

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 4

#### Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Futures Trading Commission is proposing amendments to its regulations regarding requirements applicable to investment companies registered under the Investment Company Act of 1940 (“registered investment companies”) whose advisors will be subject to registration as commodity pool operators due to changes that the Commission is adopting.

**DATES:** Comments should be received on or before April 24, 2012.

**ADDRESSES:** Comments may be submitted by any of the following methods:

- *Agency Web site, via its Comments Online Process:* Comments may be submitted to <http://comments.cftc.gov/PublicComments/ReleasesWithComments.aspx>. Follow the instructions for submitting comments on the Web site.

- *Mail:* David A. Stawick, Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

- *Hand Delivery/Courier:* Same as mail above.

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- “Regulation 4.5 Harmonization” must be in the subject field of comments submitted electronically, and clearly indicated on written submissions. All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to [www.cftc.gov](http://www.cftc.gov). You should submit only information that you wish to make available publicly. If you wish the CFTC to consider information that may be exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the established procedures in CFTC Regulation 145.9 (17 CFR 145.9).

- The CFTC reserves the right, but shall have no obligation, to: review, prescreen, filter, redact, refuse, or remove any or all of your submission

from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed which contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

**FOR FURTHER INFORMATION CONTACT:** Kevin P. Walek, Assistant Director, Telephone: (202) 418–5463, Email: [kwalek@cftc.gov](mailto:kwalek@cftc.gov), Amanda Leshner Olear, Special Counsel, Telephone: (202) 418–5283, Email: [aolear@cftc.gov](mailto:aolear@cftc.gov), or Michael Ehrstein, Attorney-Advisor, Telephone: 202–418–5957, Email: [mehrstein@cftc.gov](mailto:mehrstein@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

###### A. Statutory and Regulatory Background

The Commodity Exchange Act (“CEA”)<sup>1</sup> provides the Commission with the authority to register Commodity Pool Operators (“CPOs”) and Commodity Trading Advisors (“CTAs”),<sup>2</sup> to exclude any entity from registration as a CPO or CTA,<sup>3</sup> and to require “[e]very commodity trading advisor and commodity pool operator registered under [the CEA] to maintain books and records and file such reports in such form and manner as may be prescribed by the Commission.”<sup>4</sup> The Commission also has the power to “make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate the provisions or to accomplish any of the purposes of [the CEA].”<sup>5</sup> The Commission’s discretionary power to exclude or exempt persons from registration was intended to be exercised “to exempt from registration those persons who otherwise meet the criteria for registration \* \* \* if, in the opinion of the Commission, there is no substantial public interest to be served by the registration.”<sup>6</sup> It is pursuant to this

<sup>1</sup> 17 U.S.C. 1, *et seq.*

<sup>2</sup> 7 U.S.C. 6m.

<sup>3</sup> 7 U.S.C. 1a(11) and 1a(12).

<sup>4</sup> 7 U.S.C. 6n(3)(A). Under part 4 of the Commission’s regulations, entities registered as CPOs have reporting obligations with respect to their operated pools. See 17 CFR 4.22.

<sup>5</sup> 7 U.S.C. 12a(5).

<sup>6</sup> See H.R. Rep. No. 93–975, 93d Cong., 2d Sess. (1974), p. 20.

authority that the Commission has promulgated the exclusions from the definition of CPO that are delineated in § 4.5.<sup>7</sup>

###### B. Reinstatement of Trading and Marketing Criteria in § 4.5

In February 2011, the Commission proposed to revise the requirements for determining which persons should be required to register as a CPO under § 4.5.<sup>8</sup> The Commission is adopting the proposed changes to § 4.5, with some minor modifications, and is proposing certain provisions to facilitate compliance by registered investment companies with the Commission’s disclosure, reporting, and recordkeeping requirements. The proposed amendments that follow are based on the consideration of the comments that were submitted on the previously proposed amendments to § 4.5, information provided during a staff roundtable on July 16, 2011 (“Roundtable”),<sup>9</sup> and meetings with interested parties.<sup>10</sup>

###### C. Proposed Harmonization Provisions

Many commenters noted that sponsors of registered investment companies which also would be required to register as CPOs would be subject to duplicative, inconsistent, and possibly conflicting disclosure and reporting requirements. In comment letters, meetings, and at the Roundtable, a number of suggestions were made regarding the manner in which the Securities and Exchange Commission (“SEC”) and CFTC requirements could be harmonized. Specific areas identified by the commenters as needing harmonization include: the timing of delivery of Disclosure Documents to prospective participants; the signed acknowledgement requirement for receipt of Disclosure Documents; the cycle for updating Disclosure Documents; The timing of financial reporting to participants; the requirement that a CPO maintain its books and records on site; the required disclosure of fees; the required disclosure of past performance; the inclusion of mandatory certification language; and the SEC-permitted use of a summary prospectus of open-ended registered investment companies.

<sup>7</sup> 17 CFR 4.5. See 68 FR 47231 (Aug. 8, 2003).

<sup>8</sup> 76 FR 7976 (Feb. 12, 2011).

<sup>9</sup> See Notice of CFTC Staff Roundtable Discussion on Proposed Changes to Registration and Compliance Regime for Commodity Pool Operators and Commodity Trading Advisors, available at [http://www.cftc.gov/PressRoom/Events/opaevent\\_cftcstaff070611](http://www.cftc.gov/PressRoom/Events/opaevent_cftcstaff070611).

<sup>10</sup> See generally, <http://comments.cftc.gov/PublicComments/CommentList.aspx?id=973>.

Several commenters suggested that the Commission make available relief, with respect to document and report distribution, similar to that which it has recently adopted with respect to exchange-traded funds (“ETFs”).<sup>11</sup> Other commenters suggested that where requirements are inconsistent, the Commission should defer to SEC requirements. A few commenters made recommendations about the treatment of specific disclosures, such as presenting both SEC and CFTC-required fee information and presenting certain performance information required by the CFTC in the Statement of Additional Information (“SAI”). At least one commenter noted that registered investment companies should be required to comply with all disclosure and other requirements applicable to registered CPOs.

The Commission has carefully considered the comments regarding harmonization and has determined to propose the following exemptive provisions that would be available to advisors of registered investment companies who are required to register as CPOs.

#### 1. Delivery of Disclosure Documents and Periodic Reports

Part 4 of the Commission’s regulations impose certain risk disclosure, reporting, and recordkeeping obligations on registered CPOs. Section 4.21<sup>12</sup> of the Commission’s regulations requires that each CPO registered or required to be registered with the Commission deliver a Disclosure Document prepared in accordance with §§ 4.24 and 4.25,<sup>13</sup> which set forth the specific information required to be disclosed, including the past performance of the offered pool to each prospective participant in a pool that it operates or intends to operate. Section 4.21 further provides that the CPO may not accept or receive funds, securities, or other property from a prospective participant unless the CPO first receives from the prospective participant a signed and dated acknowledgment stating that the prospective participant received a Disclosure Document for the pool.

With respect to a CPO’s reporting obligations, § 4.22<sup>14</sup> requires that each CPO registered or required to be registered periodically distribute to each participant in each pool that it operates an Account Statement presented in the form of a Statement of Income (Loss) and a Statement of Changes in Net Asset

Value for the prescribed period. The Account Statement must be distributed monthly for pools with net assets of more than \$500,000, and otherwise at least quarterly.<sup>15</sup> The financial statements must be presented in accordance with generally accepted accounting principles, consistently applied.<sup>16</sup> With respect to a CPO’s recordkeeping obligations, § 4.23<sup>17</sup> of the Commission’s regulations requires, in relevant part, that each CPO who is registered or required to be registered must make and keep the books and records specified in the regulation “at its main business office.”

#### 2. Comments Received Regarding Recently Adopted Exemptive Relief for Exchange Traded Funds

In response to the Commission’s proposal to amend § 4.5, several commenters suggested that the Commission consider extending the exemptive relief that it recently adopted for CPO’s operating ETFs under § 4.12(c),<sup>18</sup> which makes available to such CPOs specified relief from the Disclosure Document delivery and acknowledgment requirements of § 4.21, the monthly Account Statement delivery requirement of § 4.22, and the requirement to keep the CPO’s books and records at its main business address in § 4.23. The relief permits CPOs to comply with the Disclosure Document and account statement delivery requirements by making such documents available on their web sites, and to maintain their records with specified third parties, on the condition that certain information and representations are filed with the CPO’s notice claiming relief.<sup>19</sup> The criteria for claiming this relief are that: (1) The units of participation in the pool will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933,<sup>20</sup> and (2) the units will be listed for trading on a national securities exchange registered as such under the Securities Exchange Act of 1934.<sup>21</sup> In its release proposing ETF relief, the Commission noted that historically, ETFs have been investment companies registered under the Investment Company Act of 1940 either as unit investment trusts or as open-end investment companies.<sup>22</sup> The Commission did not, however, make

such registration a condition of relief. Commenters noted that, like ETFs, the distribution and subscription mechanisms for registered investment companies would make it difficult for them to meet the Disclosure Document delivery and acknowledgment requirements under the Commission’s regulations. Commenters and Roundtable panelists also noted that the records of registered investment companies often are maintained by third parties, such as administrators, making it difficult for registered investment companies to comply with the requirement of § 4.23 that a pool’s books and records be maintained at the CPO’s main business office.<sup>23</sup> To address these concerns, the Commission is proposing to add an alternative criterion under § 4.12(c) that will permit registered investment companies to claim the disclosure, reporting, and recordkeeping relief currently available to ETFs.

Several commenters further requested that the Commission extend the same relief it made available to operators of ETFs for delivery of required disclosures and periodic reports to CPOs of publicly offered commodity pools, noting that such offerings are regulated by the CFTC, SEC, National Futures Association (“NFA”), Financial Industry Regulatory Authority (“FINRA”), and each state in which they are offered. The Commission agrees that for purposes of the exemption, there is no useful distinction between publicly offered pools whose units are listed for trading on a national securities exchange, and those which are not. Therefore, the Commission is proposing to amend § 4.12(c) such that the CPO of any pool whose units of participation will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933 may claim the relief from the delivery and acknowledgment requirements under § 4.21, certain periodic financial reporting obligations under § 4.22, and the requirement that records be maintained at the CPO’s main office under § 4.23, available under § 4.12(c) with respect to that pool.

#### 3. Content and Timing of Disclosure Documents

Many of the disclosures required by part 4 of the Commission’s regulations are consistent with SEC-required disclosures. Where CFTC requirements differ slightly, the Commission believes that CFTC-required disclosures can be presented concomitant with SEC-required information in a registered investment company’s prospectus. To

<sup>11</sup> 76 FR 28641 (May 18, 2011).

<sup>12</sup> 17 CFR 4.21.

<sup>13</sup> 17 CFR 4.24 and 4.25.

<sup>14</sup> 17 CFR 4.22.

<sup>15</sup> 17 CFR 4.22(b).

<sup>16</sup> 17 CFR 4.22(a).

<sup>17</sup> 17 CFR 4.23.

<sup>18</sup> 17 CFR 4.12(c).

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

<sup>20</sup> 15 U.S.C. 77a, *et seq.*

<sup>21</sup> 15 U.S.C. 78a, *et seq.*

<sup>22</sup> 75 FR 54794, 54795 (Sept. 9, 2010).

<sup>23</sup> 17 CFR 4.23.

address the few instances where conflicts in disclosure have been identified, the Commission is proposing relief to harmonize these requirements. With respect to performance, § 4.25(b) specifies that if the pool has traded commodity interests for three years or more, during which at least seventy-five percent of its contributions have been made by persons unaffiliated with the CPO, CTAs, or their principals, the only required performance is that of the offered pool.<sup>24</sup> If a pool has not operated for at least three years, the CPO must present the performance of other pools and accounts enumerated in §§ 4.25(c)(2)–(5).<sup>25</sup> The Commission is proposing that the performance of other pools and accounts required to be disclosed by §§ 4.25(c)(2)–(5) may be presented in the registered investment company's SAI. The Commission notes that SEC requirements may conflict with CFTC requirements with respect to reporting past performance and accordingly seeks comment below.<sup>26</sup> In addition, the Commission is proposing that, in lieu of the standard cautionary statement prescribed by § 4.24(a),<sup>27</sup> the cover page of the registered investment company's prospectus may contain a statement that combines the language required by both § 4.24(a) and Rule 481(b)(1) under the Securities Act of 1933.<sup>28</sup> With respect to the break-even point<sup>29</sup> required by § 4.24(d)(5),<sup>30</sup> the Commission will consider the forefront of the document to be the section immediately following all disclosures required by SEC Form N-1A<sup>31</sup> to be

included in the summary prospectus, or otherwise, for registered investment companies using Form N-2, in the forefront of the prospectus. Any other information required to be presented in the forefront of the document by § 4.24(d), but that is not included in the summary section of the prospectus for open-ended registered investment companies, may also be presented immediately following the summary section of the prospectus for open-ended funds, or otherwise, for registered investment companies using Form N-2, in the forefront of the prospectus. Finally, with respect to disclosure of fees and expenses required by § 4.24(i), any such expenses that are not included in the fee table required by Item 3 of Form N-1A or Item 3 of Form N-2 would be disclosed in the prospectus, along with the tabular presentation of the calculation of the pool's break-even point required by § 4.24(i)(6). The Commission continues to believe that the inclusion of the tabular presentation of the calculation of the break-even point consistent with the Commission's regulations is a necessary disclosure because, among other requirements, it mandates a greater level of detail regarding brokerage fees and does not assume a specific rate of return. The Commission believes that this results in meaningful disclosure through the break-even analysis and facilitates an investor's assessment of a registered investment company that uses derivatives.

Commenters noted that the CFTC's and SEC's timing requirements for Disclosure Document updates were inconsistent. Section 4.26 of the Commission's regulations specifies that a Disclosure Document may be used for nine months from the date of the document before a new Disclosure Document must be prepared and filed. Conversely, provisions of the securities laws effectively require an annual prospectus update. Section 10(a)(3) of the Securities Act of 1933 specifies that "when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use \* \* \*."<sup>32</sup> Because financial statements are prepared annually as of the end of the investment company's fiscal year, and information from the financial statements is included in the prospectus, the operation of Section 10(a)(3) results in an annual prospectus updating cycle. To address this inconsistency, the Commission is

proposing to require that CPOs and CTAs file updates of all Disclosure Documents twelve months from the date of the document.

Some commenters, including NFA, raised an operational issue in connection with Disclosure Document amendments filed pursuant to § 4.26(c).<sup>33</sup> NFA noted that CPOs filing amended Disclosure Documents cannot distribute the document until NFA accepts the disclosure document. NFA suggested that the Commission consider whether it may be appropriate to allow CPOs of pools that provide for daily liquidity to post the Disclosure Document with the highlighted changes on their internet web sites for pool participants at the same time the CPO files with NFA, with the final document posted upon completion of the NFA review process. The Commission notes that § 4.26(d)(2) currently permits CPOs to provide Disclosure Document updates to participants at the same time such updates are filed with NFA. Therefore, if the proposed relief is adopted by the Commission, CPOs claiming such relief may follow the procedure recommended by NFA with no additional action by the Commission.

#### 4. Reports—Timing and Certification

Section 4.22(a) requires CPOs to provide periodic reports, generally monthly, to participants in the pools that they operate. SEC regulations require that registered investment companies provide semiannual reports to shareholders. Regulations of both commissions require provision of annual financial statements to commodity pool participants and investment company shareholders, respectively.<sup>34</sup> Some commenters noted that the requirement to prepare and provide monthly account statements would be burdensome because registered investment companies are not required to do so under SEC regulations, and suggested that the Commission accept the reporting required under securities laws. The Commission has carefully considered these comments and determined not to propose relief regarding the content or timing of the monthly account statement, as the information required to prepare the account statement should be readily available to the operator of an investment vehicle maintaining records of its trading activity and other operations in accordance with recordkeeping requirements under the CEA and applicable securities laws. Registered investment companies will

<sup>24</sup> 17 CFR 4.25(b).

<sup>25</sup> 17 CFR 4.25(c)(2)–(5).

<sup>26</sup> The Commission has had preliminary discussions with SEC staff on this issue. The SEC staff stated that it would consider requests for no-action relief regarding the performance presentations, if necessary and appropriate.

<sup>27</sup> Section 4.24(a) of the Commission's regulations requires that each disclosure document prepared and distributed by registered CPOs prominently display the following prescribed cautionary statement on its cover: THE COMMODITY FUTURES TRADING COMMISSION HAS NOT PASSED UPON THE MERITS OF PARTICIPATING IN THIS POOL NOR HAS THE COMMISSION PASSED ON THE ADEQUACY OR ACCURACY OF THIS DISCLOSURE DOCUMENT. 17 CFR 4.24(a).

<sup>28</sup> 17 CFR 230.481.

<sup>29</sup> Section 4.10(j) of the Commission's regulations defines the "break-even point" as "the trading profit that a pool must realize in the first year of a participant's investment to equal all fees and expenses such that such participant will recoup its initial investment, as calculated pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act." 17 CFR 4.10(j)(1). The break-even point must be expressed in terms of dollars and as a percentage of the minimum unit of initial investment. 17 CFR 4.10(j)(2). It must also assume the redemption of the investment as of the close of the first year of investment. *Id.*

<sup>30</sup> 17 CFR 4.24(d)(5).

<sup>31</sup> 17 CFR 274.11a.

<sup>32</sup> 15 U.S.C. 77j.

<sup>33</sup> 17 CFR 4.26.

<sup>34</sup> 17 CFR 4.22 and 270.30e-1.

be able to satisfy the requirement to deliver account statements to participants by making such statements available on their internet Web sites, thereby substantially reducing any burden under § 4.22(a).

One commenter noted that the language required by the CFTC and the SEC in their respective periodic and annual report certifications is not identical, and encouraged the Commission to work with the SEC either to accept one language in lieu of the other or to develop agreed upon language for these certifications. Section 4.22(h) requires the individual making the oath or affirmation on behalf of the CPO to affirm that, to the best of his or her knowledge and belief, the information contained in the document is accurate and complete. The first item in the certification required by SEC Form N-CSR is: "Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report." The certification under § 4.22(h) must be included with the periodic and annual reports provided to participants and with the annual report filed with NFA. The certification required by SEC Form N-CSR is made available through EDGAR, but does not have to be provided to shareholders. Because the Form N-CSR certification includes language that is substantively consistent with the certification required under § 4.22(h), the Commission will accept the SEC's certification as meeting the requirement under § 4.22(h), as long as such certification is part of the Form N-CSR filed with the SEC.

The Commission seeks comment on the proposed harmonization provisions. In particular, do any provisions of part 4 in addition to those identified in the proposal need to be harmonized? For instance, as noted in the Commission's final rulemaking, *Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations*,<sup>35</sup> the Commission is considering adopting a family offices exemption from CPO registration akin to the exemption adopted by the SEC.<sup>36</sup> What are the factors that weigh in favor or against such an exemption? Do the proposed harmonization provisions for break-even analysis and performance disclosure strike the appropriate balance

between achieving the Commission's objective of providing material information to pool participants, and reducing duplicative or conflicting disclosure? Should the Commission consider harmonizing its account statement reporting requirement with the SEC's semiannual reporting requirement? Should the Commission consider harmonizing its past performance reporting requirements with the SEC requirements? Are there other approaches to harmonizing these requirements that the Commission should consider? Should the Commission consider applying any of the harmonization provisions to operators of pools that are not registered investment companies?

## II. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)<sup>37</sup> requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.<sup>38</sup>

CPOs: The Commission has previously determined that registered CPOs are not small entities for the purpose of the RFA.<sup>39</sup> With respect to CPOs exempt from registration, the Commission has determined that a CPO is a small entity if it meets the criteria for exemption from registration under current Rule 4.13(a)(2).<sup>40</sup> Based on the requisite level of sophistication needed to comply with the SEC's regulatory regime for registered investment companies and the fact that registered investment companies are generally intended to serve as retail investment vehicles and do not qualify for exemption under § 4.13(a)(2), the Commission believes that registered investment companies are generally not small entities for purposes of the RFA analysis. Moreover, the proposals herein will reduce the burden of complying with part 4 for CPOs of registered investment companies. The Commission has determined that the proposed regulation will not create a significant economic impact on a substantial number of small entities.

CTAs: The Commission has previously decided to evaluate, within the context of a particular rule proposal, whether all or some CTAs should be

considered to be small entities, and if so, to analyze the economic impact on them of any such rule.<sup>41</sup> The sole aspect of the proposal that affects CTAs would allow disclosure documents to be used for 12 months rather than nine months, thereby reducing the frequency with which updates must be prepared. Therefore, the Commission has determined that the proposal will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rules, will not have a significant impact on a substantial number of small entities.

### B. Paperwork Reduction Act

The Paperwork Reduction Act ("PRA") imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.<sup>42</sup> An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget ("OMB").

The Commission is amending Collection 3038-0023 to allow for an increase in response hours for the rulemaking resulting from the amendments to § 4.5 that the Commission adopted in a concurrent release.<sup>43</sup> In the context of that rulemaking, the Commission received comments asserting that, absent harmonization of the Commission's compliance regime for CPOs with that of the SEC for registered investment companies, entities operating registered investment companies that would be required to register with the Commission would not be able to comply with the Commission's regulations and would have to discontinue their activities involving commodity interests. Because the Commission is proposing provisions to harmonize its compliance regime for sponsors or advisors to registered investment companies required to register as CPOs, the Commission believes that such entities will be able to register with the Commission and comply with the applicable compliance obligations.

The Commission also is amending Collection 3038-0005 to allow for an increase in response hours for the rulemaking associated with modified

<sup>35</sup> Published elsewhere in this issue of the *Federal Register*.

<sup>36</sup> See 17 CFR 250.202(a)(11)(G)-1.

<sup>37</sup> See 5 U.S.C. 601, *et seq.*

<sup>38</sup> 47 FR 18618 (Apr. 30, 1982).

<sup>39</sup> See 47 FR 18618, 18619 (Apr. 30, 1982).

<sup>40</sup> See 47 FR at 18619-20.

<sup>41</sup> See 47 FR at 18620.

<sup>42</sup> See 44 U.S.C. 3501 *et seq.*

<sup>43</sup> CITE to FR for Non-Joint Rulemaking.

compliance obligations under part 4 of the Commission's regulations resulting from these revisions. The titles for these collections are "Part 3—Registration" (OMB Control number 3038–0023) and "Part 4—Commodity Pool Operators and Commodity Trading Advisors" (OMB Control number 3038–0005). Responses to this collection of information will be mandatory.

The Commission will protect proprietary information according to the Freedom of Information Act ("FOIA") and 17 CFR part 145, "Commission Records and Information." In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market position of any person and trade secrets or names of customers."<sup>44</sup> The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.<sup>45</sup>

In the Commission's February proposal, the Commission estimated that the burden of § 4.5 compliance would be 16.68 hours for an estimated 416 CPOs and CTAs that would be obligated to comply.<sup>46</sup> There currently is no source of reliable information regarding the general use of derivatives by registered investment companies. Because of this lack of information, the Commission has derived the estimated entities affected and the number of burden hours associated with this proposal through the use of statistical analysis. According to the one source of data available to the Commission, in 2010, there were 669 sponsors of 9,719 registered investment companies, including mutual funds, closed end funds, exchange traded funds, and unit investment trusts.<sup>47</sup> In the comment

letter submitted by the Investment Company Institute ("ICI") with respect to the Commission's February proposal the ICI stated that it surveyed its membership and 13 sponsors responded representing 2,111 registered investment companies. Of those 2,111 registered investment companies, the 13 sponsors estimated that 485 would trigger registration and compliance obligations under § 4.5 as amended. This constitutes approximately 23% of the reported registered investment companies.

The Commission then deducted the 2,111 registered investment companies discussed in the ICI comment letter from the 9,719 entities comprising the universe of registered investment companies, and deducted the 13 sponsors surveyed by the ICI from the universe of 669 fund sponsors to arrive at 656 fund sponsors operating 7,608 registered investment companies. This resulted in an average of 11.6 registered investment companies being offered per sponsor.

The Commission then calculated 23% of the 7,608 registered investment companies not covered by the ICI survey, which equals 1,750 registered investment companies that the Commission would expect to trigger registration under amended § 4.5. Then, the Commission divided this number by the average number of registered investment companies operated per sponsor and added the 13 sponsors from the ICI survey to reach 164 sponsors expected to be required to register under amended § 4.5. Because the Commission cannot state with absolute certainty that only 164 entities would be required to register, due to the uncertainty inherent in the use of averages, the Commission believes that the number of sponsors or advisors required to register to be somewhere between 164 and 669 entities. For PRA purposes, the Commission believes that it is appropriate to use the midpoint between the outer bounds of the range, which is 416 entities. The Commission estimates that there will still be some burden associated with § 4.5 compliance under the proposed rule, as there are some incompatibilities between SEC and Commission regulations (as discussed above). The Commission estimated this burden at approximately 2 hours annually. Thus, the Commission estimates that this new proposal will reduce the information collection burden associated with § 4.5 compliance for the estimated 416 entities by 14.68 hours per entity.

Institute (2011), available at <http://www.icifactbook.org/>.

1. Additional Information Provided by CPOs and CTAs

a. OMB Control Number 3038–0023

Part 3 of the Commission's regulations concern registration requirements. The Commission is amending existing Collection 3038–0023 to reflect the obligations associated with the registration of new entrants, *i.e.*, CPOs that were previously exempt from registration under § 4.5 that had not previously been required to register. Because the registration requirements are in all respects the same as for current registrants, the collection has been amended only insofar as it concerns the increased estimated number of respondents and the corresponding estimated annual burden.

*Estimated number of respondents:* 75,841.

*Annual responses by each respondent:* 76,350.

*Annual reporting burden:* 6,871.6.

b. OMB Control Number 3038–0005

Part 4 of the Commission's regulations concerns the operations of CTAs and CPOs, and the circumstances under which they may be exempted or excluded from registration. Under existing Collection 3038–0005 the estimated average time spent per response has not been altered; however, adjustments have been made to the collection to account for the new burden expected under the proposed rulemaking. The total burden associated with Collection 3038–0005 is expected to be:

*Estimated number of respondents:* 44,142.

*Annual responses by each respondent:* 62,121.

*Estimated average hours per response:* 4.22.

*Annual reporting burden:* 262,347.8.

The proposed harmonization specifically will add the following burden with respect to compliance obligations other than Form CPO–PQR:

*Estimated number of respondents:* 416.

*Annual responses by each respondent:* 5.

*Estimated average hours per response:* 2.

*Annual reporting burden:* 4160.

The proposed harmonization will add the following burden with respect to the burden associated with Form CPO–PQR: Schedule A:

*Estimated number of respondents:* 586.

*Annual responses by each respondent:* 4.

*Estimated average hours per response:* 6.

<sup>44</sup> See 7 U.S.C. 12.

<sup>45</sup> See 5 U.S.C. 552a.

<sup>46</sup> The Commission notes that the PRA burden proposes that it be considered in light of the costs entities may have incurred under the part 4 regulations as proposed in the Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations rulemaking. In that rulemaking, the Commission estimated that entities would incur 9.58 burden hours in filing an annual report, 3.85 burden hours in compiling and distributing periodic account statements, and 3.25 burden hours in compiling and distributing disclosure documents; in sum, the Commission estimated that these provisions would incur a burden in total of 16.68 hours. By operation of this proposal, registered investment companies regulated by the SEC will be able to use similar documents required under SEC regulations to satisfy their CFTC registration and compliance requirements under part 4 of the Commission's regulations.

<sup>47</sup> See 2011 Investment Company Fact Book, Chap. 1 and Data Tables, Investment Company

*Annual reporting burden:* 14,064.  
Schedule B:

*Estimated number of respondents:*  
586.

*Annual responses by each  
respondent:* 4.

*Estimated average hours per response:*

4.  
*Annual reporting burden:* 9,376.  
Schedule C:

*Estimated number of respondents:*  
586.

*Annual responses by each  
respondent:* 4.

*Estimated average hours per response:*  
18.

*Annual reporting burden:* 42,192.

## 2. Information Collection Comments

The Commission invites the public and other Federal agencies to comment on any aspect of the reporting and recordkeeping burdens discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information collected; and (iv) minimize the burden of the collection of information on those who are required to respond, including through the use of automated collection techniques or other forms of information technology.

Comments may be submitted directly to the Office of Information and Regulatory Affairs, by fax at (202) 395-6566 or by email at [OIRASubmissions@omb.eop.gov](mailto:OIRASubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted comments so that they can be summarized and addressed in the final rule. Refer to the **ADDRESSES** section of this notice of proposed rulemaking for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting [RegInfo.gov](http://RegInfo.gov).

OMB is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release. Consequently, a comment to OMB is most assured of being fully effective if received by OMB (and the Commission) within 30 days after publication of this notice of proposed rulemaking.

### C. Considerations of Costs and Benefits

Section 15(a) of the Act requires the Commission, before promulgating a

regulation under the Act or issuing an order, to consider the costs and benefits of its action.<sup>48</sup> Section 15(a) specifies that costs and benefits shall be evaluated in light of the following considerations: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.<sup>49</sup> The Commission can, in its discretion, give greater weight to any of the five considerations and determine that, notwithstanding its costs, a particular regulation was necessary or appropriate to protect the public interest, or to effectuate any of the provisions, or to accomplish any of the purposes, of the Act.

In February 2011, the Commission proposed to revise the requirements for determining which persons should be required to register as a CPO under § 4.5. The Commission received numerous comments that sponsors of registered investment companies that also would be required to register as CPOs would be subject to duplicative, inconsistent, and possibly conflicting disclosure and reporting requirements. The purpose of this proposal is to harmonize certain CFTC and SEC registration requirements in an effort to reduce the costs to dual registrants of complying with two regulatory regimes. To address the commenters' concerns about the content and timing of disclosure documents, account statement delivery and certification, and recordkeeping requirements, the Commission is proposing to harmonize its regulatory requirements with those of the SEC to reduce the costs for dual registrants. Each of these harmonizing provisions involves recordkeeping and reporting obligations that would be a collection of information under the PRA.

The Commission is obligated to estimate the burden of and provide supporting statements for any collections of information it seeks to establish under considerations contained in the PRA,<sup>50</sup> and to seek approval of those requirements from the OMB. Therefore, the estimated burden costs and support for the collections of information is provided for in the PRA section of this notice of proposed rulemaking and the information collection requests that will be filed

with OMB contemporaneously with this rulemaking as required by that statute.

#### 1. Section 15(a) Considerations

As stated above, section 15(a) of the CEA requires the CFTC to consider the costs and benefits of its actions in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.

##### a. Protection of Market Participants and the Public

The Commission believes that these regulations protect market participants and the public by achieving the same regulatory objectives of its proposed part 4 registration and reporting requirements but at reduced costs.

##### b. Efficiency, Competitiveness, and Financial Integrity of Futures Markets

The Commission believes that harmonization and its concomitant reduction in regulatory burden promotes the efficiency of futures markets in an indirect way; by lessening the costs that entities must bear to operate within markets, participants can pass along such savings to their customers or devote more resources to serving those customers. Moreover, as registered participants are relieved of some burdens, the incentive to remain unregistered may diminish.

##### c. Price Discovery

The Commission has not identified a specific effect on price discovery as a result of these harmonizing regulations.

##### d. Sound Risk Management

The Commission has not identified a specific effect on sound risk management as a result of these harmonizing regulations.

##### e. Other Public Interest Considerations

The CFTC has not identified other public interest considerations related to the costs and benefits of these regulations.

## 2. Conclusion

The Commission believes these regulations will lower burdens for many market participants who are also registered with other regulatory agencies as a result of doing business in multiple markets. The Commission welcomes all public comments on its cost and benefit considerations, including its analysis of the regulations in light of the five factors enumerated in § 15(a). Specifically, are

<sup>48</sup> 7 U.S.C. 19(a).

<sup>49</sup> 7 U.S.C. 19(a).

<sup>50</sup> 44 U.S.C. 3501 *et seq.*

there potential costs associated with these harmonizing rules that the Commission has not considered? Are there benefits to market participants, the public, or futures markets that the Commission should consider?

#### List of Subjects in 17 CFR Part 4

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

Accordingly, the CFTC proposes to amend 17 CFR part 4 as follows:

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

1. The authority citation for part 4 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 4, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

2. Amend § 4.12 by revising paragraph (c) to read as follows:

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

\* \* \* \* \*

(c) *Exemption from Subpart B for certain commodity pool operators based on registration under the Securities Act of 1933 or the Investment Company Act of 1940.* (1) *Eligibility.* Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (c)(2) of this section if, with respect to the pool for which it makes such claim:

(i) The units of participation will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933; or

(ii) The pool is registered under the Investment Company Act of 1940.

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

(i) In the case of § 4.21, exemption from the Disclosure Document delivery and acknowledgment requirements of that section, Provided, however, that the pool operator:

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

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

(C) Clearly informs prospective pool participants with whom it has contact of the Internet address of such Web site and directs any broker, dealer or other

selling agent to whom the pool operator sells units of participation in the pool to so inform prospective pool participants; and

(D)(1) If claiming relief under paragraph (c)(1)(i) of this section, comply with all other requirements applicable to pool Disclosure Documents under part 4. The pool operator may satisfy the requirement of § 4.26(b) to attach to the Disclosure Document a copy of the pool's most current Account Statement and Annual Report if the pool operator makes such Account Statement and Annual Report readily accessible on an Internet Web site maintained by the pool operator.

(2) If claiming relief under paragraph (c)(1)(ii) of this section, comply with all other requirements applicable to pool Disclosure Documents under part 4, except that, with respect to the specific requirements listed below, comply as follows:

(i) With respect to the legend required by § 4.24(a), include a legend that indicates that the Commodity Futures Trading Commission and the Securities and Exchange Commission have not approved or disapproved of the securities or passed upon the merits of participating in the pool, nor has either agency passed upon the accuracy or adequacy of the disclosure in the prospectus, and that any contrary representation is a criminal offense. The legend may be in one of the following or other clear and concise language:

*Example A:* The Securities and Exchange Commission and the Commodity Futures Trading Commission have not approved or disapproved these securities or this pool, or passed upon the adequacy or accuracy of this prospectus. Any representation to the contrary is a criminal offense.

*Example B:* The Securities and Exchange Commission and the Commodity Futures Trading Commission have not approved or disapproved these securities or this pool, or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

(ii) With respect to performance that is required under § 4.25(c)(2), (3), (4) or (5), present such information in the Statement of Additional Information.

(iii) In the case of § 4.22, exemption from the Account Statement distribution requirement of that section; *Provided*, however, that the pool operator:

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

operator may meet the requirement of § 4.22(h) by including the certification required by Rule 30e-1 under the Investment Company Act of 1940 (17 CFR 270.30e-1) with its posting of the pool's Account Statements; and

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

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

(2) The Internet address of such Web site.

\* \* \* \* \*

3. Amend § 4.26 by revising paragraph (a)(2) to read as follows:

#### § 4.26 Use, amendment and filing of Disclosure Document.

(a) \* \* \*

(2) No commodity pool operator may use a Disclosure Document or profile document dated more than twelve months prior to the date of its use.

\* \* \* \* \*

4. Amend § 4.36 by revising paragraph (b) to read as follows:

#### § 4.36 Use, amendment and filing of Disclosure Document.

\* \* \* \* \*

(b) No commodity trading advisor may use a Disclosure Document dated more than twelve months prior to the date of its use.

\* \* \* \* \*

Issued in Washington, DC, on February 8, 2012, by the Commission.

**David A. Stawick,**

*Secretary of the Commission.*

**Note:** The following appendices will not appear in the Code of Federal Regulations: Appendices to Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators—Commission Voting Summary and Statements of Commissioners.

#### Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Sommers, Chilton, O'Malia and Wetjen voted in the affirmative; no Commissioner voted in the negative.

#### Appendix 2—Statement of Chairman Gary Gensler

The Commodity Futures Trading Commission's (CFTC) part 4 rules require recordkeeping, reporting and disclosures from Commodity Pool Operators. I support the proposed rule that would harmonize such requirements with those of the Securities and Exchange Commission (SEC) for investment companies registered with both the CFTC and SEC. The Commission is committed to

ensuring that customers of registered investment companies receive basic protections while also seeking to balance the compliance requirements for the operators of these funds. I look forward to comments from the public to further build on this harmonization effort.

**Appendix 3—Statement of  
Commissioner Jill E. Sommers**

The final rules amending the Commission's Part 4 regulations adopted today will require,

among other things, that investment advisors of certain registered investment companies register as CPOs and operate under a dual SEC/CFTC regulatory regime. As explained in my dissent to the final rules, I could have supported a version of the rules that would have achieved the regulatory objectives outlined by the NFA in its August 18, 2010 petition to amend Rule 4.5. While I opposed the version of the rules the Commission ultimately adopted, having finalized them I support the Commission's effort to

harmonize the resulting compliance obligations. Dually registered entities should not be subject to duplicative, inconsistent, or conflicting requirements. The proposed rules, if finalized in their current form, would not achieve true harmonization. I urge those affected by the rules to submit detailed comment letters, with a focus on the costs and benefits of the rules as proposed and any suggested alternatives.

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