international commerce, including sales or exchanges with non-affiliated companies; and (b) any actions initiated during times other than an international energy supply emergency.

#### 6.0 General Description of Entities Involved.

This section describes generally the entities presently expected to participate in the IEA's allocation activities during an international energy supply emergency.

6.1 *The Standing Group on Emergency Questions ("SEQ") Emergency Group* is an IEA body, composed of representatives from each IEA country, which is convened during the period when the IEA allocation mechanism is activated. It is responsible for ensuring intergovernmental agreement or consensus as regards decisions taken in implementation of the IEP during an emergency; it also is responsible for maintaining communication between the IEA and IEA countries on matters of emergency policy or problems.

6.2 *The Allocation Coordinator* is the Executive Director of the IEA; he is assisted by a small team and may designate one or more members of this team to act on his behalf on particular matters. The Allocation Coordinator and his team will be responsible to the SEQ Emergency Group for the immediate supervision and direction of the allocation process. This responsibility will include reviewing and approving

proposed allocation actions, coordinating with the SEQ Emergency Group on policy guidance and on problems, and ensuring that the implementation of allocation is consistent with the principles and objectives of the IEP and that all of the appropriate resources of all Reporting Companies as a group are used in resolving allocation problems. The Allocation Coordinator is responsible for accepting for implementation those voluntary offers he deems most suitable in the circumstances.

6.3 *The IEA Secretariat*, consisting of the Executive Director and staff of the IEA, will be organized into several task forces to deal with various aspects of the emergency operation.

6.4 *The National Emergency Sharing Organizations ("NESOs")* are governmental organizations in each IEA country which will be responsible for national oil reallocation, other national energy emergency measures, and liaison with the IEA on matters of international oil allocation in an emergency.

6.5 *The Industry Supply Advisory Group ("ISAG")* is an ad hoc group of the Industry Advisory Board made up of representatives from the Reporting Companies, which in its substantive allocation activities is responsible to the IEA. The ISAG will serve as an advisory group to the Allocation Coordinator during a period of oil allocation under Chapters III and IV of the IEP and will coordinate, under the guidance of the Allocation Coordinator, voluntary rearrangement of supplies by Reporting Companies including independent development of transactions in order better to direct supplies to meet IEA calculated supply rights. It is composed of oil industry supply, logistics, maritime and other experts employed by Reporting Companies and presently includes an ISAG Manager, a Deputy Manager and the heads and members of the following subgroups:

(a) *The Supply Coordination Group*, each of whose members is assigned to communicate with and process the material received from a specified group of Reporting Companies.

(b) *The Country Supply Group*, each of whose members is assigned, together with a member of one of the Secretariat's task forces, to communicate with and process the material received from a specified group of IEA country NESO's.

(c) *The Supply Analysis Group*, which assists the analytical efforts of the Supply Coordination Group and the Country Supply Group as assigned, and is responsible for all other ISAG analytical work on supply reallocation

problems or potential problems identified in the course of the supply emergency.

6.6 *The Reporting Companies* are a group of oil companies so designated by the IEA, including all U.S. company participants in the Voluntary Agreement. During each monthly cycle they are responsible for submitting appropriate Questionnaire A data to the IEA and NESO's or other governmental agencies in countries in which they operate, and for carrying out Type 2 and Type 3 allocation activities.

6.7 *The "Non-Reporting Companies"* are firms which are not "Reporting Companies" and which submit data on indigenous production, imports, exports, stocks at sea and inventories, and make voluntary offers to redirect oil supplies. These submissions and offers are made to NESO's but not to the IEA directly.

6.8 *The Industry Advisory Board ("IAB")*, whose members are drawn from the group of Reporting Companies, has been established by the IEA to provide advice and consultation on emergency oil sharing and related questions. When the emergency sharing system is activated the IAB may be consulted on specific oil sharing and related questions by the Allocation Coordinator and his team and by the ISAG, at the request of the SEQ Emergency Group, as described in Section 7.8. It also may be consulted from time to time by the ISAG Manager on ISAG organizational, administrative and personnel matters.

#### 7.0 *General Description of the Allocation Process.*

The IEA international allocation operation is governed by a monthly cycle of scheduled activities set by the Allocation Coordinator, as generally described in the EMM. While normal commercial activities of the Reporting Companies, both within countries and in international trading, will go forward and change throughout the month in response to changing circumstances, the international allocation activities of U.S. Reporting Companies and the ISAG which are covered by this Plan of Action are guided by this schedule as to both timing and type of activity undertaken. Unless circumstances require modification by the Allocation Coordinator, the monthly timetable governing operations typically would be in accordance with Sections 7.1 through 7.9.

7.1 After notification of the triggering of an international energy supply emergency (or, in a subsequent month, after the beginning of the monthly cycle), Reporting Companies will submit Questionnaire As to the IEA. At the same time their affiliates in IEA

countries will submit to their NESOs or other governmental agencies similar information or data on operations in those countries. These data will be incorporated, along with aggregate information with respect to their domestic Non-Reporting Companies, in Questionnaire Bs which will be submitted to the IEA by IEA countries.

7.2 The ISAG's Supply Coordination Group will analyze Questionnaire As for errors or anomalies, and ISAG's Country Supply Group, with its counterparts from the Secretariat, will do the same with Questionnaire Bs. Possible errors in the questionnaires, as well as discrepancies between Questionnaire As and Bs, then will be discussed with the Reporting Companies and NESOs.

7.3 The questionnaire data will be processed by the Secretariat to obtain the supply right, the emergency reserve drawdown obligation and the allocation right or allocation obligation of each IEA country for the monthly cycle, taking into account any adjustment provided for in the EMM. The resulting allocation rights and allocation obligations are provided to the Allocation rights and allocation obligations are provided to the Allocation Coordinator, the Secretariat, the SEQ Emergency Group and the ISAG, and transmitted to NESOs and Reporting Companies and through NESOs to Non-Reporting Companies.

7.4 Based on this allocation right/allocation obligation information, the Reporting Companies will ascertain whether their scheduled or contemplated international shipments can be reallocated in order to assist in balancing allocation rights and allocation obligations. They also may explore with non-affiliated companies whether this result can be accomplished through sale or exchange with those companies. Within a specified time Reporting Companies are expected to notify the IEA of their potential voluntarily to meet each IEA country's allocation right or allocation obligation, and may submit to the IEA a number of volumetric voluntary offers to reallocate supplies. These may be "open" offers to supply a quantity of oil to any destination chosen by the IEA or to receive oil from any available source. They also may be "closed-loop" offers of a transaction between affiliates or with another firm or a NESO to divert quantities of oil from a specified country to another specified country. During the same period, NESOs will seek to develop similar voluntary offers from Non-Reporting Companies in their jurisdictions and submit them to the IEA.

7.5 The ISAG's Supply Coordination Group will analyze voluntary offers received from Reporting Companies, and may contact the Reporting Companies for clarification of details, to suggest possible modifications, or to explore the possibility of additional offers. The ISAG's Country Supply Group and its Secretariat counterparts will do the same for voluntary offers received from NESOs.

7.6 In accordance with criteria set forth in Sections 8.3(i) and 8.3(j), ISAG and Secretariat personnel will undertake a balancing of allocation rights and allocation obligations, including a matching of "supply" and "receive" offers and an examination of "closed-loop" offers for suitability, for the periods covered under the current monthly allocation cycle, for future monthly cycles where applicable, and to fulfill unsatisfied allocation rights or allocation obligations from prior monthly cycles.

7.7 ISAG and the Secretariat will notify the Reporting Companies and NESOs of the extent to which the Allocation Coordinator has approved ISAG's recommendation for acceptance of certain offers. Within a specified period the notified entities will confirm that they are implementing these offers. If appropriate, they also will confirm whether they have been able to conclude any additional arrangements previously suggested to them by ISAG or the Secretariat. All these results are to be reported by ISAG to the Allocation Coordinator, who in turn will report the information to the SEQ Emergency Group.

7.8 If substantial unfulfilled allocation rights and allocation obligations remain among IEA countries, the SEQ Emergency Group may request the ISAG and Allocation Coordinator to consult with the IAB on ways to elicit further voluntary offers to balance these allocation rights and allocation obligations. If the imbalances remain after subsequent efforts by ISAG to implement the recommendations agreed on by the Allocation Coordinator and the IAB, and cannot be resolved on a voluntary basis, the Allocation Coordinator will so inform the SEQ Emergency Group.

7.9 The SEQ Emergency Group then will undertake intergovernmental consultation and, after contacts by the Allocation Coordinator or his team with the Reporting Companies concerned, will determine whether corrective actions previously identified and advised to Reporting Companies, but not undertaken by them on a voluntary basis, should be mandated by IEA

country governments. As a last resort IEA country governments having jurisdiction over the Reporting Companies may order them to carry out Type 3 allocation shipments.

#### 8.0 Description of Activities Covered.

##### 8.1 U.S. Reporting Companies.

Except as otherwise noted in this Plan of Action, the following activities of a U.S. Reporting Company, including communications and other actions, are covered under it:

(a) Preliminary communications with the Emergency Management Organization to ensure that communication channels are working and to discuss schedules for submission of Questionnaire As.

(b) The submission to the IEA of Questionnaire As, and subsequent discussion of these with ISAG or the Secretariat, including provision of amplifying or collateral information, in order to clarify points of information and identify possible errors or anomalies in the questionnaires.

(c) The receipt of the monthly allocation rights and allocation obligations from the IEA, the subsequent development of voluntary offers to supply or receive oil in order to assist in balancing IEA countries' allocation rights and allocation obligations, and the submission of voluntary offers (omitting price and other commercial terms) to the IEA. The voluntary offers may consist of sales or exchanges with other companies as well as intra-company movements.

(d) Communications with other Reporting Companies or with NESOs following receipt of the monthly allocation rights and allocation obligations, for the purpose of developing voluntary offers for the current monthly cycle, including the current and two succeeding months, even if a voluntary offer cannot be agreed on the parties or subsequently is rejected by the Allocation Coordinator.

(e) Discussion with ISAG or the Secretariat to clarify aspects of a voluntary offer submitted, to consider possible modification of a voluntary offer which is seen as needed by ISAG to balance supplies among IEA countries more effectively, or to explore and identify possible additional voluntary offers which might be made.

(f) If a voluntary offer is submitted on an urgent basis, good only for a specified time period which lapses before the voluntary offer has been accepted or rejected by the Allocation Coordinator, any subsequent action to carry out a transaction which is the subject of the voluntary offer is not covered under this Plan of Action unless

a renewed offer is made and accepted by the Allocation Coordinator, or the transaction is mandated by an IEA country government having jurisdiction over the offering firm.

(g) If a voluntary offer is rejected, any subsequent action by the Reporting Company to carry out a transaction which is the subject of the voluntary offer is not covered under this Plan of Action unless a renewed voluntary offer is made and accepted by the Allocation Coordinator, or the transaction is mandated by an IEA country government having jurisdiction over the offering firm.

(h) Any communications and actions necessary and appropriate to carry out a voluntary offer after notification by ISAG or the Secretariat that it has been accepted by the Allocation Coordinator.

(i) Communications with ISAG or the Secretariat to report that accepted voluntary offers are being implemented.

(j) Consultations with the SEQ Emergency Group, interested IEA country governments and, as required, other firms about possible or actual mandatory shipments of oil, and actions taken to carry out mandated shipments of oil.

(k) Communications with ISAG or the Secretariat dealing with appraisal of the monthly allocation cycle.

(l) Any other communication with ISAG or the Secretariat which relates directly to timely aspects of implementing the monthly allocation cycle as generally set out in Section 7.

(m) Communications with the Allocation Coordinator or with duly appointed arbitrators to resolve a dispute arising out of a transaction described in this Section 8.1.

8.2 U.S. IAB Members. Except as otherwise noted in this Plan of Action, the following activities of a U.S. Reporting Company member of the IAB are covered under it, subject to such recordkeeping requirements as may be provided for pursuant to Section 13 of this Plan of Action:

(a) Participation as an IAB member in meetings with the SEQ Emergency Group, the Allocation Coordinator, ISAG representatives or the Secretariat, to develop and transmit advice on the substantive issues set forth in Section 7.8.

(b) Participation as an IAB member in meetings with the ISAG Manager or his Deputy concerning ISAG organizational, administrative or personnel matters.

(c) It is understood that during the course of an international energy supply emergency, other meetings of the IAB and its subcommittees, or other industry bodies created by the IEA, may be scheduled to advise on matters

unrelated to the emergency or only marginally related to the international emergency allocation operation. Such meetings are not covered under this Plan of Action. The provisions of Section 5 of the Voluntary Agreement continue to apply to them as if no emergency had occurred.

8.3 U.S. ISAG Members. Except as otherwise noted in this Plan of Action, the following activities of U.S. Reporting Companies and their representatives serving on the ISAG are covered under it, if within the scope of the representatives' assigned duties:

(a) Communications with Reporting Companies, NESOs, and the Secretariat, to ensure that communication channels are working and to discuss schedules for submission of Questionnaire As or Bs.

(b) Receipt and analysis of Reporting Company Questionnaire As to detect errors or anomalies, and communications with these Reporting Companies to resolve such potential discrepancies.

(c) Receipt and analysis of NESO Questionnaire Bs to detect possible errors or anomalies, and subsequent communications with NESOs to resolve them.

(d) Receipt of the monthly allocation rights and allocation obligations from the Secretariat, the transmission of allocation rights and allocation obligations to Reporting Companies, and analytical discussions within ISAG and with Reporting Companies or NESOs, as well as study of ISAG work formats as required, in order to identify the types of actions which may be needed to correct the imbalances in available supplies among IEA countries.

(e) Contacts with Reporting Companies or NESOs and with the Secretariat on formulations of voluntary offers; the receipt and analysis of voluntary offers, and discussion of them within ISAG; and follow-up contacts with Reporting Companies or NESOs to clarify aspects of voluntary offers submitted, to consider possible modification of an offer which is seen as needed by ISAG more effectively to balance supplies among IEA countries, or to explore and identify possible additional voluntary offers.

(f) Analytical work to develop a country supply/demand profile for an IEA country and to study general product imbalance problems within an IEA country in order to advise the Secretariat or a NESO on possible resolution of these problems. To assist his study of product imbalance problems within a country, a U.S. Reporting Company representative on the ISAG may receive from the government of that

IEA country or from the Secretariat, data on aggregated historical supply patterns for that country, including indigenous production, imports of crude and products by country of origin, exports of crude and products to country of destination, stocks at sea and crude and product inventory profiles. Regional breakdowns may be provided as required. However, no disaggregated individual company information for that country is comprehended in this Section 8.3(f).

(g) Other analytical work on country or company supply plans as requested by the Allocation Coordinator, including following, analyzing and forecasting shipping tonnage availability and requirements, by class of vessel, during the course of an emergency, in addition to communications within ISAG or with outside persons in order to develop necessary information for such shipping analyses.

(h) Participation in the ISAG/Secretariat process of balancing allocation rights and allocation obligations of IEA countries for the periods covered in a monthly allocation cycle, including matching available "supply" and "receive" voluntary offers and examining "closed-loop" offers.

(i) The ISAG in consultation with the Secretariat will evaluate the voluntary offers by Reporting Companies and by NESOs for Non-Reporting Companies. In making its evaluation and recommendations to the Allocation Coordinator, it may be guided by technical factors including the following, in addition to specific guidance from the Allocation Coordinator:

(i) The volumes of oil required to balance the allocation rights and allocation obligations of individual IEA countries;

(ii) The petroleum logistics system of each country, including harbor capacity, storage capacity, and barge/pipeline facilities;

(iii) The specifications of the crude oil being delivered in relation to the refining capability within the country to process that oil;

(iv) Product imbalance problems in IEA countries as compared with the supply mix scheduled for these countries;

(v) Insofar as possible, maintenance of normal supply patterns for various IEA countries and normal supply proportions between crude oil and products and among different categories of crude oil and products;

(vi) Minimization of transportation costs, for example, by avoidance to the greatest possible extent of obvious logistical disadvantages arising from unduly long voyages or empty backhaul

voyages by types of vessels in short supply;

(vii) Spreading as evenly as possible over all IEA countries the overall deviation from the normal IEA crude oil quality due to the supply disruptions;

(viii) Utilization of backhaul voyages for vessels if certain sizes of vessels are or may be in short supply following the onset of a disruption; or

(ix) The need for priorities in considering offers, as among such voluntary offers.

If, after such an evaluation process, there remain alternative allocation possibilities for an IEA country or too many voluntary offers so that a selection must be made, such alternatives may be discussed with the relevant NESO as well as with the Secretariat for the purpose of exchanging views on the choices to be made.

(j) In evaluating potential alternative actions to balance allocation rights and allocation obligations, ISAG is not to take into account the economic benefit or penalty to any Reporting Company or IEA country, or the market share of any Reporting or Non-Reporting Company in any country. Internal fair sharing of available supply is solely a matter for decision by each IEA country.

(k) Participation in development of an ISAG appraisal of the monthly allocation cycle.

(l) Participation, at meetings of ISAG, of the ISAG Manager and Deputy Manager with subgroup heads, and of ISAG subgroups, as well as participation by U.S. Reporting Company representatives on the ISAG in joint work sessions, relating to carrying out of the international emergency monthly allocation cycle as indicated in Sections 7 and 8.3.

(m) Any communications, not already specifically mentioned, with members of ISAG, with the Secretariat, with Reporting Companies and with NESOs, on subjects which relate directly to aspects of implementing the international emergency monthly allocation cycle as indicated in Sections 7 and 8.3.

8.4 *Other Activities.* Such additional actions or communications as may be needed on a timely basis to meet specific problems as they arise in implementing the emergency allocation program of the IEA (as set out in the EMM), provided that such actions or communications are approved by the U.S. Government, in such manner as may be provided for pursuant to Section 13 of this Plan of Action.

9.0 *Confidential or Proprietary Information Which May Be*

*Communicated by or to Voluntary Agreement Participants and Their Employees.*

The following types of confidential or proprietary information or data may be communicated by or to Voluntary Agreement participants or their employees in carrying out activities covered by this Plan of Action:

9.1 Disaggregated Questionnaire A or B data submitted by Reporting Companies or NESOs of IEA countries, and ISAG work formats derived from such data; i.e., disaggregated data as defined in the Questionnaire A and B reporting instructions as specified in the EMM, including:

(a) indigenous production of crude oil and natural gas liquids ("NGLs") and feedstocks;

(b) imports and exports of crude oil, NGLs and feedstocks;

(c) petroleum product imports and exports (in crude oil equivalent);

(d) international marine bunkers;

(e) inventory levels and changes; and

(f) stocks at sea.

9.2 Capability of a refinery to process crude oil or specific crude oils, and the capability of a pipeline, dock or terminal or other storage or transit facility to receive, store, or throughput crude oils or specific crude oils or petroleum products or specific petroleum products.

9.3 Capability of a port, installation, or waterway to receive or move vessels of various sizes and configurations.

9.4 Location, routing, size, specifications and operating characteristics of oil tankers.

9.5 Main characteristics of crude grades and product specifications (excluding individual company crude yields and product specifications).

9.6 Actual and estimated historical production data on crude oils and NGLs for individual countries.

9.7 Aggregated historical country supply patterns for crude oil, NGLs and petroleum products, e.g., imports by country of origin, exports to country of destination, and inventory profiles.

9.8 Specific refinery considerations that prevent acceptance or release of certain crudes, e.g., the inability of a refinery to process specific types of crude oil or to make certain specialty products for which the crude oil is particularly suited; the inability of a type of crude oil to meet product specifications; hazards to refinery operations which processing of a particular type of crude oil might cause; or the need for a refinery to operate at a minimum throughput level.

9.9 Identification of supply logistics problems relating to certain countries or regions of countries.

9.10 Identification, without disclosure of specific costs, prices or financial information, of the existence of certain individual company considerations which would preclude or make impracticable a proposed movement of oil, involving:

- (a) commercial policy;
- (b) supply or transportation factors;
- (c) affiliate, third-party, concessional or other contractual arrangements; or
- (d) constraints relating to actions or policies of governments.

9.11 Identification of product imbalances in certain countries or regions of countries.

9.12 Information or data concerning voluntary offers made by Reporting Companies to supply or receive, and information or data concerning the implementation of voluntary offers which have been accepted by the Allocation Coordinator.

9.13 Clarification, amplification, correction, explanation or supplementation of the types of information enumerated in Sections 9.1-9.12 and 9.14, provided that this Section 9.13 does not supersede any specific prohibition contained in this Plan of Action.

9.14 Such additional information or data as may be needed on a timely basis to meet specific problems as they arise in implementing the emergency allocation program of the IEA (as set out in the EMM), provided that provision of such information or data is approved by the U.S. Government, in such manner as may be provided for pursuant to Section 13 of this Plan of Action.

9.15 This Plan of Action does not cover the communication of the following types of information or data:

- (a) Company market shares of oil or types of oil;
- (b) Individual company information regarding overall long-term investment, divestment, production, refining, operating, transportation or marketing programs; or
- (c) Confidential or proprietary oil prices or other confidential or proprietary commercial terms, except in communications with the Allocation Coordinator to utilize his services to help resolve a dispute involving price or other commercial terms; and communications with any arbitrator duly appointed to resolve price or other commercial term disputes arising out of a voluntary offer or mandated shipment.

10.0 *Disposition Of and Access to Confidential or Proprietary Information or Data.*

10.1 In no case shall an employee or representative of a U.S. participant in the Voluntary Agreement or any affiliate of such a U.S. company, which affiliate is a participant in the Voluntary Agreement, supply to his company or to any other person, any confidential or proprietary information or data obtained as a consequence of his membership in the ISAG or of participation in any NESCO, except such information or data as is necessary to be supplied in the course of carrying out the international oil allocation provisions of the IEP as described in the EMM or in carrying out related NESO activities. No U.S. Reporting Company representative serving on the ISAG may remove any documents related to such allocation from the IEA premises, except as authorized by the U.S. Government in such manner as may be provided for pursuant to Section 13 of this Plan of Action.

10.2 One copy of all Questionnaire A data shall be provided in Questionnaire A format, as distinguished from telex format, to each of the following and to such other persons as the U.S.

Government may specify pursuant to Section 13 of this Plan of Action: Voluntary Agreement Coordinator, International Affairs, IA-12, Department of Energy, Forrestal Building, Room 7F-031, 1000 Independence Avenue SW., Washington, D.C. 20585, Telex, and Twx No. 7108220176

Chief, Energy Section, Antitrust Division, Department of Justice, P.O. Box 14141, Washington, D.C. 20044, Twx No. 7108221907.

10.3 Any confidential or proprietary information or data communicated pursuant to the allocation activities shall be supplied upon request to U.S. Government observers, in accordance with the provisions of this Plan of Action and any guidelines issued pursuant to Section 13.

11.0 *Requirements for Recordkeeping.*

11.1 *Introduction.* Section 252 of EPCA provides that a U.S. Government representative shall be present at all emergency allocation meetings under the Voluntary Agreement and that a full and complete record (where practicable, a verbatim transcript) shall be made. The following sections are in further implementation of the existing U.S. recordkeeping requirements in Section 252 of EPCA and 10 CFR Part 209 and apply such requirements to IEA emergency allocation activities. These requirements apply to U.S. Reporting Companies and to U.S. Reporting Company representatives serving on the ISAG who will be participating in the

allocation activities at the allocation site.

11.2 *Definitions.* For purposes of these recordkeeping requirements the following additional definitions apply:

(a) The term "allocation site communication" means any face-to-face communication (other than administrative, procedural or ministerial in nature) occurring within the allocation site which involves two or more Reporting Company representatives serving on the ISAG, at least one of whom is a U.S. Reporting Company representative.

(b) The term "allocation site telephone conversation" means any telephonic communication (other than a telephonic communication which is administrative, procedural or ministerial in nature, all of the parties to which are within the allocation site) between a U.S. Reporting Company representative serving on the ISAG and (i) another Reporting Company representative on the ISAG and (ii) a Reporting Company, (iii) the Chairman of the IAB, (iv) any NESO representative, or (v) the IEA Secretariat.

11.3 *Oral Communications by U.S. ISAG Members.*

(a) *Covered Oral Communications.* Subject to the procedures and limitations in Sections 11.4 and 11.5, the requirements of this section apply to the following types of oral communications by or to U.S. Reporting Company representatives serving on the ISAG, other than communications with representatives of the IEA Secretariat or members of the SEQ Emergency Group:

- (i) allocation site communications;
- (ii) allocation site telephone conversations; and
- (iii) off-site communications.

(b) *Restrictions on Oral Communications.* All oral communications of U.S. Reporting Company representatives serving on the ISAG related to carrying out the IEA's allocation activities during an international energy supply emergency shall occur on the allocation site except when circumstances make an off-site communication necessary, e.g., when a need for immediate communication arises unexpectedly or after normal working hours or otherwise makes a return to the allocation site impracticable or unreasonable, or when time zone differences involved in necessary communications otherwise would require early morning arrival or late night stay at the allocation site.

11.4 *U.S. Government Monitoring and Recordkeeping at the Allocation Site.*

(a) A U.S. Government observer shall be present throughout all allocation meetings during hours when ISAG normally is engaged in allocation activities and at such other times as the ISAG meets, and may be present during any other communications. It is intended that a U.S. Government observer will be present continuously at the allocation site to monitor allocation meetings, communications, work sessions and individual work by Reporting Company representatives on the ISAG (i) during such regular work hours as ISAG adopts and (ii) at any extraordinary hours if given reasonable advance notice. U.S. Reporting Company representatives serving on the ISAG may engage in, individual work or in communications other than allocation meetings or allocation site communications if no U.S. Government observer is present at the allocation site, provided adequate records of such communications (other than administrative, procedural or ministerial communications between Reporting Company representatives on the ISAG, at the allocation site) are made by the U.S. representatives on the ISAG.

(b) Allocation meetings shall be monitored by a U.S. Government observer, who shall be responsible for keeping a written record of each session or for ensuring that a verbatim transcript is made. Failure of the U.S. Government to maintain a full and complete written record shall not vitiate the antitrust defense accorded by Section 252 of EPCA, unless such failure is due to the willful act of a U.S. Reporting Company representative serving on the ISAG or of a U.S. Reporting Company.

(c) U.S. Government representatives shall be permitted to be present during any communications involving U.S. Reporting Company representatives on the ISAG or during allocation activities involving a U.S. Reporting Company representative on the ISAG, except communications between a U.S. Reporting Company representative on the ISAG and his legal counsel which would be subject to the attorney-client privilege.

#### 11.5 Recordkeeping Requirements for U.S. ISAG Representatives.

(a) A U.S. Reporting Company representative serving on the ISAG shall maintain a full and complete record of an allocation site communication (except when a U.S. Government observer present agrees to maintain such record), allocation site telephone conversation, or off-site communication, by means of entering in a standardized log the date, time, identity of the parties (by name and organization) and a

description of the transaction or information discussed, including identification of any problem involved and any conclusions reached or recommendations made. In the case of an off-site communication, the member also shall state the special circumstances necessitating this communication. Procedural, administrative or ministerial communications between Reporting Company representatives on the ISAG, at the allocation site, need not be recorded.

(b) Where a U.S. Reporting Company representative on the ISAG has been assigned to a joint work session to solve a specific identified problem, the overall subject matter of which already is contained in a full and complete record of an allocation meeting, the result of which work session will be reported at a meeting where a full and complete record will be maintained, then notwithstanding subsection (a), the record of such session to be kept by the U.S. ISAG representative need only include the date, time and identity of the parties and a brief indication of the substance of the discussion during the work session, with a reference to the allocation meeting where it was more fully discussed.

(c) When a U.S. Reporting Company representative on the ISAG contacts a NESO, he shall ascertain whether the NESO person contacted normally is employed by an oil firm, and if so the identity of that organization should be recorded in the log kept pursuant to Section 11.5(a).

(d) Where more than one U.S. Reporting Company representative on the ISAG is involved, the parties may designate who shall make and supply such records. Non-U.S. Reporting Company representatives on the ISAG may make records of communications with U.S. Reporting Companies and with U.S. Reporting Company representatives on the ISAG if such records are kept in the required form and supplied to a U.S. Government observer promptly, and if the U.S. Reporting Company involved agrees.

(e) When a U.S. Reporting Company representative on the ISAG communicates with legal counsel and the communication is subject to attorney-client privilege, the record of such communication need only contain the date and time of the communication, the identity of all parties to the communication and a statement that the matter discussed was subject to the attorney-client privilege.

#### 11.6 Disposition of Records Made at the Allocation Site.

(a) Copies of records required to be maintained by U.S. Reporting Company representatives serving on the ISAG under Section 11.5 shall be submitted to a U.S. Government observer at the allocation site within three working days following the communication involved.

(b) Documents, information or data furnished by the IEA to U.S. Reporting Company representatives serving on the ISAG to be used in balancing allocation rights and allocation obligations, including the IEA country allocation rights and allocation obligations and any other information furnished in step 1 of the IEA allocation implementation steps, as described in the EMM and the ISOM, shall be provided to a U.S. Government observer. Questionnaire A's submitted by non-U.S. Reporting Companies and Questionnaires B's submitted by NESOs and ISAG formats derived therefrom, and voluntary offers submitted by non-U.S. Reporting Companies or foreign NESOs shall be submitted to a U.S. Government observer at the allocation site.

(c) All documents, information or data furnished by or on behalf of U.S. Reporting Companies or the ISAG to the IEA in connection with allocation activities shall be submitted to a U.S. Government observer at the allocation site.

(d) Telexes or other written communications which are sent or received by a U.S. Reporting Company representative serving on the ISAG, to or from a U.S. Reporting Company or the U.S. NESO, and from U.S. Reporting Companies to the ISAG, shall be provided to a U.S. Government observer at the allocation site.

#### 11.7 U.S. Government Monitoring at U.S. Reporting Company Offices.

(a) U.S. Government observers shall be permitted to monitor allocation activities and communications at the offices of U.S. Reporting Companies located in the United States.

(b) U.S. Government observers may be present during all communications between U.S. Reporting Company personnel and Reporting Company representatives on the ISAG or members of the Secretariat, and shall be permitted to observe and interview all U.S. Reporting Company employees in connection with IEA emergency oil allocation activities.

(c) U.S. Government observers shall be permitted to examine and copy any document or information in the possession of a U.S. Reporting Company concerning IEA emergency oil allocation activities.

### 11.8 Records of U.S. Reporting Companies.

(a) A U.S. Reporting Company is required to maintain intra-corporate documents relating to the Voluntary Agreement for five years. With respect to allocation activities such records are expected to include telexes received and sent, memoranda concerning intra-company discussions of sales or exchanges, documentation concerning actions requested by the ISAG or proposed by the Reporting Company, communications with the IEA Secretariat, and any other documents generated by the allocation activities.

(b) A U.S. Reporting Company also is required to make a full and complete record of any communication with Reporting Company representatives serving on the ISAG, including any of its own representatives on the ISAG, except when the Reporting Company has agreed with the ISAG or with a Reporting Company representative on the ISAG that the communication will be recorded by the ISAG or the Reporting Company representative. Such records made by a U.S. Reporting Company shall be sent to the Department of Energy, the Department of Justice and the Federal Trade Commission within three working days of the occurrence.

(c) A U.S. Reporting Company is required to maintain copies of all written communications with another company, ISAG or the Secretariat and to make a full and complete written record of any non-written communication with another company, ISAG or the Secretariat, in connection with carrying out the allocation, i.e., a communication with respect to developing or implementing a voluntary offer.

(d) Records of unwritten communications should be made in the manner described in Section 11.5(a).

(e) Each U.S. Reporting Company is required to forward within two weeks, copies of all allocation records set forth in Section 11.8 (a) through (d), to an appropriate office at company headquarters, where they shall be maintained for five years separately from other company records. These records may be subject to U.S. Government examination during and after the allocation period.

### 11.9 Reports of Communications with Other Companies.

(a) A copy of any written communication by a U.S. Reporting Company with another Reporting Company shall be sent simultaneously to the Departments of Energy and Justice and the Federal Trade Commission, if possible by the same means of transmission as used to send

the original. In the case of a voluntary offer a "clear" copy rather than a coded copy should be sent.

(b) A U.S. Reporting Company shall make a copy of each written communication received from another company and forward it to the Departments of Energy and Justice and the Federal Trade Commission within three working days of its receipt by the company office and/or individual it specifically is addressed to.

(c) A U.S. Reporting Company shall forward to the Departments of Energy and Justice and the Federal Trade Commission, within three working days of its occurrence, a copy of each record of an unwritten communication required to be made pursuant to Section 11.8(c).

(d) Upon advance notice by the Department of Energy, U.S. Reporting Companies shall permit personnel from the Departments of Energy and Justice and the Federal Trade Commission to monitor communications with other companies by means of on-site inspections at the Reporting Companies' offices in the United States, or in three-way conference telephone calls.

### 11.10 Reports of Actions Taken.

(a) Under the Voluntary Agreement, U.S. Reporting Companies must report to the U.S. Government actions taken pursuant to a plan of action. Therefore, each U.S. Reporting Company shall report to the Departments of Energy and Justice and the Federal Trade Commission, actions taken as part of the allocation, such as details of voluntary offers made, those accepted, and reallocations of supply in response to requests for voluntary offers. When forwarding copies of voluntary offers these should be "clear" copies rather than coded ones.

(b) A report should be submitted within seven days of the end of the week in which the action was taken.

(c) The manner and particular content of a report is left to the discretion of the individual U.S. Reporting Company. It can be submitted in any fashion a company believes will best reflect what it has done. In the case of voluntary offers, the record should include substantially all of the information contained in the voluntary offer itself.

### 12.0 ISAG Meetings—Notice Requirements.

12.1 Pursuant to the notice requirements of Section 5 of the Voluntary Agreement, the ISAG emergency activities at the allocation site will be conducted as a single ISAG meeting. Because it will be impracticable to notice all allocation meetings, communications and other activities during the course of a supply emergency, there will be only one

Federal Register notice at the beginning of an emergency supply allocation operation.

12.2 U.S. Government observers shall be notified in advance of the time and place of each allocation meeting, and of any meeting held pursuant to Section 8.2 (a) or (b). If all or a portion of the allocation site is to be in a place other than IEA headquarters, the Allocation Coordinator and/or the ISAG Manager shall so notify the U.S. Government observers assigned to monitor activities of U.S. Reporting Company representatives serving on the ISAG during the allocation period, as much in advance as possible.

### 13.0 U.S. Government Monitoring.

This Plan of Action shall be governed by monitoring guidelines to be issued by the Secretary of Energy pursuant to the provisions of Section 252 of EPCA, 10 CFR Part 209, and the existing Voluntary Agreement and Plan of Action. Such monitoring guidelines may establish procedures for the approvals described in Sections 8.4 and 9.14 or for modification or revocation of this Plan of Action, for further implementation of the recordkeeping requirements established hereunder, for notice to or from U.S. Government observers, or for other matters pertaining to implementation of this Plan of Action.

### 14.0 Termination.

This Plan of Action shall cease to be effective on the expiration of Section 252 of EPCA or any successor statutory authority.

## III. Specific Comments Requested

Comments are invited on the draft "Plan of Action to Implement the International Energy Program" in general, or on particular provisions of it. In addition to such other comments as respondents wish to make, specific comments are requested on the following issues (please reference the pertinent paragraph number when commenting):

1. Does the draft plan of action comprehensively and adequately detail the potential emergency sharing actions and communications of U.S. Voluntary Agreement participants?
2. Section 9.15 provides that, with certain exceptions related to the resolution of disputes, the draft plan of action does not cover the communication of confidential or proprietary oil prices or other commercial terms. The draft plan of action does not cover the communication of such information or data by or to U.S. Reporting Companies for the purpose of carrying out voluntary offers, or of implementing oil shipments

mandated by governments of IEA countries. What impact, if any, will this exclusion have on implementation of the IEA emergency sharing system?

3. The draft plan of action does not cover the communication of confidential or proprietary price or other commercial term information or data to U.S.

Reporting Company representatives serving on the ISAG, or to the IEA Secretariat. What impact, if any, will this exclusion have on implementation of the IEA emergency sharing system?

4. Is it necessary for the draft plan of action to spell out in further detail the communications which may take place between ISAG or Reporting Companies and various other entities, or the actions which may be taken by Reporting Companies?

5. Should the proceedings of the IEA's Dispute Settlement Centre be covered by the draft plan of action?

6. The definition of "oil", which is based on that contained in the IEP, is

not the same as the definition of "petroleum" contained in the Voluntary Agreement. What definition is most appropriate and useful?

7. Should the draft plan of action quote or describe pertinent legal authorities or other provisions bearing on implementation of the Plan of Action, such as EPCA Section 252(d)(1) and Sections 6(c)(2) and (e)(3) of the Voluntary Agreement empowering the Attorney General to amend, modify, disapprove or revoke a plan of action at any time?

8. Section 13 of the draft Plan of Action provides for the subsequent issuance of monitoring guidelines establishing procedures for Government approvals, modification or revocation of the Plan of Action, further implementation of recordkeeping requirements, notice to or from U.S. Government observers, and other matters. Should these procedures be detailed in the draft plan of action?

#### IV. Comment Procedures

You are invited to submit your comments on the draft plan of action, and on the specific questions raised with respect to this draft. Comments should be in writing, identified on the outside envelope and on the documents submitted with the designation, "IEA Plan of Action". Comments should be submitted by the date indicated in the "Date" section of this Notice and to the address indicated in the "Address" section. Ten copies should be submitted. Any information or data submitted which you consider to be confidential must be so identified and submitted in writing, one copy only. We reserve the right to determine the confidential status of such information or data and to treat it according to our determination. We will consider all comments received by July 10, 1981.

Issued in Washington, D.C., May 5, 1981.

Eric J. Fygi,

*Acting General Counsel.*

[FR Doc. 81-13866 Filed 5-6-81; 8:45 am]

BILLING CODE 8450-01-M