

**List of Items Controlled***Unit:* \* \* \**Related Controls:* \* \* \**Related Definitions:* \* \* \**Items:*

\* \* \* \* \*

b. Accelerometers of any type, designed for use in inertial navigation systems or in guidance systems of all types, specified to function at acceleration levels greater than 100 g.

**Note to paragraph (b):** This paragraph (b) does not include accelerometers that are designed to measure vibration or shock.

■ 11. In Supplement No. 1 to part 774 (the Commerce Control List), Category 7—Navigation and Avionics, Export Control Classification Number (ECCN) 7A102 is amended:

■ a. By revising the Heading, and

■ b. By revising the “items” paragraph in the List of Items Controlled section, to read as follows:

**7A102 Gyros, other than those controlled by 7A002 (see List of Items Controlled), and specially designed components therefor.**

\* \* \* \* \*

**List of Items Controlled***Unit:* \* \* \**Related Controls:* \* \* \**Related Definitions:* \* \* \**Items:*

a. All types of gyros, usable in rockets, missiles, or unmanned aerial vehicles capable of achieving a “range” equal to or greater than 300 km, with a rated “drift rate” ‘stability’ of less than 0.5 degrees (1 sigma or rms) per hour in a 1 g environment.

b. Gyros of any type, designed for use in inertial navigation systems or in guidance systems of all types, specified to function at acceleration levels greater than 100 g.

**Technical Note:** In this entry, the term ‘stability’ is defined as a measure of the ability of a specific mechanism or performance coefficient to remain invariant when continuously exposed to a fixed operating condition. (This definition does not refer to dynamic or servo stability.) (IEEE STD 528–2001 paragraph 2.247).

■ 12. In Supplement No. 1 to part 774 (the Commerce Control List), Category 7—Navigation and Avionics, Export Control Classification Number (ECCN) 7A103 is amended by redesignating the Note as Note 1 and adding a Note 2 at the end of paragraph (a) of the “items” paragraph in the List of Items Controlled section, to read as follows:

**7A103 Instrumentation, navigation equipment and systems, other than those controlled by 7A003, and specially designed components therefor.**

\* \* \* \* \*

**List of Items Controlled***Unit:* \* \* \**Related Controls:* \* \* \**Related Definitions:* \* \* \**Items:*

a. \* \* \*

**Note 1:** 7A103.a does not control equipment containing accelerometers specially designed and developed as MWD (Measurement While Drilling) sensors for use in down-hole well services operations.

**Note 2:** 7A103.a does not control inertial or other equipment using accelerometers or gyros controlled by 7A001 or 7A002 that are only NS controlled.

\* \* \* \* \*

Dated: November 4, 2009.

**Matthew S. Borman,***Acting Assistant Secretary for Export Administration.*

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**BILLING CODE 3510–33–P****COMMODITY FUTURES TRADING COMMISSION****17 CFR Part 4****[RIN 3038–AC38]****Commodity Pool Operator Periodic Account Statements and Annual Financial Reports****AGENCY:** Commodity Futures Trading Commission.**ACTION:** Final rule.

**SUMMARY:** The Commodity Futures Trading Commission (“Commission” or “CFTC”) is amending its regulations governing the periodic account statements that commodity pool operators (“CPOs”) are required to provide to commodity pool participants and the annual financial reports that CPOs are required to provide to commodity pool participants and file with the National Futures Association (“NFA”). The amendments: specify detailed information that must be included in the periodic account statements and annual reports for commodity pools with more than one series or class of ownership interest; clarify that the periodic account statements must disclose either the net asset value per outstanding participation unit in the pool, or the total value of a participant’s interest or share in the pool; extend the time period for filing and distributing annual reports of commodity pools that invest in other funds; codify existing Commission staff interpretations regarding the proper accounting treatment and financial statement presentation of certain income and expense items in the periodic account statements and annual reports; streamline annual reporting

requirements for pools ceasing operation; establish conditions for use of International Financial Reporting Standards (“IFRS”) in lieu of U.S. Generally Accepted Accounting Principles (“U.S. GAAP”) and a notice procedure for CPOs to claim such relief; and clarify and update several other requirements for periodic and annual reports prepared and distributed by CPOs.

**DATES:** *Effective date:* This rule is effective December 9, 2009.

*Applicability dates:* Amendments to §§ 4.7(b)(3) and 4.22(c) (other than 4.22(c)(7)) are applicable to commodity pool annual reports for fiscal years ending December 31, 2009 and later.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background**

On February 24, 2009, the Commission published<sup>1</sup> for public comment proposed amendments to the reporting provisions applicable to CPOs under Part 4 of its regulations (“Proposed Part 4 Amendments”).<sup>2</sup> Pursuant to regulations contained in Part 4, a registered CPO must distribute an account statement to each participant in each commodity pool that it operates within 30 days of the end of the reporting period, and must file with NFA, and provide to each participant, an annual financial report for each commodity pool that it operates within 90 days of the end of the pool’s fiscal year or the permanent cessation of the pool’s trading. The Part 4 Amendments codify existing staff interpretations, clarify reporting for series funds, extend financial reporting filing deadlines for CPOs operating commodity pools that that invest in other funds, and streamline certain filing requirements for pools ceasing operation.

**II. Comments Received**

The Commission received four comment letters in response to the Proposed Part 4 Amendments. Comments were submitted by NFA; the Committee on Futures Regulation of the New York City Bar Association (“NYC Bar”); Arthur F. Bell & Associates, LLC,

<sup>1</sup> 74 FR 8220 (February 24, 2009).

<sup>2</sup> Commission regulations referred to herein are found at 17 CFR Ch. I (2009 edition).

an accounting firm (“Arthur Bell CPAs”); and the Managed Funds Association (“MFA”). All of the commenters generally supported the proposed amendments. Each of the commenters, however, had specific suggestions regarding clarification of certain aspects of the proposal. The commenters’ suggestions are discussed below.

### III. The Final Regulations

#### A. Periodic Account Statements for Regulation 4.7-Exempt Pools

Regulation 4.7(b)(2) requires the CPO of a commodity pool for which the CPO has claimed an exemption under Regulation 4.7 (*i.e.*, a “Regulation 4.7-exempt commodity pool”) to provide each participant in the pool with periodic account statements that must indicate: (1) The net asset value of the exempt pool as of the end of the reporting period; (2) the change in net asset value of the exempt pool from the end of the previous reporting period; and (3) the net asset value per outstanding unit of participation in the exempt pool as of the end of the reporting period.

The Commission proposed to amend Regulation 4.7(b)(2) to clarify that the periodic account statement provided to each pool participant must disclose either the net asset value per outstanding participation unit, or the total value of the participant’s interest or share, in the commodity pool as of the end of the reporting period. The proposal was intended to ensure that pool participants receive sufficient information to determine the value of their investments in the commodity pool from the periodic account statement, particularly for non-unitized pools. The proposed amendments also would conform the account statement requirements for Regulation 4.7-exempt pools to those for non-exempt pools under Regulation 4.22(a).

The Commission did not receive any comments regarding the proposed amendments to Regulation 4.7(b)(2). For the reasons set forth above and in the Proposed Part 4 Amendments, the Commission is adopting the amendments as proposed.

#### B. Series Pools and Pools With Multiple Classes of Ownership Interests

The ownership structure of a commodity pool may be organized to include more than one series or class of ownership interest. The commodity pool may have more than one ownership series or class due to differences in fees and expenses charged to the series or classes, currency

denomination of the series or classes, trading strategies, cash management strategies, or other aspects of the operation of the pool.

Pool financial statements prepared pursuant to both Regulation 4.22(c) and Regulation 4.7(b)(3) must be presented and computed in accordance with Generally Accepted Accounting Principles (“GAAP”). GAAP provides guidance regarding the presentation of financial statements for series funds<sup>3</sup> and for investment funds with multiple ownership classes.<sup>4</sup> As noted in the Proposed Part 4 Amendments, Commission staff has received several inquiries from CPOs, their attorneys and accountants, and NFA regarding the proper presentation of periodic account statements and annual financial reports for series funds and multi-class pools.

In order to address issues raised with series funds and to address the proper accounting treatment under GAAP, the Commission proposed to amend Regulations 4.7(b)(2) and 4.22(a) to specify that, for series funds structured with a limitation on liability among the different series, the periodic account statement may include only the information for the series being reported, although additional information on other series may be provided. The Commission further proposed that for multi-class funds and for series funds that were not structured with a limitation on liability among the different series or classes, net asset value and other information required by the regulations must be presented for both the pool as a whole as well as for each series or class of ownership interest.

The Commission also proposed to amend Regulations 4.7(b)(3) and 4.22(c) to clarify that, for series funds structured with a limitation on liability among the different series, the annual report may include only the information for the series being reported. The Commission further noted that for both periodic account statements and annual financial reports, CPOs of series funds with a limitation on liability among the different series were not precluded by the proposed amendments from providing financial information to participants for other series or classes of a respective pool.

The Commission did not receive any comment regarding the above proposals. For the reasons set forth above and in the Proposed Part 4 Amendments, the

Commission is adopting the amendments as proposed.

#### C. Changes to Fund of Funds Extension Provisions Under Regulation 4.22(f)(2)

Regulations 4.7(b)(3) and 4.22(c) require a CPO to provide to each participant in each commodity pool that the CPO operates an annual report for the commodity pool within 90 calendar days of the end of the pool’s fiscal year. The CPO is further required to submit a copy of the annual report electronically to NFA.

Regulation 4.22(f)(2) permits a CPO of a commodity pool that invests in other funds (referred to as a “fund of funds”) to claim up to an additional 60 days to distribute the pool’s annual report to pool participants and to file a copy with NFA. A CPO may claim the Regulation 4.22(f)(2) fund of funds 60-day extension by filing with NFA an initial notice, containing specified representations, in advance of the annual report’s due date for the first year the extension is claimed. In subsequent years, the CPO may confirm that the circumstances necessitating the relief continue to apply by restating certain representations in a statement filed at the same time as the pool’s annual report.

The self-certification procedures for claiming an extension of the filing deadline for a fund of funds under Regulation 4.22(f)(2) currently are applicable only to CPOs that distribute annual reports that are audited by independent public accountants. CPOs of funds of funds that distribute unaudited annual financial reports to participants pursuant to Regulation 4.7(b)(3) may not claim an extension of the filing deadline under Regulation 4.22(f)(2). Such CPOs, however, may request from NFA up to a 90-day extension of the filing deadline under Regulation 4.22(f)(1).

As discussed in the Proposed Part 4 Amendments, in adopting Regulation 4.22(f)(2), the Commission anticipated that a substantial majority of the CPOs of funds of funds would be able to distribute to the participants and to file with NFA the pools’ annual reports within 150 days of the end of the respective commodity pool’s fiscal year.<sup>5</sup> The number of CPOs that have requested additional extensions under Regulation 4.22(f)(1) after having claimed the 60-day extension under Regulation 4.22(f)(2), however, has increased significantly in recent years. To address this issue, the Commission proposed to extend from 60 to 90 days the maximum period of additional time

<sup>3</sup> American Institute of Certified Public Accountants (“AICPA”) Audit and Accounting Guide, Investment Companies paragraph 7.03.

<sup>4</sup> AICPA Audit and Accounting Guide, Investment Companies, Chapter 5, *Complex Capital Structures*.

<sup>5</sup> 65 FR 81333 at 81334 (December 26, 2000).

that a CPO that operates a commodity pool that invests in other funds may claim under Regulation 4.22(f)(2).

The Commission also proposed to extend the application of Regulation 4.22(f)(2) to CPOs that operate Regulation 4.7-exempt commodity pools that do not prepare financial statements audited by independent public accountants. As noted in the Proposed Part 4 Amendments, Regulation 4.22(f)(2) was adopted, in large part, to address difficulties that CPOs experience in obtaining timely information about their pools' investments in other funds in order for the pools' public accountants to prepare audited financial statements. Annual reports that are not audited, however, are still required to be prepared in accordance with GAAP. CPOs need information establishing the value of the pools' material investments from the investee funds. These investments may be in a number of investee funds, such as other commodity pools, securities funds, or hedge funds, both domestic and offshore. The information that the CPOs require frequently is unavailable until the investee funds complete their own audited financial statements. Thus, in many cases, the CPOs cannot obtain the information they require about the investee funds in time for the annual financial reports of the pools to be prepared and distributed by the due date. To address this issue, the Commission proposed to permit CPOs of funds of funds for which unaudited annual reports are prepared to be able to claim the extension under Regulation 4.22(f)(2).

In addition, the Commission proposed to eliminate the requirement that a CPO that filed a claim of extension under Regulation 4.22(f)(2) for a particular pool restate certain representations in a statement filed with the pool's annual reports in subsequent years. Instead, under the proposal, the CPO would be presumed to operate the pool as a fund of funds and otherwise continue to qualify for the automatic extension. The CPO, however, must provide NFA with notice if the pool no longer operates as a fund of funds and must distribute the pool's annual report to pool participants and file a copy with NFA within 90 days of the pool's fiscal year-end, as required by Regulation 4.22(c).

The Commission received several comments generally supporting the proposed amendments, and no commenter opposed the proposed amendments. NFA and Arthur Bell CPAs supported the proposed amendments to Regulation 4.22(f)(2) extending the amount of time within which funds of funds must file their

reports from 150 to 180 days after fiscal year end. NFA, however, commented that multi-tiered funds of funds could still have difficulty obtaining necessary information if their investee funds are commodity pools and the CPOs of the investee funds had claimed an extension under Regulation 4.22(f)(2) of up to 180 days. In such situations, the CPO of the fund of funds may not receive annual reports for investee funds until 180 days after the end of the investee fund's year-end, which would coincide with the due date for the CPO of the fund of funds to distribute an annual report to participants in the fund of funds. In its comment letter, NFA suggested that the Commission amend Regulation 4.22(f)(1) to provide for an additional extension of up to 210 days after the pool's year end to provide CPOs of funds of funds with additional time to prepare and to distribute annual reports for the commodity pool. The Commission did not receive any comments regarding the proposal to eliminate, after the initial year, the requirement in Regulation 4.22(f)(2) that a CPO claiming an extension of time provide a statement containing representations regarding operating a fund of funds each year after the initial year.

Arthur Bell CPAs further supported the proposal to extend the availability of the fund of funds extension to Regulation 4.7-exempt pools for which audited reports are not prepared, noting that even for an unaudited report, the additional time is necessary due to the requirement under GAAP to provide a condensed schedule of investments, which necessitates obtaining information from investee funds.

The Commission has considered the comments received and is adopting the amendments to Regulations 4.22(f)(1) and (2) as proposed. The Commission acknowledges that a CPO of a multi-tiered fund of funds may face challenges in obtaining the appropriate detailed financial information from each investee fund. The Commission, however, must balance the challenges faced by the CPO of a fund of funds with the need of pool participants to receive financial information regarding the performance of a fund in as timely a manner as possible. Based upon its review of annual report filings of commodity pools over the last several years, the Commission does not believe that there is a sufficient basis to propose additional extension provisions under Regulation 4.22(f)(1) that would extend the filing deadline to 210 days after the end of a pool's fiscal year end. Commission staff will monitor filings under the revised fund of funds

timeframe closely to ascertain whether any further changes may be warranted.

In addition, under the regulations as amended, CPOs that previously have claimed the fund of funds extension will not need to file new or revised notices with NFA in order to claim the additional 30 days to file and to distribute their qualifying pools' annual reports. However, the Commission continues to expect CPOs to file and to distribute their pools' annual reports as soon as possible after the pools' fiscal year-ends to ensure that participants obtain information that is as current as possible.

#### *D. Procedures for Preparation and Filing of Reports for Liquidating Pools*

The Commission proposed to clarify and to streamline procedures for CPOs filing final reports for pools that had ceased operation. Currently, Regulation 4.22(c) requires a CPO of a commodity pool that has ceased operation to distribute a final annual report to commodity pool participants and to file a copy with NFA within 90 days of the pool's permanent cessation of trading, but in no event longer than 90 days after funds are returned to pool participants. The Commission proposed to eliminate the confusion created by the reference in Regulation 4.22(c) to two possible timeframes for filing a final annual report by amending the regulation to specify that the final annual report must be filed no later than 90 days after the pool ceases trading. Under the proposed amendment, if a CPO has not distributed all funds to participants by the date that the report is issued, the CPO must provide information about the return of funds to pool participants, including an estimate of the value of funds remaining to be distributed and the anticipated timeframe of when those funds are expected to be returned. When the remaining funds are returned to participants, the CPO should send a notice to all participants and to NFA. The proposed amendment also would permit CPOs to prepare unaudited final reports as long as the CPO obtains from all participants, and files with NFA, written waivers of their right to receive an audited report.

NFA supported the Commission's proposal to clarify the timeframe within which the final report must be filed; however, MFA noted that requiring reports to be filed within 90 days of the cessation of trading would create reporting inefficiencies for CPOs and participants of pools that hold assets that are difficult to liquidate. MFA's comment letter described scenarios in which inefficiencies would be created, such as when the pool holds assets that

cannot be liquidated for an extended period of time, or the pool is involved in bankruptcy. The MFA comment letter also noted that a CPO may have difficulty in obtaining an audit opinion on financial statements for a pool that has significant assets that have not been liquidated.

MFA suggested as an alternative to the proposal that CPOs that have determined to liquidate a pool provide notice to NFA and pool participants shortly after the pool ceases trading, and file the pool's final annual report within 90 days of returning funds to the participants. NFA suggested an alternative to the proposed requirement that CPOs that have not distributed all funds by the time the final report is filed provide notice to NFA when the final distribution is completed. NFA proposed that only those CPOs that have not returned funds within the time frame specified in the final annual report would provide notice to NFA, along with an explanation of why the distribution has not been completed. NFA would then monitor these pools until all funds are returned.

The Commission has considered carefully the comments regarding the timeframe within which a CPO must provide a final report for a pool that has ceased operation and has determined to modify the proposed changes to address concerns raised by the commenters, including the addition of an option for CPOs that are unable to complete the liquidation of a pool in sufficient time to prepare, distribute and file the pool's final report within 90 days of the permanent cessation of trading. Under the amended regulation, a CPO generally would be required to provide a liquidating pool's final report within 90 days of the cessation of trading. The final report may contain only the Statements of Operations and Changes in Net Assets; an explanation of the winding down of the pool's operations; written disclosure that all interests in, and assets of, the pool have been redeemed, distributed or transferred on behalf of the participants; and, if all funds have not been distributed at the time the report is issued, disclosure of the value of the assets remaining to be distributed and the expected timeframe for their distribution. If the CPO has not completed the distribution of funds within the timeframe specified in the final report, the CPO will be required to provide notice to NFA and the pool's participants containing information about the value of the pool's remaining assets, the expected timeframe for liquidation, any fees and expenses that will continue to be charged to the pool, and the extent to which reports will

continue to be provided to participants pursuant to the pool's operative documents. The Commission notes that the latter requirement is for the purpose of disclosure, and is not intended to relieve CPOs of their obligation to continue to comply with the periodic and annual reporting requirements. In this connection, the Commission notes that MFA requested in its comment letter that CPOs that are unable to provide a final annual report within 90 days be permitted to provide quarterly rather than monthly periodic account statements to participants. Pools operating pursuant to Regulation 4.7 currently are permitted to provide quarterly statements; CPOs that are required to provide monthly account statements may request relief under Regulation 4.12(a).

Both NFA and MFA commented on the waiver provisions of the proposed requirement that CPOs be permitted to prepare unaudited final reports as long as the CPO obtains from all participants, and files with NFA, written waivers of their right to receive an audited report. NFA recommended that rather than filing all waivers with NFA, the CPO file a certification with NFA that a waiver has been received from each participant. The CPO would be required to make the waivers available to NFA on request. MFA noted that for pools with many participants, obtaining the waivers would be difficult and suggested that the Commission instead adopt a negative consent procedure. The Commission has determined that it is not in the public interest to permit CPOs to provide unaudited reports to participants who are entitled to receive audited reports without the affirmative consent of the participants. However, it will be sufficient for the CPO to certify to NFA that it has obtained waivers from all of the pool's participants, provided that the CPO maintain all the waivers and make them available to NFA or the Commission upon request.

Finally, in order to accommodate the appropriate numbering of changes to Regulation 4.22(c), the Commission is redesignating existing paragraph 4.22(c)(6) as 4.22(c)(8).

*E. Codifying Existing Policies Regarding Special Allocations of Ownership Equity, Unrealized Gains and Losses, and Investee Funds' Income and Expenses*

The Commission proposed to codify staff interpretations regarding reporting in a pool's annual financial report special allocations of partnership equity from limited partners to the general partner or any other special class of partner; combining gains and losses on

regulated futures transactions with gains and losses on non-CFTC regulated transactions that are part of the same trading strategy in the Statement of Operations; and disclosing in the notes to the financial statements the amounts of management and incentive fees and expenses indirectly incurred as a result of investing in any fund where the investment in the fund exceeded five percent of the pool's net asset value. One commenter specifically addressed the proposed requirement to disclose information on the amounts of income and expenses associated with a pool's investments in investee funds. Arthur Bell CPAs noted that in some cases, it may not be possible for CPOs to obtain the information about investee funds' fees and expenses that would be required under proposed Regulation 4.22(c)(5)(i), stating that some investee funds are not obligated to report this information, and other funds may not maintain records of allocations of management and incentive fees or indirect expenses relative to the fund of fund's investment. The comment letter from Arthur Bell CPAs suggested that the proposed regulation be revised to state that in such cases, a CPO would be permitted to disclose that certain information required under this section is not available, if the CPO has made a good faith effort to obtain the information.

As noted in the proposing release, Division of Clearing and Intermediary Oversight ("DCIO") staff has encouraged CPOs to disclose income and fee information for investee pools for many years, on the basis that such information is material for pool participants to comprehend fully the investment strategy and fee structure of a commodity pool. However, the illustration of investee fund disclosure that has been included as an attachment to DCIO's annual guidance letter to CPOs allows that in unusual circumstances, a CPO may state that it does not have information on specific fees and expenses. In order to address the issue noted in the comment, the Commission is adopting this regulation generally as proposed, with the addition of an option for a CPO that does not have the specific amounts of fees and expenses to disclose instead the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund.

#### *F. Use of International Financial Reporting Standards in the Preparation of Commodity Pool Annual Financial Reports*

Regulation 4.22(d) requires that audited and unaudited financial statements of commodity pools, as well as periodic account statements, be presented and computed in accordance with GAAP. This provision consistently has been interpreted by Commission staff to mean GAAP as established in the United States ("U.S. GAAP").

The Commission proposed to amend Regulation 4.22(d) to permit CPOs that operate commodity pools organized under the laws of a foreign jurisdiction to prepare financial statements for such pools using International Financial Reporting Standards ("IFRS") as issued by the International Accounting Standards Board in lieu of U.S. GAAP. The proposal specified that the IFRS financial statements contain a condensed Schedule of Investments as set forth in Statement of Accounting Positions 95-2, 01-1, and 03-04 issued by the AICPA; report special allocations of partnership equity in accordance with Commission Interpretative Letter 94-3; and, in the event that IFRS would require that the pool consolidate its financial statements with another entity, such as a feeder fund consolidating with its master fund, all applicable disclosures required by U.S. GAAP for the feeder must be presented with the reporting pool's consolidated financial statements. In addition, the use of accounting standards other than U.S. GAAP must not conflict with any representations made in offering memoranda or similar documents provided to participants or potential participants in the pool. The proposal further required that a CPO may claim the above relief by filing a notice with NFA within 90 days of the end of the commodity pool's fiscal year.

The NYC Bar commented on two technical aspects of the proposal. First, with respect to the timeframe within which a CPO that is seeking relief from the U.S. GAAP requirement under proposed Regulation 4.22(d)(2)(ii), the NYC Bar stated that the proposed regulation and accompanying explanatory text were confusing as to when the notice must be filed. The NYC Bar suggested that the adopting release clarify that a notice claiming relief must be filed within 90 days after the end of the pool's fiscal year in order to be effective. The Commission has considered the NYC Bar's comments and has amended Regulation 4.22(d)(2)(ii) to provide that the notice

must be filed with NFA within 90 days after the end of the pool's fiscal year.

Second, the NYC Bar suggested that the provision in proposed Regulation 4.22(d)(2)(i)(C) requiring that the CPO represent that the use of IFRS for the preparation of the commodity pool's financial statements was not inconsistent with the pool's "offering memorandum or similar document" be replaced with "offering memorandum or other operative document." This suggestion was intended to provide for a broader range of operating documents in which such information may be provided. The Commission has considered the comment and agrees that including the information on the accounting standards to be followed by the pool in any operative document that is provided or available to participants is consistent with the objectives of the proposed regulation, and therefore is adopting a final regulation that requires such disclosure in the pool's offering memorandum or any other operative document that is made available to participants or prospective participants.

In addition, in developing these final regulations, the Commission has noted that the use of IFRS for preparing pool financial statements generally would extend to the computations that form the basis for the information reported in periodic account statements required by Regulations 4.22(a) and 4.7(b)(2). Therefore, the Commission is adopting changes to Regulations 4.22(a) and 4.7(b)(2) to permit CPOs that have claimed the relief available in Regulation 4.22(d), as amended, to present the pool's periodic account statements on the same basis as they are computing and presenting the pool's financial statements.

#### *G. GAAP Requirements in Regulation 4.13*

Regulation 4.13 provides an exemption from registration for CPOs that operate only one pool at a time, for which no advertising is done and no compensation is received; or that operate pools that include no more than 15 participants each, and the aggregate subscriptions to all pools do not exceed \$400,000. Regulation 4.13 further provides an exemption from registration for CPOs of pools whose participants are SEC "accredited investors"<sup>6</sup> and that limit the pool's trading of commodity interests to a *de minimis* amount, or that limit participation in the pool to certain highly sophisticated investors. Regulation 4.13(c) specifies that, if a CPO that has claimed an exemption from registration under Regulation 4.13

distributes an annual report to pool participants, the annual report must be presented and computed in accordance with GAAP and, if audited by an independent public accountant, certified in accordance with Regulation 1.16.

The Commission proposed to amend Regulation 4.13(c) to delete the requirement that the annual reports for pools for which the CPO has claimed exemption from registration under Regulation 4.13 must be presented and computed in accordance with GAAP and, if audited by an independent public accountant, certified in accordance with Regulation 1.16. As noted in the Proposed Part 4 Amendments, the annual reports are not required by Commission regulations to be prepared, distributed, or filed, and therefore the Commission does not need to prescribe the form of such reports.

The Commission did not receive any comments regarding the proposed amendments to Regulation 4.13(c). The Commission has determined to adopt the amendments as proposed.

#### *H. Updating References to Financial Schedules*

The Commission proposed to update both the periodic and annual reporting provisions of Part 4 to conform with current accounting practices with respect to the references to various financial schedules. No comments were received on this proposal. Therefore, the Commission is adopting amendments to delete references to the Statement of Changes in Financial Position, which no longer exists; rename the Statement of Income (Loss) as the Statement of Operations; and rename the Statement of Changes in Net Asset Value as the Statement of Changes in Net Assets.

## **IV. Related Matters**

### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act ("RFA"), 5 U.S.C. 601 *et seq.*, requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has determined previously that registered CPOs are not small entities for the purpose of the RFA.<sup>7</sup> The proposed amendments to Regulation 4.7 and Regulation 4.22 would apply only to registered CPOs. With respect to CPOs exempt from registration, the Commission has previously determined that a CPO is a small entity if it meets the criteria for exemption from registration under current Regulation 4.13(a)(2). The proposed amendment to

<sup>6</sup> 17 CFR 230.501(a) (2009).

<sup>7</sup> 47 FR 18618, 18619 (April 30, 1982).

Regulation 4.13 would remove an existing requirement and does not impose any significant burdens. The Commission's proposal solicited public comment on this analysis.<sup>8</sup> No comments were received. Accordingly, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the action it is taking herein will not have a significant economic impact on a substantial number of small entities.

**B. Paperwork Reduction Act**

This rulemaking modifies existing regulatory requirements by clarifying information that must be included in required periodic and annual reports, increasing slightly the burden for this collection of information due to including specific fee and expense information in annual reports for funds of funds. The proposing release included an estimate of the impact of these changes on the paperwork burden under existing information collection 3038-0005, and also corrected a previous calculation error with respect to the total number of respondents. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission submitted a copy of this section to the Office of Management and Budget ("OMB") for its review. No comments were received in response to the Commission's invitation in the notice of proposed rulemaking<sup>9</sup> to comment on any change in the potential paperwork burden associated with these rule amendments. The information collection burdens created by the Commission's proposed rules, which were discussed in detail in the proposing release, are identical to the information collection burdens of the final rules.

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

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

■ Accordingly, 17 CFR Chapter I is amended 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. In § 4.7:

- a. Add paragraphs (b)(2)(iii)(A) and (B) and (b)(2)(iv) and (v);
- b. Revise paragraphs (b)(3)(i) introductory text and (b)(3)(i)(B) and (C);
- c. Add paragraph (b)(3)(i)(D); and
- d. Revise paragraph (b)(3)(ii).

The additions and revisions read as follows:

**§ 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.**

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

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

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

(iv) Where the pool is comprised of more than one ownership class or series, the net asset value of the series or class on which the account statement is reporting, and the net asset value per unit or value of the participant's share, also must be included in the statement required by this paragraph (b)(2); except that, for a pool that is a series fund structured with a limitation on liability among the different series, the account statement required by this paragraph (b)(2) is not required to include the consolidated net asset value of all series of the pool.

(v) A commodity pool operator of a pool that meets the conditions specified in § 4.22(d)(2)(i) of this part to present and compute the commodity pool's financial statements contained in the Annual Report in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board and has filed notice pursuant to § 4.22(d)(2)(ii) of this part also may use such International Financial Reporting Standards in the computation and presentation of the account statement.

(3) *Annual report relief.* (i) Exemption from the specific requirements of § 4.22(c) and (d) of this part; *Provided*, That within 90 calendar days after the end of the exempt pool's fiscal year or the permanent cessation of trading, whichever is earlier, the commodity pool operator electronically 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, affirmed in

accordance with § 4.22(h) which contains, at a minimum:

\* \* \* \* \*

(B) A Statement of Operations for that year;

(C) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading. For a pool that invests in other funds, this information must include, but is not limited to, separately disclosing the amounts of income, management and incentive fees associated with each investment in an investee fund that exceeds five percent of the pool's net assets. The income, management and incentive fees associated with an investment in an investee fund that is less than five percent of the pool's net assets may be combined and reported in the aggregate with the income, management and incentive fees of other investee funds that, individually, represent an investment of less than five percent of the pool's net assets. If the commodity pool operator is not able to obtain the specific amounts of management and incentive fees charged by an investee fund, the commodity pool operator must disclose the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund;

(D) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the financial statements are reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the financial statements are not required to include consolidated information for all series.

(ii) Except as provided in § 4.22(d)(2) of this part, 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 of this chapter as applicable.

\* \* \* \* \*

**§ 4.13 [Amended]**

■ 3. Amend § 4.13 by removing paragraph (c)(2) and redesignating paragraph (c)(3) as (c)(2).

■ 4. In § 4.22:

■ a. Revise paragraphs (a) introductory text, (a)(1) introductory text, and (a)(2) introductory text;

■ b. Add paragraphs (a)(5) and (6);

<sup>8</sup> 74 FR 8225 (February 24, 2009).

<sup>9</sup> *Id.*

- c. Revise paragraphs (c) introductory text, (c)(4), and (c)(5);
- d. Redesignate paragraph (c)(6) as paragraph (c)(8), and add new paragraphs (c)(6) and (7); and
- e. Revise paragraphs (d), (e) and (f)(2).

The revisions and additions read as follows:

#### § 4.22 Reporting to pool participants.

(a) Except as provided in paragraph (a)(4) or (a)(6) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within 30 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Operations and a Statement of Changes in Net Assets, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (h) of this section.

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

\* \* \* \* \*

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

\* \* \* \* \*

(5) Where the pool is comprised of more than one ownership class or series, information for the series or class on which the account statement is reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the account statement is not required to include consolidated information for all series.

(6) A commodity pool operator of a pool that meets the conditions specified in paragraph (d)(2)(i) of this section and has filed notice pursuant to paragraph (d)(2)(ii) of this section may elect to follow the same accounting treatment with respect to the computation and presentation of the account statement.

\* \* \* \* \*

(c) Except as provided in paragraph (c)(7) or (c)(8) of this section, each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to

each participant in each pool that it operates, and must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to the electronic filing procedures of the National Futures Association, within 90 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier; *Provided, however,* that if during any calendar year the commodity pool operator did not operate a commodity pool, the pool operator must so notify the National Futures Association within 30 calendar days after the end of such calendar year. The Annual Report must be affirmed pursuant to paragraph (h) of this section and must contain the following:

\* \* \* \* \*

(4) Statements of Operations, and Changes in Net Assets, for the period between—

(i) The later of:

(A) The date of the most recent Statement of Financial Condition delivered to the National Futures Association pursuant to this paragraph (c); or

(B) The date of the formation of the pool; and

(ii) The close of the pool's fiscal year, together with Statements of Operations, and Changes in Net Assets for the corresponding period of the previous fiscal year.

(5) Appropriate footnote disclosure and such further material information as may be necessary to make the required statements not misleading. For a pool that invests in other funds, this information must include, but is not limited to, separately disclosing the amounts of income, management and incentive fees associated with each investment in an investee fund that exceeds five percent of the pool's net assets. The management and incentive fees associated with an investment in an investee fund that is less than five percent of the pool's net assets may be combined and reported in the aggregate with the income, management and incentive fees of other investee funds that, individually, represent an investment of less than five percent of the pool's net assets. If the commodity pool operator is not able to obtain the specific amounts of management and incentive fees charged by an investee fund, the commodity pool operator must disclose the percentage amounts and computational basis for each such fee and include a statement that the CPO is not able to obtain the specific fee amounts for this fund;

(6) Where the pool is comprised of more than one ownership class or series,

information for the series or class on which the financial statements are reporting should be presented in addition to the information presented for the pool as a whole; except that, for a pool that is a series fund structured with a limitation on liability among the different series, the financial statements are not required to include consolidated information for all series.

(7) For a pool that has ceased operation prior to, or as of, the end of the fiscal year, the commodity pool operator may provide the following, within 90 days of the permanent cessation of trading, in lieu of the annual report that would otherwise be required by § 4.22(c) or § 4.7(b)(3):

(i) Statements of Operations and Changes in Net Assets for the period between—

(A) The later of:

(1) The date of the most recent Statement of Financial Condition filed with the National Futures Association pursuant to this paragraph (c); or

(2) The date of the formation of the pool; and

(B) The close of the pool's fiscal year or the date of the cessation of trading, whichever is earlier; and

(ii)(A) An explanation of the winding down of the pool's operations and written disclosure that all interests in, and assets of, the pool have been redeemed, distributed or transferred on behalf of the participants;

(B) If all funds have not been distributed or transferred to participants by the time that the final report is issued, disclosure of the value of assets remaining to be distributed and an approximate timeframe of when the distribution will occur. If the commodity pool operator does not distribute the remaining pool assets within the timeframe specified, the commodity pool operator must provide written notice to each participant and to the National Futures Association that the distribution of the remaining assets of the pool has not been completed, the value of assets remaining to be distributed, and a time frame of when the final distribution will occur.

(C) If the commodity pool operator will not be able to liquidate the pool's assets in sufficient time to prepare, file and distribute the final annual report for the pool within 90 days of the permanent cessation of trading, the commodity pool operator must provide written notice to each participant and to National Futures Association disclosing:

(1) The value of investments remaining to be liquidated, the timeframe within which liquidation is expected to occur, any impediments to liquidation, and the nature and amount

of any fees and expenses that will be charged to the pool prior to the final distribution of the pool's funds;

(2) Which financial reports the commodity pool operator will continue to provide to pool participants from the time that trading ceased until the final annual report is distributed, and the frequency with which such reports will be provided, pursuant to the pool's operative documents; and

(3) The timeframe within which the commodity pool operator will provide the final report.

(iii) A report filed pursuant to this paragraph (c)(7) that would otherwise be required by this paragraph (c) is not required to be audited in accordance with paragraph (d) of this section if the commodity pool operator obtains from all participants written waivers of their rights to receive an audited Annual Report, and at the time of filing the Annual Report with National Futures Association, certifies that it has received waivers from all participants. The commodity pool operator must maintain the waivers in accordance with § 1.31 of this chapter and must make the waivers available to the Commission or National Futures Association upon request.

\* \* \* \* \*

(d)(1) The financial statements in the Annual Report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be audited by an independent public accountant. The requirements of § 1.16(g) of this chapter shall apply with respect to the engagement of such independent public accountants, except that any related notifications to be made may be made solely to the National Futures Association, and the certification must be in accordance with § 1.16 of this chapter, except that the following requirements of that section shall not apply:

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

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

(iii) Section 1.16(c)(5), (d)(2), (e)(2), and (f).

(2)(i) The financial statements in the Annual Report required by this section or by § 4.7(b)(3) may be presented and computed in accordance with International Financial Reporting Standards issued by the International Accounting Standards Board if the following conditions are met:

(A) The pool is organized under the laws of a foreign jurisdiction;

(B) The Annual Report will include a condensed schedule of investments, or,

if required by the alternate accounting standards, a full schedule of investments;

(C) The preparation of the pool's financial statements under International Financial Reporting Standards is not inconsistent with representations set forth in the pool's offering memorandum or other operative document that is made available to participants;

(D) Special allocations of ownership equity will be reported in accordance with § 4.22(e)(2); and

(E) In the event that the International Financial Reporting Standards require consolidated financial statements for the pool, such as a feeder fund consolidating with its master fund, all applicable disclosures required by generally accepted accounting principles for the feeder fund must be presented with the reporting pool's consolidated financial statements.

(ii) The commodity pool operator of a pool that meets the conditions specified in this paragraph (d)(2) may claim relief from the requirement in paragraph (d)(1) of this section by filing a notice with the National Futures Association, within 90 calendar days after the end of the pool's fiscal year.

(A) The notice must contain the name, main business address, main telephone number and the National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool.

(B) The notice must include representations regarding the pool's compliance with each of the conditions specified in § 4.22(d)(2)(A) through (D), and, if applicable, (E); and

(C) The notice must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

(e)(1) The Statement of Operations required by this section must itemize brokerage commissions, management fees, advisory fees, incentive fees, interest income and expense, total realized net gain or loss from commodity interest trading, and change in unrealized net gain or loss on commodity interest positions during the pool's fiscal year. Gains and losses on commodity interests need not be itemized by commodity or by specific delivery or expiration date.

(2)(i) Any share of a pool's profits or transfer of a pool's equity which exceeds the general partner's or any other class's share of profits computed on the general partner's or other class's pro rata capital contribution are "special allocations." Special allocations of partnership equity or other interests must be recognized in the pool's

Statement of Operations in the same period as the net income, interest income, or other basis of computation of the special allocation is recognized. Special allocations must be recognized and classified either as an expense of the pool or, if not recognized as an expense of the pool, presented in the Statement of Operations as a separate, itemized allocation of the pool's net income to arrive at net income available for pro rata distribution to all partners.

(ii) Special allocations of ownership interest also must be reported separately in the Statement of Partners' Equity, in addition to the pro-rata allocations of net income, as to each class of ownership interest.

(3) Realized gains or losses on regulated commodities transactions presented in the Statement of Operations of a commodity pool may be combined with realized gains or losses from trading in non-commodity interest transactions, provided that the gains or losses to be combined are part of a related trading strategy. Unrealized gains or losses on open regulated commodity positions presented in the Statement of Operations of a commodity pool may be combined with unrealized gains or losses from open positions in non-commodity positions, provided that the gains or losses to be combined are part of a related trading strategy.

(f) \* \* \*

(2) In the event a commodity pool operator finds that it cannot obtain information necessary to prepare annual financial statements for a pool that it operates within the time specified in either paragraph (c) of this section or § 4.7(b)(3)(i), as a result of the pool investing in another collective investment vehicle, it may claim an extension of time under the following conditions:

(i) The commodity pool operator must, within 90 calendar days of the end of the pool's fiscal year, file a notice with the National Futures Association, except as provided in paragraph (f)(2)(v) of this section.

(ii) The notice must contain the name, main business address, main telephone number and the National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool.

(iii) The notice must state the date by which the Annual Report will be distributed and filed (the "Extended Date"), which must be no more than 180 calendar days after the end of the pool's fiscal year. The Annual Report must be distributed and filed by the Extended Date.

(iv) The notice must include representations by the commodity pool operator that:

(A) The pool for which the Annual Report is being prepared has investments in one or more collective investment vehicles (the "Investments");

(B) For all reports prepared under paragraph (c) of this section and for reports prepared under § 4.7(b)(3)(i) that are audited by an independent public accountant, the commodity pool operator has been informed by the independent public accountant engaged to audit the commodity pool's financial statements that specified information required to complete the pool's annual report is necessary in order for the accountant to render an opinion on the commodity pool's financial statements. The notice must include the name, main business address, main telephone number, and contact person of the accountant; and

(C) The information specified by the accountant cannot be obtained in sufficient time for the Annual Report to be prepared, audited, and distributed before the Extended Date.

(D) For unaudited reports prepared under § 4.7(b)(3)(i), the commodity pool operator has been informed by the operators of the Investments that specified information required to complete the pool's annual report cannot be obtained in sufficient time for the Annual Report to be prepared and distributed before the Extended Date.

(v) For each fiscal year following the filing of the notice described in paragraph (f)(2)(i) of this section, for a particular pool, it shall be presumed that the particular pool continues to invest in another collective investment vehicle and the commodity pool operator may claim the extension of time; *Provided, however*, that if the particular pool is no longer investing in another collective investment vehicle, then the commodity pool operator must file electronically with the National Futures Association an Annual Report within 90 days after the pool's fiscal year-end accompanied by a notice indicating the change in the pool's status.

(vi) Any notice or statement filed pursuant to this paragraph (f)(2) must be signed by the commodity pool operator in accordance with paragraph (h) of this section.

\* \* \* \* \*

Issued in Washington, DC, on November 2, 2009, by the Commission.

**David Stawick,**

*Secretary of the Commission.*

[FR Doc. E9-26789 Filed 11-6-09; 8:45 am]

**BILLING CODE P**

## DEPARTMENT OF THE TREASURY

### Office of Foreign Assets Control

#### 31 CFR Part 501

#### Economic Sanctions Enforcement Guidelines

**AGENCY:** Office of Foreign Assets Control, Treasury.

**ACTION:** Final rule.

**SUMMARY:** The Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury is issuing this final rule, "Economic Sanctions Enforcement Guidelines," as enforcement guidance for persons subject to the requirements of U.S. sanctions statutes, Executive orders, and regulations. This rule was published as an interim final rule with request for comments on September 8, 2008. This final rule sets forth the Enforcement Guidelines that OFAC will follow in determining an appropriate enforcement response to apparent violations of U.S. economic sanctions programs that OFAC enforces. These Enforcement Guidelines are published as an Appendix to the Reporting, Procedures and Penalties Regulations.

**DATES:** This final rule is effective November 9, 2009.

**FOR FURTHER INFORMATION CONTACT:** Elton Ellison, Assistant Director, Civil Penalties, (202) 622-6140 (not a toll-free call).

#### SUPPLEMENTARY INFORMATION:

##### Electronic Availability

This document and additional information concerning OFAC are available from OFAC's Web site (<http://www.treas.gov/ofac>) or via facsimile through a 24-hour fax-on-demand service, tel.: (202) 622-0077.

##### Procedural Requirements

Because this final rule imposes no obligations on any person, but only explains OFAC's enforcement policy and procedures based on existing substantive rules, prior notice and public comment are not required pursuant to 5 U.S.C. 553(b)(A). Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply. This final rule

is not a significant regulatory action for purposes of Executive Order 12866.

Although a prior notice of proposed rulemaking was not required, OFAC solicited comments on this final rule in order to consider how it might make improvements to these Guidelines. OFAC received a total of 11 comments.

The collections of information related to the Reporting, Procedures and Penalties Regulations have been previously approved by the Office of Management and Budget (OMB) under control number 1505-0164. A small adjustment to that collection was submitted to OMB in order to take into account the voluntary self-disclosure process set forth in the Guidelines. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. This collection of information is referenced in subpart I of Part I, subpart G of part III and subpart B of part V of these Guidelines, which will constitute the new Appendix to part 501. The referenced subparts explain that the voluntary self-disclosure of an apparent violation to OFAC will be considered in determining the appropriate agency response to the apparent violation and, in cases where a civil monetary penalty is deemed appropriate, the penalty amount. As set forth in subpart B of part V of the Guidelines, an apparent violation involving a voluntary self-disclosure will result in a base penalty amount at least 50 percent less than the base penalty amount in similar cases that do not involve a voluntary self-disclosure. This provides an incentive for persons who have or may have violated economic sanctions laws to voluntarily provide OFAC information that it can use to better implement its economic sanctions programs. The submitters who will likely seek to avail themselves of the benefits of voluntary self-disclosure are businesses, other entities, and individuals who find that they have or may have violated a sanctions prohibition and wish to disclose their actual or potential violation.

*The estimated total annual reporting and/or recordkeeping burden: 1,250 hours. The estimated annual burden per respondent/record keeper: 10 hours. Estimated number of respondents and/or record keepers: 125. Estimated annual frequency of responses: Once or less, given that OFAC expects that persons who voluntarily self disclose their violations will take better care to avoid future violations.*