

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term “commodity pool operator.”

(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 pool operator” with respect to the operation of a qualifying entity specified in paragraph (b) of this section:

(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 of, a named fiduciary of (or a person designated or acting as a fiduciary pursuant to a written delegation from or other written agreement with the named fiduciary) or an employer maintaining 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 employee benefit 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;

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

(iv) Any employee welfare benefit plan that is subject to the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974; and

(v) A plan defined as a church plan in Section 3(33) of title I of the Employee Retirement Income Security Act of 1974 with respect to which no election has been made under 26 U.S.C. 410(d).

(b) For the purposes of this section, the term “qualifying entity” means:

(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; *Provided, however,* That such entity will be operated in the manner specified in paragraph (c)(2) of this section.

(c) Any person who desires to claim the exclusion provided by this section shall file with the National Futures Association a notice of eligibility; *Provided, however,* That a plan fiduciary who is not a named fiduciary but who has

an agreement with a named fiduciary as described in paragraph (a)(4) of this section may claim the exclusion through the notice filed by the named fiduciary.

(1) The notice of eligibility must contain the following information:

(i) The name of such person;

(ii) The applicable subparagraph of paragraph (a) of this section pursuant to which such person is claiming exclusion;

(iii) The name of the qualifying entity which such person intends to operate pursuant to the exclusion; and

(iv) The applicable subparagraph of paragraph (b) of this section pursuant to which such entity is a qualifying entity.

(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in a manner such that the qualifying entity:

(i) Will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has claimed an exclusion from the definition of the term "commodity pool operator" under the Act and, therefore, who is not subject to registration or regulation as a pool operator under the Act; *Provided*, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject; and

(ii) Will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this §4.5(c);

Provided, however, That the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject.

(3) The notice of eligibility must be filed with the National Futures Association prior to the date upon which such person intends to operate the qualifying entity pursuant to the exclusion provided by this section.

(4) The notice of eligibility shall be effective upon filing.

(d)(1) Each person who has claimed exclusion hereunder must, in the event that any of the information contained or representations made in the notice of eligibility becomes inaccurate or incomplete, file a supplemental notice with the National Futures Association to that effect which, if applicable, includes such amendments as may be necessary to render the notice of eligibility accurate and complete.

(2) The supplemental notice required by paragraph (d)(1) of this section shall be filed within fifteen business days after the occurrence of such event.

(e) An exclusion claimed hereunder shall cease to be effective upon any change which would render:

(1) A person as to whom such exclusion has been claimed ineligible under paragraph (a) of this section;

(2) The entity for which such exclusion has been claimed ineligible under paragraph (b) of this section; or

(3) Either the representations made pursuant to paragraph (c)(2) of this section inaccurate or the continuation of such representations false or misleading.

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

(1) In writing;

(2) Manually signed by a representative duly authorized to bind a person specified in paragraph (a) of this section; and

(3) Filed with the National Futures Association at its headquarters office (Attn: Director of Compliance, Compliance Department).

(g) The filing of a notice of eligibility or the application of “non-pool status” under this section will not affect the ability of a person to qualify for an exemption from registration as a commodity pool operator under §4.13 in connection with the operation of another trading vehicle that is not covered under this §4.5.

[50 FR 15882, Apr. 23, 1985; 50 FR 18859, May 3, 1985, as amended at 58 FR 6374, Jan. 28, 1993; 58 FR 43793, Aug. 18, 1993; 65 FR 24128, Apr. 25, 2000; 65 FR 25980, May 4, 2000; 67 FR 77410, Dec. 18, 2002; 68 FR 47230, Aug. 8, 2003]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(B) With respect to an exempt account:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(xi) A Non-United States person;

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

(B) An exempt pool; or

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

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

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

(ii) A bank as defined in section 3(a)(2) of the Securities Act of 1933 (the "Securities Act") or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Securities Act acting for its own account or for the account of a qualified eligible person;

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

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

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

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

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

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

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

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

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

(xii) Except as provided for the governmental entities referenced in paragraph (a)(3)(iv) of this section, if otherwise authorized by law to engage in such transactions, a governmental entity (including the United States, a state, or a foreign government) or political subdivision thereof, or a multinational or supranational entity or an instrumentality, agency, or department of any of the foregoing.

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Legend. (A) If a claim for exemption has been made pursuant to this section, the commodity pool operator must make a statement to that effect on the cover page of each annual report.

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

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

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

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

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

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

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

(d) *Notice of claim for exemption.* (1) A notice of a claim for exemption under this section must:

(i) Be in writing;

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

(iii)(A) Where the claimant is a commodity pool operator, provide the name(s) of the pool(s) for which the request is made; *Provided,* That a single notice representing that the pool operator anticipates operating single-investor pools may be filed to claim exemption for single-investor pools and such notice need not name each such pool;

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

(iv) Contain representations that:

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

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

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

(v) Specify the relief claimed under §4.7;

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

(vii) Be manually signed by a representative duly authorized to bind the commodity pool operator or commodity trading advisor;

(viii) Be filed with the National Futures Association at its headquarters office (Attn: Director of Compliance, Compliance Department); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[65 FR 47854, Aug. 4, 2000, as amended at 67 FR 77411, Dec. 18, 2002; 68 FR 47231, Aug. 8, 2003]

§ 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 paragraph (b)(1)(i) (C) and (D) of this section 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, 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 §§4.24(a), 4.24(b), and 4.24(n); *Provided, however*, that the offering memorandum:

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

(B) Contains the information required by §§4.24(c) through (m) and (o) through (u); and

(C) Complies with the requirements of §§4.24(v) and (w).

(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 (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 National Futures Association. 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 paragraph (b)(1)(i) of this section and the pool operator will comply with the requirements of paragraph (b)(1)(ii) of this section;

(v) Specify the relief sought under paragraph (b)(2) of this section;

(vi) Be manually signed by a representative duly authorized to bind the pool operator; and

(vii) 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 under §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 §4.26.

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

(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.

[52 FR 41984, Nov. 2, 1987, as amended at 60 FR 38183, July 25, 1995; 67 FR 77411, Dec. 18, 2002; 68 FR 47231, Aug. 8, 2003]

§ 4.13 Exemption from registration as a commodity pool operator.

This section is organized as follows: Paragraph (a) of this section specifies the criteria that must be met to qualify for exemption from registration under this section; paragraph (b) of this section governs the notice that must be filed to claim exemption from registration; paragraph (c) of this section sets forth the continuing obligations of a person who has claimed exemption under this section; paragraph (d) of this section specifies information certain persons must provide if they subsequently register; paragraph (e) of this section specifies the effect of registration on a person who has claimed an exemption from registration under this section or who is eligible to claim an exemption from registration hereunder; and paragraph (f) of this section specifies the effect of this section on §4.5 of this chapter.

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

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

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

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

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

(2)(i) None of the pools operated by it has more than 15 participants at any time; and

(ii) The total gross capital contributions it receives for units of participation in all of the pools it operates or that it intends to operate do not in the aggregate exceed \$400,000.

(iii) For the purpose of determining eligibility for exemption under paragraph (a)(2) of this section, the person may exclude the following participants and their contributions:

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

(B) A child, sibling or parent of any of these participants;

(C) The spouse of any participant specified in paragraph (a)(2)(iii)(A) or (B) of this section; and

(D) Any relative of a participant specified in paragraph (a)(2)(iii)(A), (B) or (C) of this section, its spouse or a relative of its spouse, who has the same principal residence as such participant;

(3) For each pool for which the person claims exemption from registration under this paragraph (a)(3):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public in the United States;

(ii) At all times, the pool meets one or the other of the following tests with respect to its commodity interest positions, including positions in security futures products, whether entered into for *bona fide* hedging purposes or otherwise:

(A) The aggregate initial margin and premiums required to establish such positions, determined at the time the most recent position was established, will not exceed 5 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided*, 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) of this chapter may be excluded in computing such 5 percent; or

(B) The aggregate net notional value of such positions, determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph:

(1) The term "notional value" shall be calculated for each such futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit, and for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit; and

(2) The person may net contracts with the same underlying commodity across designated contract markets, registered derivatives transaction execution facilities and foreign boards of trade; and

(iii) The person reasonably believes, at the time of investment (or, in the case of an existing pool, at the time of conversion to a pool meeting the criteria of paragraph (a)(3) of this section), that each person who participates in the pool is:

(A) An "accredited investor," as that term is defined in §230.501 of this title;

(B) A trust that is not an accredited investor but that was formed by an accredited investor for the benefit of a family member;

(C) A "knowledgeable employee," as that term is defined in §270.3c-5 of this title;

(D) A "qualified eligible person," as that term is defined in §4.7(a)(2)(viii)(A) of this chapter; or

(E) A person eligible to participate in a pool for which the pool operator can claim exemption from registration under paragraph (a)(4) of this section; and

(iv) Participations in the pool are not marketed as or in a vehicle for trading in the commodity futures or commodity options markets; *Provided*, That nothing in paragraph (a)(3) of this section shall prohibit the person from claiming an exemption under this section if it additionally operates one or more pools for which it meets the criteria of paragraph (a)(4) of this section; or

(4) For each pool for which the person claims exemption from registration under this paragraph (a)(4):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public in the United States;

(ii) The person reasonably believes, at the time of investment (or, in the case of an existing pool, at the time of conversion to a pool meeting the criteria of paragraph (a)(4) of this section), that:

(A) Each natural person participant (including such person's self-directed employee benefit plan, if any), is a "qualified eligible person," as that term is defined in §4.7(a)(2); and

(B) Each non-natural person participant is a "qualified eligible person," as that term is defined in §4.7, or an "accredited investor," as that term is defined in §230.501(a)(1)-(3), (a)(7) and (a)(8) of this title; *Provided*, That nothing in paragraph (a)(4) of this section will prohibit the person from claiming an exemption under this section if it additionally operates one or more pools that meet the criteria of paragraph (a)(3) of this section.

(5)(i) Eligibility for exemption under this section is subject to the person furnishing in writing to each prospective participant in the pool:

(A) A statement that the person is exempt from registration with the Commission as a commodity pool operator and that therefore, unlike a registered commodity pool operator, it is not required to deliver a Disclosure Document and a certified annual report to participants in the pool; and

(B) A description of the criteria pursuant to which it qualifies for such exemption from registration.

(ii) The person must make these disclosures by no later than the time it delivers a subscription agreement for the pool to a prospective participant in the pool.

(b)(1) Any person who desires to claim the relief from registration provided by this section must file a notice of exemption from commodity pool operator registration with the National Futures Association (ATTN: Director of Compliance). The notice must:

(i) Provide the name, main business address, main business telephone number, main facsimile number and main email address of the person claiming the exemption and the name of the pool for which it is claiming exemption;

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

(iii) Be manually signed by a representative duly authorized to bind the person.

(2) The person must file the notice by no later than the time it delivers a subscription agreement for the pool to a prospective participant in the pool; *Provided*, That where a person registered with the Commission as a commodity pool operator intends to withdraw from registration in order to claim exemption hereunder, the person must notify its

pool's participants in writing that it intends to withdraw from registration and claim the exemption, and it must provide each such participant with a right to redeem its interest in the pool prior to the person filing a notice of exemption from registration.

(3) The notice will be effective upon filing, provided the notice is materially complete.

(4) Each person who has filed a notice of exemption from registration under this section must, in the event that any of the information contained or representations made in the notice becomes inaccurate or incomplete, file a supplemental notice with the National Futures Association to that effect which, if applicable, includes such amendments as may be necessary to render the notice accurate and complete. This supplemental notice must be filed within 15 business days after the pool operator becomes aware of the occurrence of such event.

(c)(1) Each person who has filed a notice of exemption from registration under this section must:

(i) Make and keep all books and records prepared in connection with its activities as a pool operator for a period of five years from the date of preparation;

(ii) Keep such books and records readily accessible during the first two years of the five-year period. All such books and records must be available for inspection upon the request of any representative of the Commission, the United States Department of Justice, or any other appropriate regulatory agency; and

(iii) Submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria for exemption under this section.

(2) In the event the person distributes an annual report to participants in the pool for which it has filed the notice, the annual report must be presented and computed in accordance with generally accepted accounting principles consistently applied and, if certified by an independent public accountant, so certified in accordance with §1.16 of this chapter as applicable.

(3) Each person who has filed a notice of exemption from registration pursuant to paragraph (a)(1) or (a)(2) of this section must:

(i) Promptly furnish to each participant in the pool a copy of each monthly statement for the pool that the pool operator received from a futures commission merchant pursuant to §1.33 of this chapter; and

(ii) Clearly show on such statement, or on an accompanying supplemental statement, the net profit or loss on all commodity interests closed since the date of the previous statement.

(d) Each person who applies for registration as a commodity pool operator subsequent to claiming relief under paragraph (a)(1) or (a)(2) of this section must include with its application the financial statements and other information required by §4.22(c)(1) through (5) for each pool that it has operated as an operator exempt from registration. That information must be presented and computed in accordance with generally accepted accounting principles consistently applied. If the person is granted registration as a commodity pool operator, it must comply with the provisions of this part with respect to each such pool.

(e)(1) Subject to the provisions of paragraph (e)(2) of this section, if a person who is eligible for exemption from registration as a commodity pool operator under this section nonetheless registers as a commodity pool operator, the person must comply with the provisions of this part with respect to each commodity pool identified on its registration application or supplement thereto.

(2) If a person operates one or more commodity pools described in paragraph (a)(3) or (a)(4) of this section, and one or more commodity pools for which it must be, and is, registered as a commodity pool operator, the person is exempt from the requirements applicable to a registered commodity pool operator with respect to the pool or pools described in paragraph (a)(3) or (a)(4) of this section; *Provided*, That the person:

(i) Furnishes in writing to each prospective participant in a pool described in paragraph (a)(3) or (a)(4) of this section that it operates:

(A) A statement that it will operate the pool as if the person was exempt from registration as a commodity pool operator;

(B) A description of the criteria pursuant to which it will so operate the pool;

(ii) Complies with paragraph (c) of this section; and

(iii) Provides to each existing participant in a pool that the person elects to operate as described in paragraph (a)(3) or (a)(4) of this section a right to redeem the participant's interest in the pool, and informs each such participant of that right no later than the time the person commences to operate the pool as described in paragraph (a)(3) or (a)(4) of this section.

(f) The filing of a notice of exemption from registration under this section will not affect the ability of a person to qualify for exclusion from the definition of the term "commodity pool operator" under §4.5 in connection with its operation of another trading vehicle that is not covered under this §4.13.

(Approved by the Office of Management and Budget under control number 3038-0005)

(Secs. 2(a)(1), 4c(a)-(d), 4d, 4f, 4g, 4k, 4m, 4n, 8a, 15 and 17, Commodity Exchange Act (7 U.S.C. 2, 4, 6c(a)-(d), 6f, 6g, 6k, 6m, 6n, 12a, 19 and 21; 5 U.S.C. 552 and 552b))

[46 FR 26013, May 8, 1981, as amended at 46 FR 63035, Dec. 30, 1981; 47 FR 57011, Dec. 22, 1982; 50 FR 15883, Apr. 23, 1985; 67 FR 77411, Dec. 18, 2002; 68 FR 47231, Aug. 8, 2003; 68 FR 52837, Sept. 8, 2003; 68 FR 59113, Oct. 14, 2003; 69 FR 41426, July 9, 2004]

§ 4.14 Exemption from registration as a commodity trading advisor.

This section is organized as follows: Paragraph (a) of this section specifies the criteria that must be met to qualify for exemption from registration under this section, including the notice of exemption from registration and continuing obligations of persons who have claimed exemption under paragraph (a)(8) of this section; paragraph (b) of this section concerns "cash market transactions"; and paragraph (c) of this section specifies the effect of registration on a person who has claimed an exemption from registration under this section or who is eligible to claim an exemption from registration hereunder.

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

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

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

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

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

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

(6) It is registered under the Act as an introducing broker and the person's trading advice is solely in connection with its business as an introducing broker;

(7) It is registered under the Act as a leverage transaction merchant and the person's trading advice is solely in connection with its business as a leverage transaction merchant;

(8) It is registered as an investment adviser under the Investment Advisers Act of 1940 or with the applicable securities regulatory agency of any State, or it is exempt from such registration, or it is excluded from the definition of the term "investment adviser" pursuant to the provisions of sections 202(a)(2) and 202(a)(11) of the Investment Advisers Act of 1940, *Provided*, That:

(i) The person's commodity interest trading advice is directed solely to, and for the sole use of, one or more of the following:

(A) "Qualifying entities," as that term is defined in §4.5(b), for which a notice of eligibility has been filed;

(B) Collective investment vehicles that are excluded from the definition of the term commodity "pool" under §4.5(a)(4); and

(C) Commodity pools that are organized and operated outside of the United States, its territories or possessions, where:

(1) The commodity pool operator of each such pool has not so organized and is not so operating the pool for the purpose of avoiding commodity pool operator registration;

(2) With the exception of the pool's operator, advisor and their principals, solely "Non-United States persons," as that term is defined in §4.7(a)(1)(iv), will contribute funds or other capital to, and will own beneficial interests in, the pool; *Provided*, That units of participation in the pool held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10 percent of the beneficial interest of the pool;

(3) No person affiliated with the pool conducts any marketing activity for the purpose of, or that could reasonably have the effect of, soliciting participation from other than Non-United States persons; and

(4) No person affiliated with the pool conducts any marketing activity from within the United States, its territories or possessions; and

(D) A commodity pool operator who has claimed an exemption from registration under §4.13(a)(3) or 4.13(a)(4), or, if registered as a commodity pool operator, who may treat each pool it operates that meets the criteria of §4.13(a)(3) or 4.13(a)(4) as if it were not so registered; and

(ii) The person:

(A) Provides commodity interest trading advice solely incidental to its business of providing securities or other investment advice to qualifying entities, collective investment vehicles and commodity pools as described in paragraph (a)(8)(i) of this section; and

(B) Is not otherwise holding itself out as a commodity trading advisor.

(iii)(A) A person who desires to claim the relief from registration provided by this §4.14(a)(8) must file a notice of exemption from commodity trading advisor registration with the National Futures Association (ATTN: Director of Compliance). The notice must:

(1) Provide the name, main business address, main business telephone number, main facsimile number and main email address of the trading advisor claiming the exemption;

(2) Contain the section number pursuant to which the advisor is filing the notice (*i.e.*, under §4.14(a)(8)(i)) and represent that it will provide commodity interest advice to its clients in accordance with the criteria of that paragraph or paragraphs; and

(3) Be manually signed by a representative duly authorized to bind the person.

(B) The person must file the notice by no later than the time it delivers an advisory agreement for the trading program pursuant to which it will offer commodity interest advice to a client; *Provided*, That where the advisor is registered with the Commission as a commodity trading advisor, it must notify its clients in writing that it intends to withdraw from registration and claim the exemption and must provide each such client with a right to terminate its advisory agreement prior to the person filing a notice of exemption from registration.

(C) The notice will be effective upon filing, provided the notice is materially complete.

(D) Each person who has filed a notice of registration exemption under this section must, in the event that any of the information contained or representations made in the notice becomes inaccurate or incomplete, file a supplemental notice with the National Futures Association to that effect which, if applicable, includes such amendments as may be necessary to render the notice accurate and complete. This supplemental notice must be filed within 15 business days after the trading advisor becomes aware of the occurrence of such event.

(iv) Each person who has filed a notice of registration exemption under this §4.14(a)(8) must:

(A)(1) Make and keep all books and records prepared in connection with its activities as a trading advisor, including all books and records demonstrating eligibility for and compliance with the applicable criteria for exemption under this section, for a period of five years from the date of preparation; and

(2) Keep such books and records readily accessible during the first two years of the five-year period. All such books and records must be available for inspection upon the request of any representative of the Commission, the United States Department of Justice, or any other appropriate regulatory agency; and

(B) Submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria for exemption under this section;

(9) It does not engage in any of the following activities:

(i) Directing client accounts; or

(ii) Providing commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients; or

(10) If, as provided for in section 4m(1) of the Act, during the course of the preceding 12 months, it has not furnished commodity trading advice to more than 15 persons and it does not hold itself out generally to the public as a commodity trading advisor.

(i) For the purpose of paragraph (a)(10) of this section, the following are deemed a single person:

(A) A natural person, and:

(1) Any minor child of the natural person;

(2) Any relative, spouse, or relative of the spouse of the natural person who has the same principal residence;

(3) All accounts of which the natural person and/or the persons referred to in paragraph (a)(10)(i)(A) of this section are the only primary beneficiaries; and

(4) All trusts of which the natural person and/or the persons referred to in paragraph (a)(10)(i)(A) of this section are the only primary beneficiaries;

(B)(1) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(10)(i)(A)(4) of this section), or other legal organization (any of which are referred to hereinafter as a "legal organization") that receives commodity interest trading advice based on its investment

objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an "owner"); and

(2) Two or more legal organizations referred to in paragraph (a)(10)(i)(B)(1) of this section that have identical owners.

(ii) *Special Rules.* For the purpose of paragraph (a)(10) of this section:

(A) An owner must be counted in its own capacity as a person if the commodity trading advisor provides advisory services to the owner separate and apart from the advisory services provided to the legal organization; *Provided*, That the determination that an owner is a client will not affect the applicability of paragraph (a)(10) of this section with regard to any other owner;

(B)(1) A general partner of a limited partnership, or other person acting as a commodity trading advisor to the partnership, may count the limited partnership as one person; and

(2) A manager or managing member of a limited liability company, or any other person acting as a commodity trading advisor to the company, may count the limited liability company as one person.

(C) A commodity trading advisor that has its principal office and place of business outside of the United States, its territories or possessions must count only clients that are residents of the United States, its territories and possessions; a commodity trading advisor that has its principal office and place of business in the United States or in any territory or possession thereof must count all clients.

(iii) *Holding Out.* Any commodity trading advisor relying on paragraph (a)(10) of this section shall not be deemed to be holding itself out generally to the public as a commodity trading advisor, within the meaning of section 4m(1) of the Act, solely because it participates in a non-public offering of interests in a collective investment vehicle under the Securities Act of 1933.

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

(c)(1) Subject to the provisions of paragraph (c)(2) of this section, if a person who is eligible for exemption from registration as a commodity trading advisor under this section nonetheless registers as a commodity trading advisor, the person must comply with the provisions of this part with respect to those clients for which it could have claimed an exemption from registration hereunder.

(2) If a person provides commodity interest trading advice to a client described in paragraph (a) of this section and to a client for which it must be, and is, registered as a commodity trading advisor, the person is exempt from the requirements applicable to a registered commodity trading advisor with respect to the clients so described; *Provided*, That the person furnishes in writing to each prospective client described in paragraph (a) of this section a statement that it will provide commodity interest trading advice to the client as if it was exempt from registration as a commodity trading advisor; *Provided Further*, That the person provides to each existing client described in paragraph (a) of this section a right to terminate its advisory agreement, and informs such client of that right no later than the time the person commences to provide commodity interest trading advice to the client as if the person was exempt from registration.

(Secs. 8a(5) and 19 of the Commodity Exchange Act, as amended, 7 U.S.C. 12a(5) and 23 (1982); 5 U.S.C. 552 and 552b)

[46 FR 26013, May 8, 1981; 46 FR 26761, May 15, 1981; 48 FR 35298, Aug. 3, 1983; 49 FR 5526, Feb. 13, 1984; 52 FR 41985, Nov 2, 1987; 52 FR 43827, Nov 16, 1987; 65 FR 12943, Mar. 10, 2000; 67 FR 77411, Dec. 18, 2002; 68 FR 47233, Aug. 8, 2003; 68 FR 52837, Sept. 8, 2003; 68 FR 59114, Oct. 14, 2003]

18-96 Offshore Commodity Pools

Relief for Certain Registered CPOs

From Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11)

and

From the Location of Books and Records Requirement of Rule 4.23

By this Advisory, the Division of Trading and Markets ("Division") of the Commodity Futures Trading Commission ("Commission") is making generally available to qualifying commodity pool operators ("CPOs") relief that the Division previously has issued on a case-by-case exemptive basis with respect to registered CPOs who operate offshore commodity pools. The Division will continue to evaluate on a case-by-case basis requests for relief that do not meet the criteria set forth below.

A. Relief for Certain Registered CPOs from Disclosure, Reporting and Certain Recordkeeping Requirements in Connection with the Operation of Offshore Commodity Pools. A registered CPO who operates an offshore commodity pool may claim relief from the disclosure, reporting and recordkeeping requirements of Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11), respectively, through the filing of a notice of a claim for exemption with the Division that sets forth the following representations:

1. The CPO claiming the relief is registered as a CPO with the Commission;
2. The commodity pool is, and will remain, organized and operated outside of the United States;
3. The commodity pool will not hold meetings or conduct administrative activities within the United States;
4. No shareholder of or other participant in the commodity pool is or will be a United States person;
5. The commodity pool will not receive, hold or invest any capital directly or indirectly contributed from sources within the United States; and
6. The CPO, the commodity pool and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from United States persons.

The content and filing procedures for such notices are discussed in Section C, infra.

B. Relief For Certain Registered CPOs from Location Requirement of Offshore Pool's Original Books and Records. A registered CPO whose main business office is within the United States and who operates a commodity pool that has its main business office outside the United States

may claim relief from the requirement of Rule 4.23 that a registered CPO maintain the original books and records of its commodity pool at its main business office through the filing of a notice of a claim for exemption with the Division that sets forth the following representations:

- 1.The CPO will maintain the original books and records of the commodity pool at the main office of the commodity pool located outside the United States;
- 2.The CPO desires to maintain such books and records outside the United States in furtherance of compliance with Internal Revenue Service ("IRS") requirements for relief from United States federal income taxation;
- 3.The CPO will maintain duplicate books and records of the commodity pool at a designated office in the United States; and
- 4.Within 72 hours after the request of a representative from the Commission, the United States Department of Justice or the National Futures Association ("NFA"), the original books and records will be provided to such representative at a place located in the United States that is specified by the representative.

Filing a notice of a claim for exemption under this Section B of the Advisory, however, does not eliminate the requirement to comply with the location of the CPO's own books and records under Rule 4.23(b), or, in the case of a CPO of a Rule 4.7 exempt pool, the location requirement for the CPO's own books and records under Rule 4.7(a)(2)(iv).

C.Filing of a Notice of a Claim For Exemption.

A CPO may claim: (1) all of the relief made available by this Advisory, which may be claimed through one notice which makes the representations set forth in Sections A and B above; (2) relief solely from Rules 4.21, 4.22 and 4.23(a)(10)and (a)(11), as set forth in Section A; or (3) relief solely from the Rule 4.23 requirement regarding location of a pool's books and records, as set forth in Section B.

Any notice of a claim for exemption filed for relief pursuant to this Advisory must:

- 1.Be in writing;
- 2.Provide the name, business address, business telephone number and the NFA identification number of the CPO(s) claiming the relief;
- 3.Provide the name(s) of the commodity pool(s) for which the request is made;
- 4.Contain representations that neither the CPO nor any of its principals is subject to any statutory disqualification under Section 8a(2) or 8a(3) of the Act unless such disqualification arises from a matter which (a) was previously disclosed in connection with a previous application for

registration if such registration was granted, or (b) was disclosed to the Commission or the NFA more than thirty days prior to the filing of this notice;

5.(a) Specify the rules from which the CPO seeks relief and make the representations set forth above (i.e., those in Section A, subparagraphs 1 through 6, or those in Section B, subparagraphs 1 through 4) required for obtaining such relief; and

(b) Where relief is requested pursuant to Section B of this Advisory, provide the name, title, full mailing address, telephone number and relationship to the commodity pool of the person who will have custody of the pool's original books and records and the location outside the United States where those books and records will be kept;

6.Be signed by the CPO as follows: if a sole proprietorship, by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer; and

7.Be filed in duplicate with the Commission and the NFA at the headquarters addresses set forth below:

Commodity Futures Trading Commission

(Attn: Office of the Chief Counsel)

Division of Trading and Markets

1155 21st Street, N.W.

Washington, D.C. 20581

National Futures Association

(Attn: Director of Compliance, Compliance Department)

200 West Madison Street

Suite 1600

Chicago, Illinois 60606-3447.

A notice of a claim for exemption must be filed with the Division prior to the date upon which the CPO filing such notice intends to operate pursuant to the terms of the relief available. The notice will be effective upon filing, provided that the representations set forth therein are valid and accurate. An exemption claimed hereunder will cease to be effective upon any change which would render the representations set forth in the notice of a claim for exemption inaccurate or the continuation of such representations false or misleading. Each person who has claimed relief hereunder, in the event that any of the information contained or representations made in the

notice of a claim for exemption changes or becomes inaccurate or incomplete, must file a supplemental notice with the Commission to that effect which, if applicable, includes such amendments as may be necessary to render the notice of a claim for exemption accurate and complete. Such supplemental notice must be filed within fifteen business days after the occurrence of the relevant event.

Notwithstanding any notice of a claim of exemption filed under this Advisory, persons claiming such relief remain subject to all other applicable requirements contained in the Act and the Commission's regulations issued thereunder, including, without limitation, the antifraud provisions of Sections 4b and 4o of the Act, the reporting requirements for traders set forth in Parts 15, 18, and 19 of the Commission's regulations, and all other provisions of Part 4.

Updated February 1, 2001

Appendix A to Part 4—Guidance on the Application of Rule 4.13(a)(3) in the Fund-of-Funds Context

The following provides guidance on the application of the trading limits of Rule 4.13(a)(3)(ii) to commodity pool operators (CPOs) who operate "fund-of-funds." For the purpose of this Appendix A, it is presumed that the CPO can comply with all of the other requirements of Rule 4.13(a)(3). It also is presumed that where the investor fund CPO is relying on its own computations, the investor fund is participating in each investee fund that trades commodity interests as a passive investor, with limited liability (*e.g.*, as a limited partner of a limited partnership or a non-managing member of a limited liability company). Fund-of-funds CPOs who seek to claim exemption from registration under Rule 4.13(a)(1), (a)(2) or (a)(4) may do so without regard to the trading engaged in by an investee fund, because none of the registration exemptions set forth in those rules concerns limits on or levels of commodity interest trading. Persons whose fact situations do not fit any of the scenarios below should contact Commission staff to discuss the applicability of the registration exemption in Rule 4.13(a)(3) to their particular situations.

1. *Situation:* An investor fund CPO allocates the fund's assets to one or more investee funds, none of which meets the trading limits of Rule 4.13(a)(3) and each of which is operated by a registered CPO. It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may claim relief under Rule 4.13(a)(3) provided the investor fund itself meets the trading limits of Rule 4.13(a)(3)(ii)(A).

2. *Situation:* An investor fund CPO allocates the fund's assets to one or more investee funds, each having a CPO who is either: (1) itself claiming exemption from CPO registration under Rule 4.13(a)(3); or (2) a registered CPO that is complying with the trading restrictions of Rule 4.13(a)(3). It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO fund may rely upon the representations of the investee fund CPOs that they are complying with the trading limits of Rule 4.13(a)(3).

3. *Situation:* An investor fund CPO allocates the fund's assets to investee funds, each of which operates under a percentage restriction on the amount of margin or option premiums that may be used to establish its commodity interest positions (whether pursuant to Rule 4.12(b), Rule 4.13(a)(3)(ii)(A) or otherwise), by, *e.g.*, contractual agreement. It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The CPO of the investor fund may multiply the percentage restriction applicable to each investee fund by the percentage of the investor fund's allocation of assets to that investee fund to determine whether the CPO is operating the investor fund in compliance with Rule 4.13(a)(3)(ii)(A).

4. *Situation:* An investor fund CPO allocates the fund's assets to one or more investee funds, and it has actual knowledge of the trading limits and commodity interest positions of the investee funds, *e.g.*, where the CPO or one or more affiliates of the CPO operate the investee funds. (For this purpose, an "affiliate" is a person who controls, who is controlled by, or who is under common control with, the CPO.) It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may aggregate commodity interest positions across investee funds to determine compliance with the trading restrictions of Rule 4.13(a)(3). For this purpose, the aggregate assets of the investee funds would be compared to the aggregate of their commodity interest positions (as to margin or as to net notional value). The investor fund CPO should use the results of this computation to determine its compliance with the trading limits of Rule 4.13(a)(3).

5. *Situation:* An investor fund CPO allocates no more than 50 percent of the fund's assets to investee funds that trade commodity interests (without regard to the level of commodity interest trading engaged in by those investee pools). It does not allocate any of the investor fund's assets directly to commodity interest trading.

Application: The investor fund CPO may claim relief under Rule 4.13(a)(3).

6. *Situation:* An investor fund CPO allocates the fund's assets to both investee funds and direct trading of commodity interests.

Application: The investor fund CPO must treat the amount of investor fund assets committed to such direct trading as a separate pool for purposes of determining compliance with Rule 4.13(a)(3)(ii), such that the commodity interest trading of that pool must meet the criteria of Rule 4.13(a)(3)(ii) independently of the portion of investor fund assets allocated to investee funds.

[68 FR 47236, Aug. 8, 2003; 68 FR 52837, Sept. 8, 2003]