Call Report schedule of quarterly averages.

* * * * *

3. Paragraph (c)(4) of § 325.3 is revised as follows:

§ 325.3 Minimum capital requirement.

* * * * *

(c) * * *

(4) In any merger, acquisition or other type of business combination where the FDIC must give its approval, where it is required to consider the adequacy of the financial resources of the existing and proposed institutions, and where the resulting entity is either insured by the FDIC or not otherwise federally insured, approval will not be granted when the resulting entity does not meet the minimum capital requirement.

* * * * *

4. Paragraph (c) of § 325.5 is revised as follows:

§ 325.5 Miscellaneous.

* * * * *

(c) *Reservation of authority.* Notwithstanding the definitions of "primary capital" and "secondary capital" in §§ 325.2(h) and 325.2(i), the Director of the Division of Bank Supervision may, if he finds a newly developed or modified capital instrument or a particular balance sheet entry or account to be the functional equivalent of a component of primary or secondary capital, permit one or more insured banks to include all or a portion of such instrument, entry, or account as primary or secondary capital, permanently or on a temporary basis, for purposes of this part. Similarly, the Director of the Division of Bank Supervision may, if he finds that a particular primary or secondary capital component or balance sheet entry or account has characteristics or terms that diminish its contribution to an insured bank's ability to absorb losses, require the deduction of all or a portion of such component, entry, or account from primary or secondary capital.

* * * * *

5. A new § 325.5(f) is added as follows:

§ 325.5 Miscellaneous.

* * * * *

(f) *Restrictions relating to capital components.* To qualify as primary or secondary capital, a capital instrument must not contain or be subject to any conditions, covenants, terms, restrictions, or provisions that are inconsistent with safe and sound banking practices.

6. New §§ 325.101 and 325.102 are added as follows:

§ 325.101 Optional redemption provision in a subordinated note or debenture.

This interpretive rule describes the effect of the presence of an optional redemption provision on the minimum maturity provision of a "subordinated note or debenture" as defined in § 325.2(j). An optional redemption ("call") provision exercisable by the issuing bank in less than seven years will not be deemed to constitute a maturity of less than seven years for the purposes of this part, provided:

(a) The obligation otherwise has a stated contractual maturity of at least seven years;

(b) The call is exercisable solely at the discretion or option of the issuing bank, and not at the discretion or option of the holder of the obligation; and

(c) The call is exercisable only with the express prior written consent of the FDIC under 12 U.S.C. 1828(i)(1) at the time early redemption or retirement is sought, and such consent has not been given in advance at the time of issuance of the obligation.

§ 325.102 Conditions and covenants inconsistent with safe and sound banking practices.

This interpretive rule provides examples of conditions, covenants, terms, restrictions, and provisions that a capital instrument must not contain or be subject to in order for the instrument to qualify as primary or secondary capital. These examples are not intended to be an exhaustive listing of such conditions and covenants; other conditions and covenants that are not expressly listed in this interpretive rule may be inconsistent with safe and sound banking practices. A condition, covenant, term, restriction, or provision is inconsistent with safe and sound banking practices if it:

(a) Unduly interferes with the ability of the issuer to conduct normal banking operations;

(b) Results in significantly higher dividends or interest payments in the event of a deterioration in the financial condition of the issuer;

(c) Impairs the ability of the issuer to comply with statutory or regulatory requirements regarding the disposition of assets or incurrence of additional debt; and

(d) Limits the ability of the FDIC or a similar regulatory authority to take any necessary action to resolve a problem bank or failing bank situation.

By order of the Board of Directors. Dated at Washington, DC, this 27th day of October 1987.

Federal Deposit Insurance Corporation

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 87-25330 Filed 10-30-87; 8:45 am]

BILLING CODE 6714-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket Number 86-ANE-33; Amdt. 39-5753]

Airworthiness Directive; Rolls-Royce (R-R) plc (formerly Rolls-Royce Limited) RB211-22B, -524, -524B, -524B2, -524B3, and -524C2 Turbofan Engines

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that requires modification of the low pressure turbine (LPT) stage 2 nozzle vane assemblies installed in certain R-R RB211 engines in accordance with the manufacturer's published instructions. The AD is needed to prevent an uncontained LPT stage 1 disk failure that can be caused by damage to the vane assembly.

DATES: *Effective*—December 11, 1987. *Compliance Schedule*—As prescribed in the body of this AD. *Incorporation by Reference*—Approved by the Director of the Federal Register as of December 11, 1987.

ADDRESSES: The applicable service bulletin (SB) may be obtained from Rolls-Royce plc, Technical Publication Department, P.O. Box 31, Derby DE2 8BJ, England.

A copy of the SB is contained in Rules Docket Number 86-ANE-33, in the Office of the Regional Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803, and may be examined between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Chris Gavriel, Engine Certification Branch, ANE-141, Engine Certification Office, Aircraft Certification Division, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273-7084.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal

Aviation Regulations (FAR) to include a new AD requiring modification of the LPT stage 2 nozzle vane assembly in accordance with the Accomplishment Instructions of R–R SB RB.211–72–8301, dated June 20, 1986, was published in the **Federal Register** on September 19, 1986 (51 FR 33277). The proposal was prompted by an uncontained LPT stage 1 disk failure in service. The failure of the LPT stage 1 disk was precipitated by a high pressure turbine (HPT) stage 1 blade failure that damaged the LPT stage 2 nozzle vanes sufficiently for the inner seal to pivot relative to the engine centerline. This condition resulted in severe rub and separation of the LPT stage 1 to 2 disk arm, allowing the LPT stage 1 disk to overspeed and fail.

Since this condition is likely to exist or develop in other engines of the same type design, the AD requires modification of the LPT stage 2 nozzle vane assembly in accordance with R–R SB RB.211–72–8301, Revision 2, dated March 27, 1987.

Interested persons have been afforded the opportunity to participate in the making of this amendment and due consideration has been given to all relevant data and comments received. Three responses were received concerning the proposed rule.

One commenter requested that the AD be changed to include only the engines listed in R–R SB RB.211–72–8301 since the RB211–524B4 and –524D4 engine models use a different type of LPT stage 2 vane assembly. The AD, by incorporating the Accomplishment Instructions of the SB, is limited to Part Numbers (P/N) LK63392, LK63331, and LK63333 LPT stage 2 vane assemblies. However, it was not readily apparent to the commenter, and the wording of the AD has been changed to clarify this.

The same commenter requested that the compliance requirement to modify assemblies at the next shop visit be deleted. The commenter made this request under the assumption that this requirement was based upon a uniform rate of modification throughout the compliance period. The FAA disagrees because deletion of this requirement, which is based on historical removal rate trends, would result in an unacceptable increase in the risk of failure.

The FAA has determined that the proposed wording which defines an LPT module shop visit was more restrictive than necessary. The wording in the AD has been changed to establish an LPT module shop visit which is constituted when the module visits the shop for rework due to its condition, or by a requirement for scheduled maintenance. Since this results in a more relaxed compliance schedule, no further notice is necessary.

A second commenter requested that (1) the compliance category of R–R SB RB.211–72–8301 should remain on a mandatory level, and (2) the compliance deadline be changed to December 31, 1989, if the SB is incorporated in an AD. In regard to the first request, the FAA can not respond because it has no jurisdiction over the compliance category established by the United Kingdom, Civil Aviation Authority (CAA). The commenter's second request is denied because it would cause an unacceptable increase in the risk of failure.

A third commenter requested that the compliance deadline be extended from June 30, 1989, to December 31, 1990. The commenter requested the extension based on the following information received from an operator:

(1) The operator uses directionally solidified (DS) HPT blades in his operation and has experienced no failures to date. The failed blade in service that caused the LPT disk rupture was not the DS type blade.

(2) Intermediate pressure turbine (IPT) blade failures in his operation have not caused a need for this modification.

(3) IPT vane and LPT blade and vane failures have not occurred in his operation.

The FAA disagrees. The potential for an uncontained failure of the LPT stage 1 disk is a function of the current design of the LPT stage 2 vane assembly. The probability of such a failure is associated with upstream failure of any engine component in the gas stream. Service experience to date indicates that many HPT blades, including DS type blades, have failed from many causes although only one such blade failure caused a disk failure. Service experience also indicates that there is a higher propensity to have a disk failure as a result of an IPT blade failure, even though none of the failures in service to date have resulted in damage to the LPT disk of that severity. Therefore, since it is possible to have an LPT stage 1 disk rupture as a result of any significant upstream blade or vane failure, and due to the hazardous nature of such a disk failure, the current compliance schedule is considered adequate.

After the FAA issued the notice of proposed rulemaking (NPRM), (51 FR 33277), which preceded this rule, R–R revised the SB with the approval of the CAA. R–R SB RB.211–72–8301, Revision 2, dated March 27, 1987, adds descriptive information to identify the various standards of existing stage 2 nozzle vane assemblies. Since more P/N's are now identified, the FAA will issue an NPRM that will propose to amend this AD to include all P/N's affected since that change is beyond the scope of this action.

Conclusion

The FAA has determined that this regulation involves approximately 428 RB211–22B and –524, –524B2, 524B3, 524C2 engines (domestic fleet) at an approximate total cost of 1.9 million dollars. It has also been determined that few, if any, small entities within the meaning of the Regulatory Flexibility Act will be affected since this regulation affects only operators using Lockheed L–1011 series aircraft in which the RB211 series engines are installed, none of which are believed to be small entities. Therefore, I certify that this action (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the final evaluation prepared for this action is contained in the regulatory docket. A copy of it may be obtained by contacting the person identified under the caption **"FOR FURTHER INFORMATION CONTACT"**.

List of Subjects in 14 CFR Part 39

Engines, Air transportation, Aircraft, Aviation safety, Incorporation by reference.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulations (FAR) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421, and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding to § 39.13 the following new airworthiness directive (AD):

Rolls-Royce plc (formerly Rolls-Royce Limited): Applies to Rolls-Royce (R–R) RB211–22B, –524, –524B, –524B2, –524B3, and –524C2 turbofan engines

Compliance is required as indicated, unless already accomplished.

To prevent low pressure turbine (LPT) stage 1 disk uncontained failure, accomplish the following:

Modify LPT stage 2 nozzle vane assemblies Part Numbers LK63392, LK63331, and LK63333, in accordance with the

Accomplishment Instructions of R–R Service Bulletin (SB) RB.211–72–8301, Revision 2, dated March 27, 1987, at the next shop visit of the LPT module, but not later than June 30, 1989. **Note.**—For the purpose of this AD, an LPT module shop visit is defined as separation of the LPT rotor assembly from the LPT case/vane assembly as necessitated by (1) its condition or (2) a requirement for scheduled maintenance.

Aircraft may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

Upon request, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, Engine Certification Office, Aircraft Certification Division, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803.

Upon submission of substantiating data by an owner or operator through an FAA maintenance inspector, the Manager, Engine Certification Office, New England Region, may adjust the compliance time specified in this AD.

R–R SB RB.211–72–8301, Revision 2, dated March 27, 1987, identified and described in this document, is incorporated herein and made a part hereof pursuant to 5 U.S.C. 552(a)(1). All persons affected by this directive who have not already received this document from the manufacturer may obtain copies upon request to Rolls-Royce plc, Technical Publication Department, P.O. Box 31, Derby DE2 8BJ, England. This document also may be examined at the Office of the Regional Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803, Rules Docket Number 86–ANE–33, Room 311, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except federal holidays.

This amendment becomes effective on December 11, 1987.

Issued in Burlington, Massachusetts, on October 7, 1987.

Jack A. Sain,

Acting Director, New England Region.

[FR Doc. 87–25260 Filed 10–30–87; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 87–NM–43–AD; Amdt. 39–5760]

Airworthiness Directives; SAAB Fairchild Model SF–340A Series Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment amends an existing airworthiness directive, applicable to all SAAB Fairchild Model SF–340A series airplanes, which currently applies limitations to the operation of the cabin lighting system, to eliminate an unsafe condition created by the potential for electrical arcing. This action limits the applicability to specific airplanes and also provides for terminating action.

EFFECTIVE DATE: December 16, 1987.

ADDRESSES: The applicable service information may be obtained from SAAB Aircraft, Product Support, S–58188, Linkoping, Sweden. This information may be examined at FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Ms. Judy M. Golder, Standardization Branch, ANM–113; telephone (206) 431–1967. Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C–68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to amend AD 85–25–54, Amendment 39–5359 (51 FR 25682; July 16, 1986), to limit the applicability to specific airplanes and provide for terminating action, was published in the **Federal Register** on July 2, 1987 (52 FR 25028).

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received in response to the proposal.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 15 airplanes of U.S. registry will be affected by this AD. Since this amendment will only limit the number of affected airplanes, and provide an optional terminating action, it does not impose any additional monetary or regulatory burden on any operator.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities, because it imposes no additional burden. A final evaluation has been prepared for this regulation and has been placed in the docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

PART 39—[AMENDED]

1. The authority citation for Part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By amending AD 85–25–54, Amendment 39–5359 (51 FR 25682; July 16, 1986), as follows:

A. Change the applicability statement to read:

SAAB-Fairchild: Applies to Model SF–340 airplanes, airliner version, listed in SAAB–SCANIA Service Bulletin SF340–33–016, Revision 1, dated April 3, 1987, certificated in any category.

B. Add a new paragraph D. that reads:

D. Installation of Modification 1422, as described in SAAB–SCANIA Service Bulletin SF340–33–016, Revision 1, dated April 3, 1987, constitutes terminating action for the requirements of paragraph A. of this AD.

This amendment becomes effective December 16, 1987.

Issued in Seattle, Washington, on October 22, 1987.

Mel Yoshikami,

Acting Director, Northwest Mountain Region.

[FR Doc. 87–25261 Filed 10–30–87; 8:45 am]

BILLING CODE 4910-13-M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 3, 4 and 140

Relief From Regulation as a Commodity Trading Advisor for Certain Persons; Relief From Compliance With Subpart B of Part 4 for Certain Commodity Pool Operators; Disclosure Documents and Annual Reports

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rules.

SUMMARY: The Commodity Futures Trading Commission (the "Commission") has adopted § 4.6, which excludes certain otherwise regulated persons, such as State-regulated

insurance companies, from the definition of the term "commodity trading advisor" ("CTA") and § 4.14(a)(8), which exempts certain other persons, such as registered investment advisers ("IAs"), from registration as a CTA. To implement this relief, the Commission has adopted certain other amendments to its regulations. The Commission also has adopted § 4.12(b), which provides relief from specific compliance with certain disclosure, reporting and recordkeeping requirements of Part 4 for registered commodity pool operators ("CPOs") who operate pools which, among other things, trade generally and routinely in securities instruments and who intend to commit no more than 10 percent of the fair market value of their pools' assets as initial margin or as option premiums for commodity interest trading. Finally, the Commission has adopted certain technical amendments to Part 4 regarding the Disclosure Document required of registered CPOs and CTAs and the Annual Report required of registered CPOs.

EFFECTIVE DATES: Sections 3.16(a)(3), 4.6, 4.12, 4.14(a)(8), 4.21(a)(17)(i), 4.21(g), that portion of § 4.22(c) which pertains to the number of Annual Report copies that must be filed, §§ 4.31(f) and 140.93(a)(1) and (a)(6) are effective November 2, 1987. That portion of § 4.22(c) which pertains to when the Annual Report must be distributed and filed will become effective December 2, 1987.

FOR FURTHER INFORMATION CONTACT: With respect to §§ 3.16, 4.6, 4.12, 4.14 and 140.93, Barbara S. Gold, Assistant Chief Counsel, and with respect to §§ 4.21, 4.22 and 4.31, Patricia N. Gillman, Senior Special Counsel, Division of Trading and Markets, 2033 K Street NW., Washington, DC 20581. Telephone (202) 254-8955.

SUPPLEMENTARY INFORMATION:

I. Introduction

The term "commodity trading advisor" is defined in section 2(a)(1)(A) of the Commodity Exchange Act, as amended (the "Act"), 7 U.S.C. 2 (1982), to mean:

> [A]ny person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market, any commodity option authorized under section 4c, or any leverage transaction authorized under section 19, or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) any bank or trust company or any person acting as an employee thereof, (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, (v) the fiduciary of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, (vi) any contract market, and (vii) such other persons not within the intent of this definition as the Commission may specify by rule, regulation, or order: *Provided*, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession * * *.

Section 4m(1) of the Act, 7 U.S.C. 6m(1) (1982), generally makes it unlawful for any person to engage in business as a CTA without being registered as such. Part 4 of the Commission's regulations, 17 CFR Part 4 (1987), governs the operations and activities of CTAs.[1]

In connection with the adoption of the Futures Trading Act of 1986, Pub. L. No. 99-641, 100 Stat. 3556 *et seq.* (1987), the House of Representatives Committee on Agriculture (the "Committee") considered a proposal to exclude certain persons from the CTA definition.[2] The Committee Report then noted the Commission's objections to the breadth of the proposal. It further noted the Commission's questioning of the need for a statutory amendment to the CTA definition in light of existing authority in section 2(a)(1)(A) of the Act,[3] and the Commission's prior responsiveness and stated preparedness to the requests of insurance companies regarding some of the problems that would have been addressed by the proposed amendment.

In light of the foregoing, the Committee declined to adopt the proposed amendment. Instead, the Committee urged the Commission to issue regulations in this regard. As the Committee Report states:

> The Committee believes that any insurance company subject to regulation by State insurance departments (including any wholly owned subsidiary or employee thereof), provided its commodity advisory activities are solely incidental to the conduct of the business of the insurance company as such, generally is not within the intent of the definition of the term "commodity trading [advisor]." The Committee similarly believes that any person who is excluded from the definition of the term "commodity pool operator" by Commission Rule 4.5 should be excluded from the commodity trading advisor definition, provided its commodity advisory activities are solely incidental to its operation of those trading vehicles for which Rule 4.5 provides relief. Relatedly, where the advisor advises an entity that is excluded from registration as a commodity pool under Rule 4.5 or is a Rule 4.5 qualifying entity and such advisor is subject to appropriate regulation under the Investment Advisers Act, that advisor should ordinarily be exempted from commodity trading advisor registration if its commodity advice is solely incidental to its business of providing securities advice to such entity and the advisor is not otherwise holding itself out as a commodity trading advisor. Therefore, the Committee urges the Commission to exercise its authority to adopt regulations in regard to these matters.
>
> Should the Commission determine that registration as a commodity trading advisor is required, the Committee expects that the Commission will use its existing authority to consider other appropriate relief. In this regard, the Committee is aware that the Commission has exercised its authority to limit, by exemption, those employees of otherwise regulated entities who must register as an associated person of a commodity trading advisor. The Committee further understands that the Commission has coordinated its activities with the Securities and Exchange Commission to eliminate duplicative requirements, for example, by deeming in appropriate cases compliance with SEC disclosure, recordkeeping, and reporting requirements as sufficient compliance with the Commission's corresponding commodity pool operator requirements. The Committee intends that the Commission will continue to provide this and such other relief as may be appropriate to applicants for registration as a commodity trading advisor or in any other registration category.
>
> On the other hand, the Committee does not expect the Commission to grant exempted commodity trading advisors any relief from the antifraud provisions of section 4*o* of the Act.

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[1] Part 4 also governs the operations and activities of commodity pool operators ("CPOs"). For the purpose of this **Federal Register** release, references to a particular Part 4 regulation may be found at 17 CFR Part 4 (1987).

[2] H.R. Rep. No. 624, 99th Cong., 2d Sess. 46-48 (1986).

As interested persons will recall, in connection with the adoption of the Futures Trading Act of 1982, the Senate Committee on Agriculture, Nutrition and Forestry similarly considered a proposal to provide relief from CPO regulation for certain otherwise regulated persons. *See* S. Rep. No. 384, 97th Cong. 2d Sess. 79-80 (1982). Pursuant to the language in the Report of that Committee, the Commission adopted § 4.5, which makes an exclusion from the definition of the term "commodity pool operator" available to the "eligible persons" specified in the rule with respect to their operation of certain "qualifying entities." To claim that relief, generally a notice of eligibility, containing specified representations on how the qualifying entity will be operated, must be filed with the Commission. Section 4.5(c)(2). *See generally* 50 FR 15868 (April 23, 1985).

[3] As is stated above, section 2(a)(1)(A) provides the Commission with authority to exclude or exempt from the CTA definition "such [other] persons not within the intent of this definition as the Commission may specify by rule, regulation, or order."

The Committee understands that rulemaking addressing these concerns may take some time for the Commission to develop and promulgate. Individual requests for exclusions or exemptions, consistent with the above guidelines, however, should be processed by the Commission as expeditiously as practicable. The Commission's experience with individual cases should facilitate the formulation of more general rulemaking. H.R. Rep. No. 624, 99th Cong., 2d Sess. 47–48 (1986).

In response to this language, on May 26, 1987 the Commission published for comment in the **Federal Register** proposed § 4.6, which would have excluded certain otherwise regulated persons, such as State-regulated insurance companies, from the CTA definition and proposed § 4.14(a)(8), which would have exempted certain other persons, such as registered investment advisers, from CTA registration.[4] By that **Federal Register** release the Commission further proposed certain revisions to its rules for CPOs and CTAs which also generally would have had the effect of reducing regulatory burdens. Specifically, the Commission proposed to adopt in § 4.12(b) relief from specific compliance with certain disclosure, reporting and recordkeeping requirements of Part 4 for registered CPOs of certain pools and to reduce to two from three the number of certain documents that CPOs and CTAs are required to file under Part 4.

The Commission received 11 comment letters on these proposals: 1 from a person registered as both a CTA and as an investment adviser; 3 from persons registered as an investment adviser; 1 from a national bank; 2 from persons registered as a futures commission merchant; 1 from a commodity exchange; 2 from trade associations; and 1 from a law firm.

The Commission's careful review of those comment letters indicates that they uniformly supported the Commission's proposals.[5] Accordingly, with the exception of § 4.12(b), these proposals have been adopted essentially as they had been proposed.[6]

II. Relief from CTA Regulation

A. Section 4.6: Exclusion for Certain Otherwise Regulated Persons from the Definition of the Term "Commodity Trading Advisor"

Paragraph (a) of the rule specifies the persons who are eligible for exclusion from the CTA definition and the activities for which such relief is available. As it stated in the preamble to the proposed rule, the Commission has strictly followed the Committee Report language in specifying these persons and activities. Thus, the rule provides relief for: (1) A State-regulated insurance company, or any wholly-owned subsidiary or employee thereof, and (2) a person who is excluded from the definition of the term "commodity pool operator" by § 4.5 under certain circumstances.[7] In particular, the commodity interest advisory activities of these persons are subject to a "solely incidental" test—*i.e.*, in the case of an insurance company (or wholly-owned subsidiary or employee thereof) those activities must be "solely incidental to the conduct of the insurance business of the insurance company as such" and in the case of a person excluded from the CPO definition by § 4.5 those activities must be "solely incidental to its operation of those trading vehicles for which § 4.5 provides relief." [8]

Paragraph (b) of the rule requires each person claiming an exclusion from the CTA definition to submit to special calls to demonstrate its compliance with the terms of paragraph (a).[9] This provision is intended to permit the Commission to monitor whether persons claiming the exclusion are properly entitled to do so. Paragraph (c) provides that an exclusion under the rule will cease to be effective "upon any change which would render the person claiming the exclusion ineligible under paragraph (a)."

Section 4.6 follows the format of § 4.5 with one significant exception.[10] The

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[4] 52 FR 19522.

[5] Certain commenters urged the Commission to provide even broader relief. The specific remarks of those commenters and the Commission's responses thereto are set forth in the discussion of the particular rule to which they apply.

[6] As is discussed more fully below, proposed § 4.12(b) would have required a CPO to request the relief available thereunder *and* the Commission to act upon that request. As adopted, § 4.12(b) does not require any such action upon the part of the Commission. Rather, the relief available thereunder is effective upon the filing of a claim of exemption with the Commission.

Further, because these proposals have been adopted essentially as they had been proposed, the Commission is repeating in this **Federal Register** release much of the discussion contained in the proposing **Federal Register** release.

[7] Section 4.5(a) specifies the persons eligible for that relief as follows:

(1) An investment company registered as such under the Investment Company Act of 1940;

(2) An insurance company subject to regulation by any State;

(3) A bank, trust company or any other such financial depository institution subject to regulation by any State or the United States; and

(4) A trustee or named fiduciary of a pension plan that is subject to Title I of the Employee Retirement Income Security Act of 1974: *Provided, however,* That for purposes of this § 4.5 the following pension plans shall not be construed to be pools:

(i) A noncontributory plan, whether defined benefit or defined contribution, covered under Title I of the Employee Retirement Income Security Act of 1974;

(ii) A contributory defined benefit plan covered under Title IV of the Employee Retirement Income Security Act of 1974: *Provided, however,* That with respect to any such plan to which an employee may voluntarily contribute, no portion of an employee's contribution is committed as margin or premiums for futures or options contracts; and

(iii) A plan defined as a governmental plan in section 3(32) of Title I of the Employee Retirement Income Security Act of 1974.

[8] Section 4.5(b) lists the following trading vehicles as qualifying entities:

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such under the Investment Company Act of 1940;

(2) With respect to any person specified in paragraph (a)(2) of this section, a separate account established and maintained or offered by an insurance company pursuant to the laws of any State or territory of the United States, under which income gains and losses, whether or not realized, from assets allocated to such account, are, in accordance with the applicable contract, credited to or charged against such account, without regard to other income, gains, or losses of the insurance company;

(3) With respect to any person specified in paragraph (a)(3) of this section, the assets of any trust, custodial account or other separate unit of investment for which it is acting as a fiduciary and for which it is vested with investment authority; and

(4) With respect to any person specified in paragraph (a)(4) of this section, and subject to the proviso thereof, a pension plan that is subject to Title I of the Employee Retirement Income Security Act of 1974 * * *.

Moreover, where necessary, before it provides such advice to any such qualifying entity, the person must file a notice of eligibility. (As is stated in n. 7, *supra*, certain trading vehicles are deemed under § 4.5(a)(4)(i)–(iii) to be "non-pools" and, thus, no notice is required to be filed with respect to their operation.)

[9] In the absence of any negative comments, the Commission also has adopted as proposed § 140.93(a)(6), which delegates to the Director of the Division of Trading and Markets, or the Director's designee, the authority to make such special calls. The Division of Trading and Markets is responsible for, among other things, administering and interpreting the Part 4 regulations.

[10] Thus, interested persons should note that the Commission intends to interpret the special call provision in § 4.6(b) and in § 4.5(c)(2)(v) in an identical manner. With respect to the latter provision the Commission has stated:

[I]t does not intend to administer the special call representation in any * * * burdensome or onerous manner. Rather, the Commission intends that the information it would require pursuant to a special call basically would be information that the qualifying entity's other Federal or State regulator would already be requiring it to keep—*e.g.*, data concerning the execution dates, execution prices and current values of its cash market and commodity interest positions. Moreover, as is now expressly stated in the rule, a special call would be strictly limited to documenting compliance with the information and representations on operating criteria that the notice of eligibility must contain. Therefore, the Commission believes that compliance with a special call should pose little, if any, inconvenience or disruption to the conduct of the entity's operations. 50 FR 15868 at 15880.

CTA exclusionary rule, unlike the CPO exclusionary rule, does not require that a notice be filed with the Commission to claim the exclusion.[11] The Commission did not propose a notice requirement because

(1) With respect to insurance companies, pursuant to the Committee Report the proposal follows the exclusionary language in section 2(a)(1)(A) for such persons as banks (who do not have to file any notice), and (2) with respect to those persons who are excluded under § 4.5 from the CPO definition, the Commission will, in fact, be receiving an identifying notice under that rule. 52 FR 19522 at 19524.

The Commission nonetheless sought comment on whether a notice should be required to be filed to claim relief under § 4.6 and, if so, what information the notice should contain.[12] The several persons responding to this request agreed with the Commission, stating that a notice requirement would be unnecessary or redundant. Accordingly, the Commission has not adopted a notice requirement in the final rule. The exclusion provided by § 4.6 is available without any action on the part of a person claiming that relief—subject, of course, to the person meeting the requirements of paragraph (a).

As is noted above, the one criterion to which persons claiming relief under § 4.6 are subject is that their commodity interest advisory activities must be "solely incidental" to their insurance business or § 4.5 activities. As the Commission noted in proposing this criterion, pursuant to the Committee Report language, Commission staff had received and responded to several requests for interpretation on the meaning of the "solely incidental" criterion in the context of the activities of State-regulated insurance companies and their wholly-owned subsidiaries.[13] Specifically, it noted that staff had found that this condition of the exclusion would be met where commodity interest trading advice would be provided—

to persons to whom [the insurance company] (or a subsidiary insurance company) has issued a[n] * * * insurance contract and, thus, with whom [the insurance company] (or a subsidiary insurance company) has established a relationship through the issuance of that contract.[14]

Conversely, staff had found that this condition would not be met where—

certain State-regulated insurance companies (or a wholly-owned subsidiary thereof) have established and serve as the registered investment adviser to a mutual fund complex into which persons who are not policyholders of the insurance company and who have no other relationship with the company may invest.[15]

As for the other persons excluded from the CTA definition by § 4.6, the Commission expressed its belief that the requirement that the excluded person's advisory activities be "solely incidental" to certain other activities could only be met where such a person served as the operator of the § 4.5 trading vehicle *and* provided securities investment advise to it and commodity interst advice consistent with strategies permitted under § 4.5.[16]

No specific comments were received concerning how to further articulate this standard. Accordingly, as it stated in its proposal, the Commission expects to interpret the "solely incidental" condition flexibly following prior interpretations and to further delineate the words "solely incidental" based on specific fact situations.

The Commission did, however, receive various comments on proposed § 4.6 concerning the evolving nature of the definition of the term "bona fide hedging transactions and positions" in § 1.3(z)(1), 17 CFR 1.3(z)(1) (1987).[17] As one commenter urged, because § 4.6 would be available to persons excluded from the CPO definition by §4.5, in adopting § 4.6 the Commission should verify that the scope of activities under § 4.5 may be refined. In that way, the commenter stated, § 4.5 would flexibly accommodate evolving regulatory enhancements without having to be amended and revised. The Commission agrees with the recommendation and by this **Federal Register** release acknowledges its intention to apply any such evolving definitions of the term "bona fide hedging" to §§ 4.5 and 4.6.[18]

B. Section 4.14(a)(8): Exemption for Certain Persons from Registration as a CTA

Section 4.14(a) is that section of the Commission's regulations which contains the provisions pursuant to which a person who comes within the statutory definition of the term" commodity trading advisor" my nonethless claim exemption from registration as a CTA. In furtherance of the Committee Report, the Commission proposed and has adopted certain other CTA registration exemptions in § 4.14(a)(8).[19]

Preliminarily, the Commission notes that section 4m(1) of the Act provides a statutory exemption from CTA registration for any CTA "who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor." In response to comments received, the Commission wishes to make clear that the relief provided by §4.14(a)(8) is mutually exclusive from that provided by section 4m(1)—that is, depending on the nature of its activities a CTA may be exempt from registration as such under either or both provisions. Thus, the fact that a CTA who is claiming exemption under § 4.14(a)(8) has more than 15 clients for the purpose of that rule will not affect the CTA's ability to claim exemption under section 4m(1) for a different set of clients—*i.e,* clients who are other than § 4.5 trading vehicles.

Like § 4.6, § 4.14(a)(8) similarly closely follows the language of the Committee Report in specifying the persons who are eligible for relief thereunder—*e.g.,* persons who are registered as in IA under the Investment Advisers Act of 1940 (the "IAA"), 15 U.S.C. 80b *et seq.* (1982). In addition, the Commission also has made § 4.14(a)(8) available to persons who are excluded from the definition of the term "investment adviser" by sections 202(a)(2) and 202(a)(11) of the IAA [20]—essentially certain banks of the nature described in those sections. As the Commission noted in its proposal, without such a

[11] *See* paragraphs (c) through (f) of § 4.5.

[12] *Cf.* § 4.14(a)(8), which requires the persons eligible under that section to file a notice of exemption to claim relief from registration as a CTA. As is explained below, such a notice would be needed to identify those persons—who otherwise would not be known to the Commission.

[13] *See, e.g.,* Division of Trading and Markets Interpretative Letter No. 86–24, Comm. Fut. L. Rep. (CCH) ¶23,292 (Oct. 1, 1986).

[14] *Id.* at p. 32,798.

[15] Division of Trading and Markets Interpretative Letter No. 86–18, Comm. Fut. L. Rep. (CCH) ¶23,201 (July 23, 1986) at p. 32,531, n. 6. As is discussed below, however, the Commission has adopted in § 4.14(a)(8) an exemption from registration as a CTA for persons who are registered as an IA and who provide commodity interest trading advice to § 4.5 trading vehicles. *See also* Interpretative Letter No. 86–24, n. 13, *supra,* at p. 32,800.

[16] *Cf.* Division of Trading and Markets Interpretative Letter No. 87–1, Comm. Fut. L. Rep. (CCH) ¶23,623 (May 19, 1987), wherein staff found that certain of an insurance company/IA's commodity interest advisory activities would not be "solely incidental," and thus would not come within the scope of the Committee Report language, because those activities would not be given in the context either of an insurance product or a primary securities relationship.

[17] *See, e.g., Clarification of Certain Aspects of the Hedging Definition,* 52 FR 27195 (July 20, 1987); *but cf. Risk Management Exemptions from Speculative Position Limits Approved under Commission Regulation 1.61,* 52 FR 34633 (Sept. 14, 1987) at 34634, n. 3.

[18] Similar comments were received with respect to proposed § 4.14(a)(8) which, as is discussed more fully below, provides an exemption from CTA registration for certain persons who, among other things, provide commodity interest trading advice to § 4.5(b) trading vehicles. The Commission similarly intends to apply any such evolving definitions to § 4.14(a)(8).

[19] The Commission similarly proposed and has adopted an amendment § 3.16(a)(3) of its regulations, to provide exemption from registration for the associated persons ("APs") of these exempt CTAs.

[20] 15 U.S.C. 80b-2(a)(2) and 2(a)(11) (1982).

provision, those banks— because of the very fact that they statutorily are excluded from the IA definition—would be ineligible for the relief that persons who must register as an IA could claim.[21]

Further similar to § 4.6, the criteria for relief under § 4.14(a)(8) closely follows the Committee Report language. Specifically, the criteria that a person who seeks to claim exemption from CTA registration under § 4.14(a)(8) must meet were proposed and have been been adopted as follows:

(i) The persons's commodity trading advice:

(A) Is directed solely to, and for the sole use of, entities which are excluded from the definition of the term "pool" under § 4.5 or are qualifying entities under § 4.5 for which a notice of eligibility has been filed;

(B) Is solely incidental to its business of providing securities advice to each such entity; and

(C) Employs only such strategies as are consistent with eligiblity status under § 4.5.

(ii) The person is not otherwise holding itself out as a commodity trading advisor * * *.

As the Commission similarly noted in proposing § 4.14(a)(8), pursuant to the Committee Report staff also had occasion to interpret the exemption criteria of the Report.[22] As staff stated:

As for the * * * condition * * * that [no registered IA] will otherwise hold itself out as a CTA with respect to those activities for which a "no-action" position from CTA registration has been issued herein * * * we believe that further discussion is necessary and appropriate to ensure compliance with that condition. In this regard, you asserted that [a registered IA] "should, however, be allowed to describe to existing and potential clients the limited commodities advice it may provide in accordance with the terms of this letter and how it believes that such advice may be used to benefit its clients"—which, you noted, would parallel the disclosures the Commission has said would be appropriate for the purpose of the "marketing" representation under Rule 4.5. *See* 50 Fed. Reg. 15868 at 15879, [April 23, 1985]. We further note that in discussing this representation the Commission stated that it—

intends the term "marketing" to include oral, written and electronic promotional materials and that an entity would be "marketing participations" in a manner inconsistent with the required representation if [a trading vehicle] was actively promoted as "a hybrid—*e.g.*, a securities *and* a commodities—trading vehicle or as an investment vehicle in which commodity futures and options trading was particularly significant and critical to the growth of its assets, as opposed to being incidental to protecting those assets against a decline in value." *Id.*

Thus, the marketing materials to be used should state, with respect to transactions in commodity interests, only that strategies consistent with eligibility status under Rule 4.5 may be used. These strategies may, of course, be described in the marketing materials. Further in this regard, we believe that [the IA]: (1) should market its ability to manage an actual or prospective client's securities portfolio, not a comodity interest trading vehicle; and (2) should not represent that it has any unique expertise or ability in providing commodity interest trading advice.[23]

As it stated in its proposal, absent comment that would indicate otherwise, the Commission intended to interpret this criteria of § 4.14(a)(8) in accord with the foregoing staff position. The Commission further noted that the foregoing position was not intended to be an all inclusive discussion but, rather, an attempt to identify activities which would be consistent—or inconsistent—with the Committee Report.

The Commission received several comments on the proposed criteria. One commenter recommended deletion of the "solely incidental" criterion—*i.e.*, that the exemption in § 4.14(a)(8) should be available where an IA only provides commodity interest trading advice to § 4.5 trading vehicles and only employs trading strategies consistent with eligibility status under § 4.5.

The Commission disagrees with this recommendation. Because it would provide relief for persons who are acting *solely* as CTAs (of § 4.5 clients), we do not believe that such activity would be consistent with the Committee Report.[24]

Certain other commenters urged the Commission to broaden the scope of permissible advisees under § 4.14(a) (8). One person suggested expanding the scope to include certain so-called "institutional investors"—*e.g.*, endowments, foundations, corporations and partnerships with certain minimum assets. In response, the Commission notes that while the IAA may afford certain rights and remedies to these investors, there has been no showing that these investors *themselves* are in fact "otherwise regulated" on the State or Federal level. Accordingly, the Commission is declining at this time to specifically broaden the scope of permissible advisees under the rule but, instead, intends to continue to provide relief as appropriate in individual cases.[25] The Commission thus intends to continue to intepret the criteria of § 4.14(a)(8) in accord with the foregoing staff position and, as it gains more experience in this area, to identify such other activities as are consistent with the Committee Report.

The Commission also proposed to require that a notice of exemption, containing certain specified information, be filed with the Commission to claim the relief available under the rule and that a supplemental notice be filed in the event of changed circumstances—*i.e.*, registration as a CTA. Sections 4.14(a) (8) (iii) and (iv).[26] In addition, to ensure the proper administration of § 4.14(a)(8), the Commission also proposed that any such notice would be required to be filed with the National Futures Association, which has responsibility for registering CTAs. Section 4.14(a) (8) (v).[27] Several persons specifically addressed the Commission's request for comment on these proposals. They generally questioned whether such requirements would be necessary. In response, the Commission repeats the explanation in its proposal that such a requirement is in fact necessary because

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[21] *See* Division of Trading and Markets Interpretative Letter No. 86-31, Comm. Fut. L. Rep. (CCH) ¶23,416 (Dec. 11, 1986), wherein staff stated that, based upon the facts at issue, it would not recommend that the Commission take any enforcement action for failure to register as a CTA against a bank that provided "outside" advisory services to a § 4.5 registered investment company. *Cf.* § 4.6, which provides an exclusion from the CTA definition for the bank if the bank is an eligible person under § 4.5(a)(3) and the trading vehicle is a qualifying entity under § 4.5(b)(3).

[22] *See* Interpretative Letter No. 86-24, n. 13, *supra*. In that letter staff also stated that, based upon the facts at issue, it would not recommend that the Commission take any enforcement action for failure to register as a CTA against certain registered IAs—*i.e.*, the insurance company and certain of its wholly-owned subsidiaries.

[23] *Id.* at pp. 32,800-01.

Upon request the Division subsequently clarified its position as follows:

[W]e wish to emphasize that for a registered investment adviser to be exempt from CTA registration under the House Committee Report language it must, among other things, provide commodity interest trading advice to a trading vehicle specified in Rule 4.5 in a manner solely incidental to its business of providing securities advice to the trading vehicle—regardless of whether that vehicle is a "non-pool" under Rule 4.5(a)(4)(i), (ii) or (iii) or a "qualifying entity" under Rule 4.5(b). Division of Trading and Markets letter dated Nov. 19, 1986.

[26] The Commission previously has provided in this **Federal Register** release its reasons for not adopting such a notice requirement in § 4.6.

[27] Pursuant to section 17 of the Act, 7 U.S.C. 21 (1982), the Commission has designated the NFA as a registered futures association with responsibility for the regulation of persons who are required to be registered with the Commission—*e.g.*, CTAs and CPOs. *See* NFA Bylaw 1101. *See also*, NFA Compliance Rule 2-13, which provides in pertinent part that "[a]ny Member who violates any of CFTC Regulations 4.1 and 4.16 through 4.41 shall be deemed to have violated an NFA requirement." Thus, a requirement that any notice filed under § 4.14(a) (8) must be filed with the NFA is necessary to ensure that this designated self-regulatory organization is timely apprised of the activities or persons who are acting as a CTA—and persons who have qualified under § 4.14(a)(8) for exemption from CTA registration.

the securities investment advisory profesionals who could claim relief under the rule are not otherwise known to the Commission. Thus, the purpose of this notice requirement, which is patterned after that contained in § 4.5, is to enable the Commission to know the identities of those persons claiming relief under § 4.14(a)(8) and to monitor their compliance with the criteria of the rule.[28]

One commenter stated that the burden of filing a notice would be wholly inconsistent with the underlying concept of providing exemption in the first place. The Commission believes, however, that the benefits both to it and to affected persons far outweigh any burden that the preparation of a mere notice of exemption would impose upon them. This is particularly true in light of the fact that while the notice must be filed before a person first intends to engage in business as a CTA, it is effective upon filing. Section 4.14(a)(8)(iii). Accordingly, the Commission has adopted the notice provision as proposed.

As is noted above, § 4.14(a)(8) is effective today upon its publication in the **Federal Register.** In this regard, the Commission recognizes that pending the completion of its rulemaking proceeding, there may have been uncertainty on the part of affected CTAs as to whether, and under what criteria, they would be eligible to claim the relief from registration as a CTA under the final rule. In fact, to alleviate that uncertainty the Commission stated in the **Federal Register** release accompanying proposed § 4.14(a)(8) that it would not take enforcement action solely for failure to register as a CTA against any person who met the criteria of the proposed rule.[29] Thus, because of their uncertainty and the Commission's "no-action" position, these CTAs may be engaging in activities for which they now would be eligible for regulatory relief under § 4.14(a)(8) as adopted without having filed a notice of exemption with the Commission. In light of the foregoing, and subject to compliance with all of the other provisions of § 4.14(a)(8), the Commission has determined that it will not take enforcement action solely for failure to register as a CTA against any such person who files a claim of exemption as is specified in § 4.14(a)(8) within 60 days from the date hereof.[30]

C. The Effects of the Rules

In General. Section 4.6 provides an *exclusion* for certain persons from the definition of the term "commodity trading advisor." The Commission wishes to emphasize, however, that while these persons may be outside the CTA definition, they still are "persons" for the purposes of the Act and the Commission's regulations thereunder. Thus, they remain subject to, among other things, Section 4b of the Act, 7 U.S.C. 6b (1982), which generally prohibits fraudulent transactions, and Part 18 of the regulations, 17 CFR Part 18 (1987), which requires certain reports to be furnished by traders in the commodity interest markets.

Section 4.14(a)(8) provides an *exemption* for certain other persons from CTA registration. Thus, these other persons continue to be both "persons" and CTAs for the purposes of the Act and the regulations. In addition to section 4b and Part 18 they remain subject to all other provisions which concern CTAs regardless of their registration status—*e.g.*, section 4*o* of the Act, 7 U.S.C. 6*o* (1982), which specifically prohibits fraudulent transactions by any CTA (or CPO, or any AP thereof) § 4.30, which prohibits any CTA from accepting in its own name funds intended to secure commodity interest positions, and § 4.41, which prescribes certain advertising standards for all CTAs.

On Disclosure Document Past Performance. A person who qualifies for relief under § 4.6 or § 4.14(a)(8) may at a late date decide to engage in activities which require registration as a CTA and, accordingly, for which it in fact registers as such.[31] As a registered CTA that person will be required under § 4.31 to distribute to prospective managed account clients a Disclosure Document containing the past performance record of the commodity interest accounts traded by the CTA (and each of its principals) for the three years preceding the date of the Document. In light of the comments received and its own deliberations, the Commission believes that the information required under § 4.31(a)(3) does not need to include the record of the accounts traded by a person (or principal thereof) pursuant to an exclusion from the CTA definition under § 4.6. This is because the person was not within the CTA definition with respect to those accounts. It further believes that whether that information needs to include the record of the accounts traded by a person (or principal thereof) pursuant to an exemption from CTA registration under § 4.14(a)(8) remains to be determined on a case-by-case basis in the context of a particular fact situation.

III. Section 4.12(b): Relief from Subpart B of Part 4 for Certain Registered CPOs

The Commission proposed that its general authority to exempt "any person or any class or classes of persons" from Part 4 would be retained in § 4.12(a) and that specific authority to exempt certain CPOs from certain provisions of Subpart B of Part 4—that is, from certain of the disclosure, reporting and recordkeeping requirements of §§ 4.21, 4.22 and 4.23, respectively—would be contained in § 4.12(b).[32] In light of very favorable comments, the Commission has adopted these proposals, with certain modifications to the mechanics of § 4.12(b) as are discussed more fully below.

Preliminary and as it stated in the preamble accompanying its proposal, the Commission wishes to emphasize that in adopting § 4.12(b) it has not intended to set forth the sole basis for granting relief from Subpart B of Part 4. Rather, the Commission's intention is to codify in a rule those situations for which it has routinely granted relief and with which it has become most familiar and, thus, for which it is best equipped to adopt a specific rule.[33] All other requests for exemption from Subpart B—and from any other provision of Part 4—will continue to be eligible for consideration under § 4.12(a) on a case-by-case basis.[34]

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[28] Section 4.14(a) also contains various provisions which exempt certain other commodity professionals from registration as a CTA. It should be noted that by their very terms those provisions refer to persons who have been identified to the Commission—either through registration (as other than a CTA) (§§ 4.14(a) (3), (4), (6) and (7)) or through the filing of a notice of exemption from CPO registration (§ 4.14(a) (5)).

[29] 52 FR 19522 at 19526. By that release the Commission adopted a similar "no-action" position with respect to persons who met the criteria of proposed § 4.6.

[30] Similarly, the Commission will not take enforcement action solely for failure to register as an AP of a CTA against any person who is associated with a CTA who files a claim of exemption as is specified in § 4.14(a)(8) within 60 days from the date hereof.

[31] *See* § 4.14(a)(8)(iv), which requires that a person who has filed a notice of exemption from CTA registration must supplement the notice in the event the person subsequently registers as a CTA.

[32] This action also was in furtherance of the Committee Report, which, as is stated above, acknowledged the actions that had been taken in this area and expressed the intention "that the Commission will continue to provide this and such other relief."

[33] In this regard, the Commission wishes to clarify that the adoption of § 4.12(b) will not affect any similar exemptions it has previously issued. Conversely, any CPO who has received such an exemption with respect to a commodity pool it operates is now required to comply with § 4.12(b) with respect to any other pools for which it desires to receive similar relief.

[34] *See* § 140.93(a)(1), 17 CFR 140.93(a)(1) (1987), whereby the Commission delegated its authority

Continued

As proposed and as adopted, § 4.12(b) also follows the format of § 4.5. Thus, paragraph (1) of the rule sets forth the pesons who are eligible for relief—*i.e.*, any person who is registered as a CPO or who has applied for such registration—and the criteria pursuant to which their commodity pools must be operated. Briefly stated, any such pool for which a registered CPO seeks to claim relief under § 4.12(b) is required: (1) To be offered and sold in compliance with the Securities Act of 1933 (the "33 Act"), 15 U.S.C. 77a *et seq.* (Supp. III 1985), or an exemption from that Act; (2) to be generally and routinely engaged in securities transactions; (3) to restrict to 10 percent of the fair market value of its assets the amount it may commit to initiate its commodity interest transactions; and (4) to trade commodity interests in a manner soley incidental to its securities trading activities—*i.e.*, that commodity interest trading is not an integral part of the pool's trading strategy and that the pool's trading strategy can, in fact, be accomplished without the use of commodity interests. Section 4.12(b)(1)(i)(A)-(D).[35] Moreover, the CPO must provide written notice to its existing and prospective participants of the restrictions on the pool's commodity interest trading prior to the date the pool commences trading commodity interests. Section 4.12(b)(1)(ii).[36]

One person commented on the criteria proposed for § 4.12(b)(1). It expressed the view that the term "in a manner solely incidental to its securities activities" was a subjective criterion and therefore an inappropriate criterion for an exemptive rule. It further thought the criterion unnecessary in light of the other criteria of the rule. In response, the Commission wishes to make clear that the intent of the "solely incidental" criterion is not to preclude an operator who desires that its fund is exposed to the commodity interest markets through the commitment of a relatively small amount of assets—*i.e.*, 10%—from claiming relief under § 4.12(b). Rather, the criterion is intended to ensure that § 4.12(b) is not available where commodity interest trading is a critical component of the fund's trading—*e.g.*, where by its very terms the fund's trading program requires that a specified percentage of the fund's assets must at all times be committed to commodity interest trading or where, because the fund's other assets are held in debt securities solely for the purpose of generating interest income, commodity interest trading is, in fact, the only trading in which the fund engages.[37]

The relief that is available under § 4.12(b) is set forth in paragraph (2).[38] First, in the case of § 4.21(a), that the Commission accept in lieu and in satisfaction of the Disclosure Document specified by that section an offering memorandum as described in the proposal § 4.12(b)(2)(i). Specifically, such an offering memorandum is not required to include the past performance records of the pool's CPO and CTA nor the Risk Disclosure and Cautionary Statements.[39] The Memorandum is, however, required to be prepared in compliance with the '33 Act (or with an exemption therefrom) and to include the other information required by § 4.21(a). As the Commission explained in its proposal, the term "responds" as used in the rule is intended to clarify that the specific negative disclosures which otherwise would be required by § 4.21(a) do not need to be made.[40] Moreover, the term "responds" is intended to acknowledge the disclosure requirements of the '33 Act (or exemption therefrom) and to further clarify that for the purpose of § 4.12(b) the Commission intends that those requirements will control the specific content of the disclosures made in the Memorandum.[41] Second, in the case of § 4.22 (a) through (e), that the Commission accept in lieu and in satisfaction of the Account Statement and Annual Report required by those sections the financial reports specified in the rule. Sections 4.12(b)(2) (ii) and (iii), respectively. With respect to the Account Statement, these financial reports are a statement which indicates the net asset value of the pool as of the end of the reporting period and the change in net asset value from the end of the previous reporting period—which must be prepared and distributed at least quarterly. As the Commission explained in its proposal, the term "net asset value" refers to the total operations of the pool and the term "indicates" means that this information may be presented in either narrative or tabular format. With respect to the Annual Report, these financial reports must include, at a minimum, a Statement of Financial Condition as of the close of the pool's fiscal year and a Statement of Income (Loss) for that year. These statements are required to be prepared according to generally accepted accounting principles and to be certified by an independent public accountant. Moreover, these substitute financial reports continue to be subject to all of the other requirements of the rules to which they pertain.[42] Third, and last, in the case of § 4.23 (a)(10) and (a)(11), to exempt the CPO from the requirements of those sections to respectively make and keep Statements of Financial Condition and of Income (Loss) for the pool § 4.12(b)(iv).[43] The Commission proposed and has adopted this relief because these Statements would otherwise provide specific supporting data for the Account Statement—from which, as is discussed above, an exemption has been adopted. As it stated in its proposal, the Commission believes that the data necessary to verify the financial reports which may substitute for the Account Statement

under (former) § 4.12 to the Director of the Division of Trading and Markets, or the Director's designee.

Similarly, the Commission previously has stated in connection with its adoption of revisions to the Part 4 rules that:

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) [, which defines the term "pool",] and of all the other Part 4 rules. 46 FR 26004 at 26006 (May 8, 1981).

[35] *Cf.* § 4.5(c)(2)(i), which requires a qualifying entity to trade commodity interests for hedging purposes within § 1.3(z)(1) or, with respect to certain long strategies, for incidental purposes where the underlying commodity value of its long contracts at all times will not exceed the sum of certain specified items.

[36] This notice is subject to the recordkeeping requirements of § 4.23.

[37] While acknowledging that its proposal was outside the scope of the Commission's proposed rulemaking, another commenter suggested that the Commission adopt a complete exemption from Subpart B for "accredited investors only-hedge funds" which met the criteria of § 4.12(b)(1). ("Hedge funds" were defined by the commenter to mean investment funds exempt from registration under the Investment Company Act of 1940 due to being privately sold to not more than 100 investors.) In response, the Commission repeats its prior statement that the relief it has adopted is for those situations for which it has become most familiar and, thus, for which it is best equipped to adopt a specific rule. The situations of which the commenter spoke will continue to be eligible for consideration under § 4.12(a) on a case-by-case basis.

[38] It should be noted that a CPO may request any or all of the relief available under the rule.

[39] This information would otherwise be required by §§ 4.21 (a)(4), (a)(5), (a)(17) and (a)(18), respectively.

[40] *See* §§ 4.21 (a)(3), (a)(6), (a)(8), (a)(10), (a)(13) and (a)(15). For example, under the rule an offering memorandum would respond to the requirements of § 4.21(a)(13) if it disclosed information on certain litigation concerning certain persons associated with the pool. Unlike the Disclosure Document specified by § 4.21(a), then, the memorandum is not also subject to the requirement that "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."

[41] The applicable provisions of § 4.21(a) will, however, continue to control the subject matter of the disclosures that are required to be made.

[42] For example, they continue to be subject to the oath or affirmation requirement of § 4.22(h).

[43] Unlike the other documents subject to the rule, the books and records required under these sections are not required to be filed with the Commission. Thus, the Commission does not "accept" them.

generally should be available from the other books and records the CPO is required to keep.[44]

As proposed, the rule contemplated that the CPO would request exemption under § 4.12(b) and that the Commission specifically would grant (or deny) such relief. The one commenter on these proposed mechanics of the rule urged the Commission to make the relief available under § 4.12(b) effective upon the filing of a notice with the Commission—which would parallel the mechanism for effectiveness of relief under §§ 4.5 and 4.14(a)(8). The Commission agrees with this suggestion, and has incorporated it into the rule. Accordingly, any registered CPO who desires to claim the relief available under § 4.12(b) must file a claim of exemption with the Commission containing certain specified information, along with a copy to the NFA. Section 4.21(b)(3).[45] The claim of exemption, which must be filed before the date the commodity pool first enters into a commodity interest transaction, is effective upon filing. Section 4.21(b)(4).[46]

The Commission's proposal also would have required certain continuing obligations on the part of a CPO to whom relief had been granted under § 4.12(b)—namely, that the CPO would have had to attach a copy of the order granting such relief to each Disclosure Document and Annual Report that it filed with the Commission. In light of the revised mechanics of the rule, as are discussed above, the Commission instead has adopted a requirement that the CPO must make a statement on the cover page of the Disclosure Document or Annual Report that it is required to file with the Commission to the effect that a claim of exemption under § 4.12(b) has been made with respect to that document. Section 4.12(b)(5).[47] The Commission wishes to clarify that any Disclosure Document filed pursuant to § 4.12(b) is subject to the 21-day "pre-filing" requirement of § 4.21(g). Consistent with the purpose and the very terms of the exemption, however, and with its previous interpretation above of the term "responds," the Commission emphasizes its intent that any staff review of any such Document will be limited to ensuring general compliance with § 4.21 (a)(1) through (a)(3) and (a)(6) through (a)(16). *See* § 4.12(b)(2)(i)(B).

As proposed and as adopted, the final provision of the rule makes clear the extent of an exemption claimed under § 4.12(b)—*i.e.*, that it is effective only with respect to the pool for which relief has been claimed and, further, that it does not affect the applicability of any other provisions of Part 4, the Act or the Commission's regulations with respect to that pool and any other pool the pool operator operates or intends to operate. Section 4.12(b)(6).

IV. Technical Amendments to §§ 4.21, 4.22 and 4.31

A. Section 4.21(a)(17): The Risk Disclosure Statement

Section 4.21 requires each registered CPO to distribute and to file with the Commission a Disclosure Document containing specified information. (Rule 4.31 places a similar requirement on certain registered CTAs.[48]

Section 4.21(a)(17)(i) also requires the Risk Disclosure Statement to appear by itself on the first page of the Disclosure Document. As it explained in its proposal, however, the Commission recognized that certain CPOs also must comply with requirements imposed by such other regulatory authorities as the NFA[49] and the Securities and Exchange Commission ("SEC")[50]. Accordingly, the Commission proposed to amend § 4.21(a)(17)(i) to clarify existing Commission policy that the Statement must appear by itself on the page immediately following any disclosures which otherwise are mandated by the Commission or NFA to appear on the cover of the Document, or immediately following any disclosures explicitly required in the forepart of a securities prospectus pursuant to applicable securities laws. As the Commission further explained, this proposal was supported by the history of the Part 4 regulations, which encouraged accommodation between Commission and SEC regulations in this area. For example, in adopting Part 4 in 1979, the Commission noted that "[i]n those cases where a CPO chooses to provide [an SEC] prospectus to prospective pool participants, the Commission will permit that prospectus to be supplemented to comply with the specific requirements of 4.21."[51]

Consistent with this language, in reviewing CPO Disclosure Documents since the adoption of Part 4, Commission staff had not objected to placing the Risk Disclosure Statement behind cover page material required by other regulators. Recently, however, staff had received a number of inquiries seeking a formal statement of the Commission's position. Accordingly, the Commission also proposed an amendment to end any confusion in this area.

The one person who specifically commented on these amendments strongly supported them. Accordingly, the Commission had adopted this amendment as proposed.

B. Section 4.22(c): The Annual Report

Section 4.22(c) requires each registered CPO to distribute and file an Annual Report for each pool that it operates within 90 calendar days after the end of the pool's fiscal year. As the Commission stated in proposing its amendment to § 4.22(c):

> One of the purposes of the Annual Report requirement is to enable pool participants to receive financial information in a timely manner.
>
> However, under the current rule, this purpose is defeated in cases where the pool stops trading before the end of its fiscal year. Accordingly, the proposal would require that the Report be distributed and filed within 90 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier, but in no event later than 90 days after funds are returned to pool participants. Permanent cessation of trading would be determined by reference to objective indications such as, but not limited to, the date notice is sent to pool participants advising that the pool has ceased trading or the date the CPO states in writing to the Commission, National Futures Association ("NFA") or other party that the pool has ceased operation. In any event, the Annual Report would be required to be filed with the Commission and distributed to pool participants no later than 90 days after funds are returned to the participants. As a result of this proposal, a participant would never have to wait more than 90 days from the end of the pool's operation to receive his final Annual Report. 52 FR 19522 at 19528.

In the absence of any negative comments, the Commission has adopted as proposed the amendment to § 4.22(c) to clarify when the Annual Report must

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[44] *See, e.g.*, § 4.23 (a)(6) and (a)(8), which respectively require the CPO to make and keep a general ledger and "all other records" generated for the pool.

[45] The Commission previously has explained in n. 27, *supra*, why it is necessary to send a copy of the claim to the NFA.

[46] Accordingly, the Commission has amended § 140.93(a)(1) such that it now applies to any general request for exemption under § 4.12(a).

[47] This requirement is intended to ensure that the Commission is informed under all circumstances of those CPOs who have claimed relief under § 4.12(b) and the documents for which they have claimed such relief. Accordingly, the CPO may—but is not required—to include such a statement on any Disclosure Document or Annual Report that it provides to the participants in its pool.

[48] Specifically, those registered CTAs who seek to direct or to guide client accounts are subject to § 4.31.

[49] *See e.g.*, NFA Guideline for the Disclosure by CPOs and CTAs of "Up Front" Fees and Organizational and Offering Expenses, NFA Manual ¶ 10,067.

[50] *See e.g.*, regulation S-K, items 501, 502 and 503, 17 CFR § 229.501-.503 (1987).

[51] 44 FR 1918 at 1922 (Jan. 8, 1979).

be filed if a pool permanently ceases operations before the end of a pool's fiscal year.

C. Sections 4.21(g), 4.22(c) and 4.31(f): Numbers of Copies of Documents to be Filed

In light of generally favorable comments, the Commission has adopted as proposed amendments to §§ 4.21(g) and 4.31(f) which reduce to two from three the number of copies of the Disclosure Document that a CPO or a CTA must file with the Commission. Likewise, § 4.22(c) has been amended as proposed to require that only two copies of the Annual Report be filed with the Commission.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 et seq. (1982), requires that agencies, in proposing rules, consider the impact of those rules on small business. The Commission has already established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such small entities in accordance with the RFA.[52]

As the Commission noted in the preamble to the proposed rules, these definitions do not address the persons set forth In proposed §§ 4.6 and 4.14(a)(8) because, by the very nature of those proposals, the operations and activities of such persons generally are regulated by Federal and State authorities other than the Commission.[53] Assuming, *arguendo*, that such persons and entities would be "small entities" for purposes of the RFA, the Commission expressed its belief that proposed §§ 4.6 and 4.14(a)(8) would not have a significant economic impact on them because it merely would require in the case of the former rule certain information upon special call and in the case of the latter rule the filing of a notice with the Commission, the documentation for either of which should be pre-existing. Moreover, the proposals would relieve these persons from the requirement to register as a CTA and from the disclosure and recordkeeping requirements applicable to registered CTAs.[54]

As for those proposals which addressed registered CPOs,[55] the Commission previously had determined that registered CPOs are not small entities for the purpose of the FRA.[56] Thus, no economic analysis of these proposals as they relate to registered CPOs was required.[57]

As for the proposals which addressed registered CTAs,[58] the Commission had stated that it was more appropriate to consider on a case-by-case basis which CTAs should be deemed small under the RFA.[59] However, since the proposal would have reduced an existing burden on those registered CTAs to which it would apply, the Commission expressed its belief the proposal would not have a significant economic impact on any of those CTAs—regardless of whether any such CTA would be a small entity for the purpose of the RFA.

In certifying, pursuant to section 3(a) of the RFA, 5 U.S.C. 605(b), that these proposed rules would not have a significant economic impact on a substantial number of small entities, the Commission nonetheless invited comments from any CTA or CPO which believed that these proposed rules would have such an impact on its operations. No such comments were received.

B. Section 15 of the Act

Section 15 of the Act, 7 U.S.C. 19 (1982), requires the Commission to—

> Take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of this Act, as well as the policies and purposes of this Act, in issuing any order or adopting any Commission rule or regulation.

The Commission has taken into consideration the public interest to be proteted by the antitrust laws and has endeavored to take the least anti-competitive means of achieving the regulatory objectives of the Act. To the extent the rules adopted herein raise competitive concerns, the Commission has determined that such rules are necessary and appropriate. This is particularly true in light of the nature and extent of regulatory relief available under §§ 4.6, 4.12(b) and 4.14(a)(8) to the persons and with respect to the activities specified therein. As for other persons and activities, the Commission notes that, as is discussed above, while it closely has followed the Committee Report in adopting these rules it intends that staff will continue to issue exemptions and interpretations under Part 4—such that, under appropriate circumstances, relief from CTA or CPO regulation may be afforded to other persons who engage in activities not covered by these rules.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et. seq.*, imposes certain requirements on federal agencies (including the Commission) in connection with these conducting or sponsoring any collection of information as defined by the Paperwork Reduction Act. In compliance with that Act the Commission previously submitted these rules in proposed form and its associated information collection requirements to the Office of Management and Budget. The Office of Management and Budget approved the collection of information associated with these rules on July 15, 1987 and assigned OMB control number 3038-0023 Part 3 and 3038-0005 to Part 4.

Copies of the OMB approved information collection package associated with these rules may be obtained from Bob Neal, Office of Management and Budget, Room 3220, NEOB, Washington, DC 20503, (202) 395-7340.

D. Effective Dates

The Administrative Procedure Act generally requires that rules promulgated by an agency may not be made effective less than 30 days after publication except for, among other things, "a substantive rule which grants or recognizes an exemption or relieves a restriction" or "or for good cause." Insasmuch as §§ 4.6 and 4.14(a)(8) and the amendments to §§ 3.16(a)(3), 4.12, 4.21(a)(17), 4.21(g), that portion of § 4.22(c) which pertains to the number of copies of the Annual Report which must be filed and § 4.31(f) come within the first exception, the Commission is making these rules effective upon the date of publication of this **Federal Register** release. As is explained more fully above, however, by this **Federal Register** release the Commission also, in effect, is providing a 60 day "no-action" period for person to file the requisite notice of exemption necessary to claim the relief available under § 4.14(a)(8). Since the amendments to § 140.93(a)(1) and (a)(6) necessarily flow from the

[52] 47 FR 18618-18621 (April 30, 1982).

[53] For example, § 4.6 applies to, among other persons, "an insurance company subject to regulation by any State" and § 4.14(a)(8) applies to IAs who are registered with, and subject to the supervision of, the SEC.

[54] 52 FR 19522 at 19528. Section 3.16(a)(3) exempts from registration as an AP of a CTA an AP of a person exempt under § 4.14(a)(8). An AP must be an individual: *See* Section 4k of the Act, 7 U.S.C. 6k (1982). Because the RFA does not apply to "individuals," no economic analysis of proposed § 3.16(a)(3) was required.

[55] *See* proposed § 4.12(b) and the proposed revisions to §§ 4.21(a)(17)(i), 4.21(g) and 4.22(c).

[56] 47 FR 18619-20.

[57] As the Commission further noted, those proposals would not have imposed any new requirements on registered CPOs. In fact, certain of the proposals would have relieved existing requirements. *See, e.g.*, §§ 4.12(b) and 4.21(g).

[58] *See* the proposed revision to § 4.31(f).

[59] 47 FR 18620.

adoption of §§ 4.12 and 4.6, respectively, the Commission finds that good cause exists similarly to make these rules effective upon publication. The amendment to § 4.22(c) which pertains to when the Annual Report must be distributed and filed does not come within any such exception and, accordingly, it is to be effective 30 days after publication.

List of Subjects

17 CFR Part 3

Registration, Associated persons, Commodity futures.

17 CFR Part 4

Commodity pool operators, Commodity trading advisors, Commodity futures.

17 CFR Part 140

Authority delegation (Government agencies), Commodity futures.

In consideration of the foregoing, and pursuant to the authority contained in the Commodity Exchange Act and, in particular, sections 2(a)(1)(A), 4k, 4*l*, 4m, 4n, 4*o*, and 8a, 7 U.S.C. 2, 6k, 6*l*, 6m, 6n, 6*o*, and 12a and in 5 U.S.C. 552 and 552b (1982), the Commission hereby amends Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 3—REGISTRATION

1. The authority citation for Part 3 continues to read as follows:

Authority: 7 U.S.C. 2 and 4, 6, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6*i*, 6k, 6m, 6n, 6*o*, 6p, 8, 9, 9a and 13b, 12, 12a, 18, 19, 21 and 23; 5 U.S.C. 552 and 552b.

2. Section 3.16(a)(3) is revised to read as follows:

§ 3.16 Registration of associated persons of commodity trading advisors and commodity pool operators.

(a) * * *

(3) Is exempt from registration as a commodity trading advisor pursuant to the provisions of § 4.14(a)(1), § 4.14(a)(2) or § 4.14(a)(8) of this chapter or is associated with a person who is so exempt from registration: *Provided*, That the provisions of this paragraph (a)(3) shall not apply to the solicitation of a client's or prospective client's discretionary account, or the supervision of any person or persons so engaged, by, for, on behalf of a commodity trading advisor (i) which is not exempt from registration pursuant to the provisions of § 4.14(a)(1), § 4.14(a)(2) or § 4.14(a)(8) of this chapter or (ii) which is registered as a commodity trading advisor notwithstanding the availability of that exemption;

* * * * *

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

3. The authority citation for Part 4 continues to read as follows:

Authority: 7 U.S.C. 2, 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23; 5 U.S.C. 552 and 552b.

4. Section 4.6 is added to read as follows:

§ 4.6 Exclusion for certain otherwise regulated persons from the definition of the term "commodity trading advisor."

(a) Subject to compliance with the provisions of this section, the following persons, and any principal or employee thereof, shall be excluded from the definition of the term "commodity trading advisor:"

(1) An insurance company subject to regulation by any State, or any wholly-owned subsidiary or employee thereof; *Provided, however*, That its commodity interest advisory activities are solely incidental to the conduct of the insurance business of the insurance company as such; and

(2) A person who is excluded from the definition of the term "commodity pool operator" by § 4.5; *Provided, however*, That:

(i) Its commodity interest advisory activities are solely incidental to its operation of those trading vehicles for which § 4.5 provides relief; and

(ii) Where necessary, prior to providing any commodity interest trading advice to any such trading vehicle the person files a notice of eligibility as specified in § 4.5 to claim the relief available under that section.

(b) Any person who has claimed an exclusion under this § 4.6 must submit to such special calls as the Commission may make to require the person to demonstrate compliance with the provisions of paragraph (a) of this section.

(c) An exclusion claimed under this § 4.6 shall cease to be effective upon any change which would render the person claiming the exclusion ineligible under paragraph (a) of this section.

5. Section 4.12 is revised to read as follows:

§ 4.12 Exemption from provisions of Part 4.

(a) *In general.* (1) 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 provisions from which the exemption is sought.

(2) The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(b) *Exemption from Subpart B for certain commodity pool operators.* (1) Any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (b)(2) of this section if:

(i) The pool for which it makes such claim:

(A) Will be offered and sold pursuant to the Securities Act of 1933 or pursuant to an exemption from said Act;

(B) Will generally and routinely engage in the buying and selling of securities and securities derived instruments;

(C) Will not enter into commodity futures and commodity options contracts for which the aggregate initial margin and premiums exceed 10 percent of the fair market value of the pool's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; *Provided, however*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01(x) may be excluded in computing such 10 percent; and

(D) Will trade such commodity interests in a manner solely incidental to its securities trading activities.

(ii) Each existing participant and prospective participant in the pool for which it makes such request is informed in writing of the restrictions set forth in § 4.12(b)(1)(i) (C) and (D) prior to the date the pool commences trading commodity interests. The pool operator may furnish this information by way of the pool's Disclosure Document, Account Statement, a separate notice or other similar means.

(2) The commodity pool operator of a pool which meets the criteria of paragraph (b)(1) of this section may claim the following relief:

(i) In the case of § 4.21(a), that the Commission accept in lieu and in satisfaction of the Disclosure Document specified by that section an offering memorandum for the pool which does not contain the information required by § 4.21 (a)(4), (a)(5), (a)(17) and (a)(18); *Provided, however*, That the offering memorandum:

(A) Is prepared pursuant to the requirements of the Securities Act of 1933 or the exemption from said Act pursuant to which the pool is being offered and sold; and

(B) Responds to the information requirements of § 4.21 (a)(1) through (a)(3) and (a)(6) through (a)(16).

(ii) In the case of § 4.22 (a) and (b), that the Commission accept in lieu and in satisfaction of the Account Statement and prescribed frequency respectively specified by those sections a statement which indicates the net asset value of the pool as of the end of the reporting period and the change in net asset value from the end of the previous reporting period, to be prepared and distributed no less frequently than quarterly; *Provided, however,* That each such statement complies with the other requirements of § 4.22 (a) and (b), including the references in those sections to § 4.22 (g) and (h).

(iii) In the case of § 4.22 (c) through (e), that the Commission accept in lieu and in satisfaction of the financial information and statements in the Annual Report specified by those sections an annual report for the pool which contains, at a minimum, a Statement of Financial Condition as of the close of the pool's fiscal year and a Statement of Income (Loss) for that year; *Provided, however,* That:

(A) Each such annual report complies with the other requirements of § 4.22(c), including the reference in that section to § 4.22(h) and the requirement in § 4.22(c)(5) that the annual report must contain appropriate footnote disclosure and further material information; and

(B) The financial statements in such 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.

(iv) In the case of § 4.23 (a)(10) and (a)(11), to exempt the pool operator from the requirements of those sections with respect to the pool.

(3) Any registered commodity pool operator who desires to claim the relief available under this § 4.12(b) must file a claim of exemption with the Commission. Such claim must:

(i) Be in writing;

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

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

(iv) Contain representations that the pool will be operated in compliance with § 4.12(b)(1)(i) and the pool operator will comply with the requirements of § 4.12(b)(1)(ii);

(v) Specify the relief sought under § 4.12(b)(2);

(vi) Be signed by the pool operator, as follows: If the pool operator is a sole proprietorship, the request must be signed by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer; and

(vii) Be filed, along with a copy, with the Commission at the address specified in § 4.2.

(viii) A copy also must be filed with the National Futures Association at its headquarters office (Attn: Director of Compliance, Compliance Department).

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

(ii) The claim of exemption shall be effective upon filing; *Provided, however,* That any exemption claimed hereunder shall cease to be effective upon any change which would render the representations made pursuant to paragraph (b)(3)(iv) of this section inaccurate or the continuation of such representations false or misleading.

(5)(i) If a claim of exemption has been made with respect to § 4.12(b)(2)(i), the commodity pool operator must make a statement to that effect on the cover page of each offering memorandum, or amendment thereto, that it is required to file with the Commission pursuant to § 4.21(g).

(ii) If a claim of exemption has been made with respect to § 4.12(b)(2)(iii), the pool operator must make a statement to that effect on the cover page of each annual report that it is required to file with the Commission pursuant to § 4.22(c).

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

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

6. Section 4.14 is amended by adding paragraph (a)(8) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

(a) * * *

(8) It is registered as an investment adviser under the Investment Advisers Act of 1940 or is excluded from the definition of the term "investment adviser" pursuant to the provisions of sections 202(a)(2) and 202(a)(11) of that Act; *Provided, however,* That:

(i) The person's commodity interest trading advice:

(A) Is directed solely to, and for the sole use of, entities which are excluded from the definition of the term "pool" under § 4.5 or are qualifying entities under § 4.5 for which a notice of eligibility has been filed;

(B) Is solely incidental to its business or providing securities advice to each such entity; and

(C) Employs only such strategies as are consistent with eligibility status under § 4.5.

(ii) The person is not otherwise holding itself out as a commodity trading advisor; and

(iii) Prior to the date upon which such person intends to engage in business as a commodity trading advisor, the person files a notice of exemption with the Commission.

(A) The notice must provide the name, main business address and main business telephone number of the person filing the notice.

(B) The notice must represent that the person qualified for exemption under this § 4.14(a)(8) and that it will comply with the criteria of this section.

(C) The notice shall be effective upon filing; *Provided, however,* That an exemption claimed hereunder shall cease to be effective upon any change which would render the representations made pursuant to paragraph (a)(8)(iii)(B) of this section inaccurate or the continuation of such representations false or misleading.

(iv) In the event a person who has filed a notice of exemption under this § 4.14(a)(8) subsequently becomes registered as a commodity trading advisory, the person must file a supplemental notice of that fact.

(v) Any notice required to be filed hereunder must be:

(A) In writing;

(B) Signed by a duly authorized representative; and

(C) Filed, along with a copy, with the Commission at the address specified in § 4.2.

(D) A copy also must be filed with the National Futures Association at its headquarters office (ATTN: Director of Compliance, Compliance Department).

* * * * *

7. Section 4.21 is amended by revising paragraphs (a)(17)(i) introductory text and (g) to read as follows:

§ 4.21 Disclosure to prospective pool participants.

(a) * * *

(17)(i) The following Risk Disclosure Statement, to be prominently disclosed on, and as the only language on, the page immediately following any disclosures required to appear on the cover page as provided by the Commission or any registered futures association, or immediately following the disclosures explicitly required in the forepart of a securities prospectus pursuant to any regulations promulgated under applicable securities laws.

* * * * *

(g)(1) The commodity pool operator must file with the Commission two 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.

(2) The commodity pool operator must file with the Commission two 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.

8. Section 4.22 is amended by revising the first sentence of paragraph (c) to read as follows:

§ 4.22 Reporting to pool participants.

* * * * *

(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 two copies of the Report with the Commission, within 90 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier, but in no event longer than 90 days after funds are returned to pool participants; *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. * * *

* * * * *

9. Section 4.31 is amended by revising paragraph (f) to read as follows:

§ 4.31 Disclosure to prospective clients.

* * * * *

(f)(1) The commodity trading advisor must file with the Commission two 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.

(2) The commodity trading advisor must file with the Commission two copies of all subsequent amendments to the Disclosure Document for each trading program that it offers or that it intends to offer within 21 calendar days of the date upon which the trading advisor first knows or has reason to know of the defect requiring the amendment.

* * * * *

PART 140—ORGANIZATION, FUNCTIONS AND PROCEDURES OF THE COMMISSION

10. The authority citation for Part 140 continues to read as follows:

Authority: 7 U.S.C. 2, 4, 4a(c), 4a(j), 6, 6c, 6d, 6e, 6f, 6g, 6k, 6*l*, 6m, 6n, 6p, 7, 7a, 8, 8a, 12, 12a, 18 and 23; 5 U.S.C. 552 and 552b.

11. Section 140.93(a) is amended by revising paragraph (a)(1) and by adding paragraph (a)(6) to read as follows:

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

(a) * * *

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

* * * * *

(6) All functions reserved to the Commission in § 4.6(b) of this chapter.

* * * * *

Issued in Washington, DC on October 27, 1987, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 87-25280 Filed 10-30-87; 8:45 am]

BILLING CODE 6351-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 5

Delegations of Authority and Organization; Center for Devices and Radiological Health

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the regulations for delegations of authority relating to certification of true copies and use of the Department seal to add to the list of delegates the Director and Deputy Director and the Freedom of Information Officers of the Office of Standards and Regulations, Center for Devices and Radiological Health (CDRH).

The additional authority is being delegated because the CDRH Freedom of Information function is located in the Office of Standards and Regulations.

EFFECTIVE DATE: November 2, 1987.

FOR FURTHER INFORMATION CONTACT: Melissa H. Moncavage, Office of Management and Operations (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443 4976.

SUPPLEMENTARY INFORMATION: FDA is amending § 5.22 *Certification of true copies and use of the Department seal* (21 CFR 5.22) to add to the list of delegates the Director and Deputy Director and the Freedom of Information Officers of the Office of Standards and Regulations, CDRH. The additional authority is being delegated because the CDRH Freedom of Information function is located in the Office of Standards and Regulations.

Further redelegation of the authority delegated is not authorized. Authority delegated to a position by title may be exercised by a person officially designated to serve in such position in an acting capacity or on a temporary basis.

List of Subjects in 21 CFR Part 5

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

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 5 is amended as follows:

PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION

1. The authority citation for 21 CFR Part 5 continues to read as follows:

Authority: 5 U.S.C. 504, 552; 7 U.S.C. 2217; 15 U.S.C. 638, 1451 et seq.; 21 U.S.C. 41 et seq., 61-63, 141 et seq., 301-392, 467f(b), 679(b), 801 et seq., 823(f), 1031 et seq.; 35 U.S.C. 156; 42 U.S.C. 219, 241, 242(a), 242a, 242l, 242o, 243, 262, 263, 263b through 263m, 264, 265, 300u et seq., 1395y and 1395y note, 3246(b)(3), 4831(a), 10007, and 10008; Federal Caustic Poison Act (44 Stat. 1406); Federal Advisory Committee Act (Pub. L. 92-463); E.O. 11490, 11921.

2. In § 5.22 by adding new paragraphs (a)(9) (v) and (vi) to read as follows:

§ 5.22 Certification of true copies and use of Department seal.

(a) * * *

(9) * * *

(v) The Director and Deputy Director, Office of Standards and Regulations, CDRH.

(vi) Freedom of Information Officers, Office of Standards and Regulations, CDRH.

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