

§ 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.

(a) Definitions.

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

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

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

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

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

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

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

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

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

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

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

(~~v~~5) **Portfolio Requirement** means that a person:

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

(B~~ii~~) Has had on deposit with a futures commission merchant, for its own account at any time during the six-month period preceding either the date of sale to that person of a pool participation in the exempt pool or the date that the person opens an exempt account with the commodity trading advisor, at least \$200,000 in exchange-specified initial margin and option premiums, together with required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) for commodity interest transactions; or

(C~~iii~~) Owns a portfolio comprised of a combination of the funds or property specified in paragraphs (a)(~~1~~5)(~~v~~)(A~~i~~) and (B~~ii~~) of this section in which the sum of the funds or property includable under paragraph (a)(~~1~~5)(~~v~~)(A~~i~~), expressed as a percentage of the minimum amount required thereunder, and the amount of futures margin and option premiums includable under paragraph (a)(~~1~~5)(~~v~~)(B~~ii~~), expressed as a percentage of the minimum amount required thereunder, equals at least one hundred percent. An example of a composite portfolio acceptable under this paragraph (a)(~~1~~5)(~~v~~)(C~~iii~~) would consist of \$1,000,000 in securities and other property (50% of paragraph (a)(~~1~~5)(~~v~~)(A~~i~~)) and \$100,000 in exchange-specified initial margin and option premiums (50% of paragraph (a)(~~1~~5)(~~v~~)(B~~ii~~)).

(6) **Qualified eligible person** means any person, acting for its own account or for the account of a qualified eligible person, who the commodity pool operator reasonably believes, at the time of the sale to that person of a pool participation in the exempt pool, or who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, is eligible to invest in the exempt pool or open the exempt account and is included in the following list of persons that is divided into two categories: Persons who are not required to satisfy the Portfolio Requirement defined in paragraph (a)(5) of this section to be qualified eligible persons, and those persons who must satisfy the Portfolio Requirement in paragraph (a)(5) to be qualified eligible persons.

(i) **Persons who do not need to satisfy the Portfolio Requirement to be qualified eligible persons:**

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

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

(~~Ⓐ~~)

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

(B) A retail foreign exchange dealer registered pursuant to section 2(c)(2)(B)(i)(II)(gg) of the Act, or a principal thereof;

(C) A swap dealer registered pursuant to section 4s(a)(1) of the Act, or a principal thereof;

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

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

(A1) Has been registered and active as such for two years; or

(B2) Operates pools which, in the aggregate, have total assets in excess of \$5,000,000;

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

(A1) Has been registered and active as such for two years; or

(B2) Provides commodity interest trading advice to commodity accounts which, in the aggregate, have total assets in excess of \$5,000,000 deposited at one or more futures commission merchants;

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

(A1) Has been registered and active as such for two years; or

(B2) Provides securities investment advice to securities accounts which, in the aggregate, have total assets in excess of \$5,000,000 deposited at one or more registered securities brokers;

(~~Ⓕ~~) A “qualified purchaser” as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (the “Investment Company Act”);

(~~Ⓖ~~) A “knowledgeable employee” as defined in § 270.3c-5 of this title;

(~~viii~~)

(AJ) With respect to an exempt pool:

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

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

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

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

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

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

(5) The spouse, child, sibling or parent of a person who satisfies the criteria of paragraph (a)(26)(viii)(AJ)(1), (2), (3) or (4) of this section; *Provided*, That:

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

(ii) The family member is not a qualified eligible person for the purposes of ~~paragraph (a)(3)(xi)~~ paragraph (a)(6)(ii)(K) of this section;

~~(6)(i)~~ Any person who acquires a participation in the exempt pool by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(26)(viii)(AJ)(1), (2), (3), (4) or (5) of this section;

~~(i)~~ The estate of any person listed in paragraph (a)(26)(viii)(AJ)(1), (2), (3), (4) or (5) of this section; or

~~(iii)~~ A company established by any person listed in paragraph (a)(26)(viii)(AJ)(1), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(26)(viii)(AJ)(6)(i) or (iZ) of this section;

~~(BK)~~ With respect to an exempt account:

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

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

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

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

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

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

(5) The spouse, child, sibling or parent of the commodity trading advisor of the exempt account or of a person who satisfies the criteria of paragraph (a)(26)(viii)(BK)(1), (2), (3) or (4) of this section; *Provided*, That:

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

(ii) The family member is not a qualified eligible person for the purposes of ~~paragraph (a)(3)(xi)~~ paragraph (a)(6)(ii)(K) of this section;

~~(6)(i)~~ Any person who acquires an interest in an exempt account by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(26)(viii)(BK)(1), (2), (3), (4) or (5) of this section;

(#7) The estate of any person listed in paragraph (a)(26)(viii)(B)(K), (2), (3), (4) or (5) of this section; or

(#8) A company established by any person listed in paragraph (a)(26)(viii)(BK)(I), (2), (3), (4) or (5) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(26)(viii)(BK)(6)(I) or (#7) of this section;

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

(A1) The trust was not formed for the specific purpose of either participating in the exempt pool or opening an exempt account; and

(B2) The trustee or other person authorized to make investment decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a qualified eligible person;

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

(xiN) A Non-United States person;

(xii)

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

(BP) An exempt pool; or

(EQ) Notwithstanding ~~paragraph (a)(3)~~ paragraph (a)(6)(ii) of this section, an entity as to which a notice of eligibility has been filed pursuant to § 4.5 which is operated in accordance with such rule and in which all unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons.

(3ii) *Persons who must satisfy the Portfolio Requirement to be qualified eligible persons.*

~~Qualified eligible person means any person who the commodity pool operator reasonably believes~~ With respect to the persons listed below, the commodity pool operator must reasonably believe, at the time of the sale to ~~that person of a pool~~ such person of a participation in the ~~exempt pool, or any person who the commodity trading advisor reasonably believes~~ exempt pool, or the commodity trading advisor must reasonably believe, at the time ~~that person~~ such person opens an ~~exempt account~~ exempt account, that such person satisfies the ~~Portfolio Requirement and is:~~ Portfolio Requirement in paragraph (a)(5) of this section.

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

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

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

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

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

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

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

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

(~~ix~~I) A natural person whose individual net worth, or joint net worth with that person's spouse at the time of either his purchase in the exempt pool or his opening of an exempt account would qualify him as an accredited investor as defined in § 230.501(a)(5) of this title;

(~~x~~J) A natural person who would qualify as an accredited investor as defined in § 203.501(a)(6) of this title;

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

(~~xii~~L) Except as provided for the governmental entities referenced in paragraph (a)(~~36~~)(~~iv~~i)(D) of this section, if otherwise authorized by law to engage in such transactions, a governmental entity (including the United States, a state, or a foreign government) or political subdivision thereof, or a multinational or supranational entity or an instrumentality, agency, or department of any of the foregoing.

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

(b) *Relief available to commodity pool operators*—(1) *Eligibility*. Relief from specific compliance obligations is available to certain registered commodity pool operators with respect to the pool(s) they operate, provided that the registered commodity pool operator files the required notice under paragraph (d) of this section and otherwise complies with the conditions of paragraph (d) of this section in operating the exempt pool(s).

(i) *Types of commodity pools*.

(A) Regarding an offering that is exempt from registration under section 4(a)(2) of the Securities Act of 1933, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool; Provided, that the prohibition on marketing to the public shall not apply to a registered commodity pool operator who offers or sells participations in a pool offered pursuant to § 230.506(c) of this title.

(B) Regarding an offering that is offered and sold pursuant to Regulation S, § 230.901 through 230.905 of this title, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(C) Regarding a pool that is a collective trust fund, the securities of which are exempt from registration pursuant to section 3(a)(2) of the Securities Act of 1933, any bank registered as a commodity pool operator that offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(ii) *Resales*. A registered commodity pool operator may claim any or all of the relief described in this paragraph (b) with respect to the pools described in paragraphs (b)(1)(i)(A) through (C) of this section, if participations in such pools are resold pursuant to Rule 144A (§ 230.144A of this title).

(2) *Disclosure relief*.

(i) Exemption from the specific requirements of ~~§§ 4.21, 4.24, 4.25 and §§ 4.24 and 4.26(d)~~ with respect to each exempt pool; *Provided*, ~~That if an~~that any offering memorandum ~~is~~ distributed in connection with soliciting prospective ~~participants in the exempt pool, such offering memorandum must include all~~participants in the exempt pool be distributed consistent with the requirements of § 4.21 and include:

(A) A description of principal risk factors for the exempt pool, as required by § 4.24(g);

(B) A description of the exempt pool's investment program and use of proceeds, as

required by § 4.24(h);

(C) A description of fees and expenses, as required by § 4.24(i);

(D) A description of conflicts of interest, as required by § 4.24(j);

(E) Performance disclosures, as required by § 4.25, with the exception of information

required by paragraphs (a)(3) and (c)(2) of § 4.25;

(F) All other disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the

context in which it is furnished, not misleading; and

(G) The following statement is, prominently disclosed on the cover page of the offering memorandum, or, if none is provided, immediately above the signature line on the subscription agreement or other document that the prospective participant must execute to become a participant in the pool:

memorandum:

“PURSUANT TO AN EXEMPTION FROM THE COMMODITY

FUTURES TRADING COMMISSION IN CONNECTION WITH POOLS

WHOSE ~~PARTICIPANTS~~PARTICIPANTS ARE LIMITED TO QUALIFIED ELIGIBLE

PERSONS, AN OFFERING MEMORANDUM FOR THIS POOL IS NOT

REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE

~~COMMISSION~~COMMISSION. THE COMMODITY FUTURES TRADING

COMMISSION DOES NOT PASS UPON THE MERITS OF

PARTICIPATING IN A POOL OR UPON THE ADEQUACY OR

ACCURACY OF AN OFFERING MEMORANDUM.

CONSEQUENTLY, THE COMMODITY FUTURES TRADING

COMMISSION HAS NOT REVIEWED OR APPROVED THIS

OFFERING OR ANY OFFERING MEMORANDUM FOR THIS POOL.”

PRIOR TO FIRST USE.”

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

(3) *Periodic reporting relief.*

(i) Exemption from the specific requirements of § 4.22(a) and (b), provided, that a statement signed and affirmed in accordance with § 4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must be presented and computed in accordance with generally accepted accounting principles and indicate:

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

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

(C) Either the net asset value per outstanding participation unit in the exempt pool as of the end of the reporting period, or the total value of the participant's interest or share in the exempt pool as of the end of the reporting period.

(ii) 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)(3); except that, for a pool that is a series fund structured with limitation on liability among the different series, the account statement required by this paragraph (b)(3) is not required to include the consolidated net asset value of all series of the pool.

(iii) A commodity pool operator that meets the conditions specified in § 4.22(d)(2)(i) to present and compute the pool's financial statements contained in the Annual Report other than in accordance with generally accepted accounting principles, and has filed notice pursuant to § 4.22(d)(2)(iii), may also use the alternative accounting principles, standards or practices identified in that notice with respect to the computation and presentation of the account statement.

(iv) Pools Invested in Certain Other Pools or Funds. Where the exempt pool is invested in one or more other pools or funds operated by third parties, the commodity pool operator may choose instead to prepare and distribute to its pool participants statements signed and affirmed in accordance with § 4.22(h) on a monthly basis within 45 days of the month-end; *Provided*, that the statements otherwise meet the conditions of paragraphs (b)(3)(i)-(ii) of this section, and that the commodity pool operator notifies its pool participants of this alternate distribution schedule in the exempt pool's offering memorandum distributed prior to the initial investment, or upon its adoption of this reporting schedule, for then existing pool participants.

(4) Annual report relief.

(i) Exemption from the specific requirements of § 4.22(c) 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 that section, an annual report for the exempt pool, affirmed in accordance with § 4.22(h) which contains, at a minimum:

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

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

(5) **Recordkeeping relief.** Exemption from the specific requirements of § 4.23; *Provided*, That the commodity pool operator must maintain the [offering memoranda and](#) reports referred to in paragraphs (b)(2) ~~and~~, (b)(3), and (b)(4) of this section, and all [other](#) books and records prepared in connection with his activities as the pool operator of the exempt pool (including, without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations). Books and records that are not maintained at the pool operator's main business office shall be maintained by one or more of the following: the pool's administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool. Such books and records must be made available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of § 1.31.

(6) If the pool operator does not maintain its books and records at its main business office, the pool operator shall:

(i) At the time it registers with the Commission or delegates its recordkeeping obligations, whichever is later, file a statement that:

(A) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;

(B) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;

(C) Specifies, by reference to the respective paragraph of this section, the books and records that such person will be keeping; and

(D) Contains representations from the pool operator that:

(1) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(2) It remains responsible for ensuring that all books and records required by this section are kept in accordance with § 1.31;

(3) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office; *Provided, however,* that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within 72 hours of such a request; and

(4) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.

(ii) The pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:

(A) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;

(B) Agrees to keep and maintain such records required in accordance with § 1.31 of this chapter; and

(C) Agrees to keep such required books and records open to inspection by any representative of the Commission, the National Futures Association, or the United States Department of Justice in accordance with § 1.31 of this chapter.

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

(1) Disclosure relief.

(i) Exemption from the specific requirements of ~~§§ 4.31, §§ 4.34, 4.35~~ and 4.36(d); *Provided, That if the commodity trading advisor delivers a brochure or other disclosure statement to such qualified eligible persons, such brochure or statement shall include all that any brochure or other disclosure statement delivered by a commodity trading advisor to its prospective qualified eligible person clients be distributed consistent with the requirements of § 4.31 and include:*

(A) A description of persons to be identified, as required by § 4.34(e);

(B) A description of principal risk factors, as required by § 4.34(g);

(C) A description of the exempt commodity trading advisor's trading program, as required by § 4.34(h);

(D) A description of fees, as required by § 4.34(i);

(E) A description of conflicts of interest, as required by § 4.34(j);

(F) Performance disclosures, as required by § 4.35;

(G) All additional disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and that the context in which it is furnished, not misleading; and

(H) The following statement is, prominently displayed on the cover page of the brochure or statement or, if none is provided, immediately above the signature line of the agreement that the client must execute before it opens an account with the commodity trading advisor:

other disclosure statement:

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

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

(2) Recordkeeping relief. Exemption from the specific requirements of § 4.33; *Provided*, That the commodity trading advisor must maintain, at its main business office, ~~all~~the trading brochure or disclosure statement referred to in paragraph (c)(1) of this section, and all other books and records prepared in connection with his activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations) ~~and must make such~~. Such books and records must be made available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of § 1.31.

(d) Notice of claim for exemption.

(1) A notice of a claim for exemption under this section must:

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

(ii)

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

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

(iii) Contain representations that:

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

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

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

(iv) Specify the relief claimed under § 4.7;

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

(vi) Be filed by a representative duly authorized to bind the commodity pool operator or commodity trading advisor;

(vii) Be filed electronically with the National Futures Association through its electronic exemption filing system; and

(viii)

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

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

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

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

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

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

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

(4)

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

(ii) Any exemption from the requirements of ~~§ 4.31~~, § 4.33, § 4.34, § 4.35 or § 4.36 claimed hereunder shall not affect the obligation of the commodity trading advisor to comply with all

other applicable provisions of part 4, the Act and the Commission's rules and regulations, with respect to any qualified eligible person and any other client to which the commodity trading advisor provides or intends to provide commodity interest trading advice.

(e) *Insignificant deviations from a term, condition or requirement of § 4.7.*

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

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

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

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

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

§ 4.14 Exemption from registration as a commodity trading advisor.

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

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

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

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

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

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

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

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

(7)

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

(ii) It is registered under the Act as a retail foreign exchange dealer and the person's trading advice is solely in connection with its business as a retail foreign exchange dealer.

(8) It is registered as an investment adviser under the Investment Advisers Act of 1940 or with the applicable securities regulatory agency of any State, or it is exempt from such registration, or

it is excluded from the definition of the term “investment adviser” pursuant to the provisions of sections 202(a)(2) and 202(a)(11) of the Investment Advisers Act of 1940, *Provided*, That:

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

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

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

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

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

(2) With the exception of the pool's operator, advisor and their principals, solely “Non-United States persons,” as that term is defined in § 4.7(a)(~~1~~)(iv~~7~~), will contribute funds or other capital to, and will own beneficial interests in, the pool; *Provided*, That units of participation in the pool held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10 percent of the beneficial interest of the pool;

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

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

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

(ii) The person:

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

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

(iii)

(A) A person who desires to claim the relief from registration provided by this § 4.14(a)(8) must file electronically a notice of exemption from commodity trading advisor registration with the National Futures Association through its electronic exemption filing system. The notice must:

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

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

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

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

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

(D) *Annual notice.* Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 60 days of the calendar year end through National Futures Association's electronic exemption filing system.

(E) Each person who has filed a notice of exemption from registration under this section must, in the event that any of the information contained or representations made in the notice becomes inaccurate or incomplete, amend the notice electronically through National Futures Association's electronic exemption filing system as may be necessary to render the notice accurate and complete. This amendment must be filed within 15 business days after the trading advisor becomes aware of the occurrence of such event.

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

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

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

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

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

(i) Directing client accounts; or

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

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

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

(A) A natural person, and:

(1) Any minor child of the natural person;

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

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

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

(B)(1) A corporation, general partnership, limited partnership, limited liability company, trust (other than a trust referred to in paragraph (a)(10)(i)(A)(4) of this section), or other legal organization (any of which are referred to hereinafter as a “legal organization”) that receives commodity interest trading advice based on its investment objectives rather than the individual investment objectives of its shareholders, partners, limited partners, members, or beneficiaries (any of which are referred to hereinafter as an “owner”); and

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

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

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

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

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

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

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

(11) The person's commodity trading advice is solely directed to, and is for the sole use of, "family clients," as defined in § 275.202(a)(11)(G)-1 of this title.

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

(c)

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

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

§ 4.21 Required delivery of pool Disclosure Document.

(a)

(1) Subject to the provisions of paragraph (a)(2) of this section, each commodity pool operator registered or required to be registered under the Act must deliver or cause to be delivered to a prospective participant in a pool that it operates or intends to operate a Disclosure Document for the pool prepared in accordance with §§ 4.24 and 4.25 by no later than the time it delivers to the prospective participant a subscription agreement for the pool; *Provided*, That any information distributed in advance of the delivery of the Disclosure Document to a prospective participant is consistent with or amended by the information contained in the Disclosure Document and with the obligations of the commodity pool operator under the Act, the Commission's regulations issued thereunder, and the laws of any other applicable federal or state authority; *Provided, further*, That in the event such previously distributed information is amended by the Disclosure Document in any material respect, the prospective participant must be in receipt of the Disclosure Document at least 48 hours prior to its subscription being accepted by the pool operator.

(2) For the purpose of the Disclosure Document delivery requirement, including any offering memorandum delivered pursuant to ~~§ 4.7(b)(1)~~ [§ 4.7\(b\)\(2\)\(i\)](#) or 4.12(b)(2)(i), the term “prospective pool participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of the offered pool.

(b) [Reserved]

§ 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:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(vi)

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

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

(3) The Account Statement must also disclose any material business dealings between the pool, the pool's operator, commodity trading advisor, futures commission merchant, retail foreign exchange dealer, swap dealer, or the principals thereof that previously have not been disclosed in the pool's Disclosure Document or any amendment thereto, other Account Statements or Annual Reports.

(4) For the purpose of the Account Statement delivery requirement, including any Account Statement distributed pursuant to ~~§ 4.7(b)(2)~~ § 4.7(b)(3) or 4.12(b)(2)(ii), the term "participant" does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested.

(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)(iii) of this section may elect to follow the same accounting treatment with respect to the computation and presentation of the account statement.

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

(c) 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:

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

(2)

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

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

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

(4) Statements of 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)~~ § 4.7(b)(4):

(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 paragraph (c)(7) of this section that would otherwise be required by paragraph (c) of this section is not required to be audited in accordance with paragraph (d) of this section if the commodity pool operator:

(A) Obtains a written waiver of their right to receive an audited Annual Report from each participant other than the pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, and any principal of the foregoing; and

(B) At the time of filing the Annual Report with the National Futures Association, certifies that it has received a written waiver from each participant from whom it is required to obtain a waiver to qualify for the relief available under this paragraph (c)(7). The commodity pool operator must maintain the waivers in accordance with § 4.23 and must make the waivers available to the Commission or National Futures Association upon request. Notwithstanding the provisions of paragraph (g)(2)(ii) of this section, the relief made available by this paragraph (c)(7)(iii) will not be available where the commodity pool operator has not previously distributed an audited Annual Report to pool participants and submitted an audited Annual Report to the National Futures Association.

(8) For the purpose of the Annual Report distribution requirement, including any annual report distributed pursuant to ~~§ 4.7(b)(3)~~ § 4.7(b)(4) or 4.12(b)(2)(iii), the term “participant” does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested; *Provided*, That the Annual Report of such investing pool contain financial statements that include such information as the Commission may specify concerning the operations of the pool in which the commodity pool has invested.

(d)

(1) Subject to the provisions of paragraphs (d)(2) and (g)(2) of this section, the financial statements in the Annual Report required by this section or by ~~§ 4.7(b)(3)~~ § 4.7(b)(4) must be presented and computed in accordance with United States generally accepted accounting principles consistently applied and must be audited by an independent public accountant; *Provided, however*, and subject to the exception in paragraph (c)(7)(iii)(B) of this section, that the requirement that the Annual Report be audited by an independent public accountant does not apply for any fiscal year during which the only participants in the pool are one or more of the pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, and any principal of the foregoing; and *Provided further*, that the ~~CPO~~ [commodity pool operator](#) obtains a written waiver from each such pool participant of their right to receive an audited Annual Report for such fiscal year, maintains such waivers in accordance with § 4.23, and makes such waivers available to the Commission or National Futures Association upon request. 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) Where a ~~commodity~~ pool is organized in a jurisdiction other than the United States, the financial statements in the Annual Report required by this section or by ~~§ 4.7(b)(3)~~ § 4.7(b)(4) may be presented and computed in accordance with the generally accepted accounting principles, standards or practices followed in such other jurisdiction; *Provided, That:*

(A) The other jurisdiction follows accounting principles, standards or practices set forth in paragraph (d)(2)(ii) of this section and the Annual Report presents and computes the financial statements of the pool in accordance with the applicable accounting principles, standards or practices followed by such other jurisdiction;

(B) The Annual Report includes a condensed schedule of investments, or, if required by the applicable accounting principles, standards or practices followed by such other jurisdiction, a full schedule of investments;

(C) The Annual Report reports special allocations of ownership equity in accordance with paragraph (e)(2) of this section;

(D) The Disclosure Document or offering memorandum for the pool identifies the accounting principles, standards or practices of the other jurisdiction pursuant to which the Annual Report presents and computes the financial statements of the pool; and

(E) Where the accounting principles, standards or practices of the other jurisdiction require consolidated financial statements for the pool, such as a feeder fund consolidating with its master fund, all applicable disclosures required by United States generally accepted accounting principles for the feeder fund must be presented with the reporting pool's consolidated financial statements.

(ii) For purposes of paragraph (d)(2)(i) of this section, the following alternative accounting principles, standards or practices may be employed in the preparation and computation of the financial statements in the Annual Report of the commodity pool; *Provided, That* any such alternative accounting principles, standards or practices so employed are those followed by the jurisdiction other than the United States in which the commodity pool is organized:

(A) International Financial Reporting Standards;

(B) Generally Accepted Accounting Practice in the United Kingdom;

(C) New Irish Generally Accepted Accounting Practice;

(D) Luxembourg Generally Accepted Accounting Principles; or

(E) Canadian Generally Accepted Accounting Principles.

(iii) To claim the relief available under this paragraph (d)(2), a commodity pool operator must file a notice with the National Futures Association within 90 calendar days after the end of the pool's first fiscal year.

(A) The notice must contain: The name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator; the name and identification number of the commodity pool for which the pool operator is claiming relief; and the alternative accounting principles, standards or practices pursuant to which the financial statements in the Annual Report will be presented and computed;

(B) The notice must include a representation that the commodity pool operator complies with each of the conditions specified in paragraphs (d)(2)(i)(A) through (D) of this section and, if applicable, paragraph (d)(2)(i)(E) of this section; 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)

(1)

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

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

(B) State the reasons for the requested extension;

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

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

(E) Be filed with the National Futures Association prior to the date on which the Annual Report is due.

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

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

(B) Do you have any indication from the part of your audit completed to date that would lead you to believe that the commodity pool operator was or is not meeting the recordkeeping requirements of this part 4 or was or is not complying with the § 4.20(c) prohibition on commingling of property of any pool with the property of any other person?

(iii) Within ten calendar days after receipt of an application for an extension of time, the National Futures Association shall:

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

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

(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~~4)(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~~4)(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.

(g)

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

(2)

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

(ii) For purposes of this paragraph (g)(2), the time period from the date on which the commodity pool operator first receives funds, securities or other property from a participant in the pool that is not a person listed in paragraphs (g)(2)(ii)(A)(1) through (g)(2)(ii)(A)(5) of this section to the end of the pool's first fiscal year is the stub period of the pool. Where the stub period is four months or less, the first Annual Report for the pool may be unaudited; *Provided, however,* That:

(A) Throughout the stub period, the pool had no more than fifteen participants and no more than \$3,000,000 in aggregate gross capital contributions. For the purpose of satisfying these criteria, the commodity pool operator may exclude the following persons and their contributions:

(1) The pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, and any principal of the foregoing;

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

(3) The spouse of any participant specified in paragraph (g)(2)(ii)(A)(1) or (2) of this section;

(4) Any relative of a participant specified in paragraph (g)(2)(ii)(A)(1), (2) or (3) of this section, their spouse or a relative of their spouse, who has the same principal residence as such participant; and

(5) An entity that is wholly-owned by one or more participants specified in paragraph (g)(2)(ii)(A)(1), (2), (3) or (4) of this section; and

(B) The next Annual Report for the pool is audited and covers the stub period plus the pool's first 12-month fiscal year.

(C) To claim the relief available under paragraph (g)(2)(ii) of this section, a commodity pool operator must:

(1) Prior to the date upon which it is required to distribute and submit an audited Annual Report for the pool's first fiscal year, obtain a written waiver of the pool participant's right to receive an audited Annual Report for the pool's first fiscal year from each participant other than a participant who is the pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, or any principal of the foregoing. The waiver may be included in the subscription agreement for the pool or other agreement with the participant; *Provided, however,* That the waiver is a separate page in the agreement and the pool operator requires the participant to separately sign and date it. The waiver must be in a form substantially as follows: “[Name of participant], a participant in [Name of pool], voluntarily waives the right under CFTC Regulation 4.22(d) to receive an audited Annual Report for the fiscal year ended [end date of the pool's first fiscal year] and will accept in lieu thereof an unaudited Annual Report covering [the stub period] and an audited Annual Report covering [the start date of the stub period] through [the end date of the pool's first twelve-month fiscal year].”; and

(2) On or before the date upon which it is required to distribute and submit the Annual Report for the pool's first fiscal year, file a notice with the National Futures Association, along with a certification that it has received the required written waiver from each participant who is not the pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, or any principal of the foregoing, and who has been a participant in the pool for its first fiscal year.

(i) The notice must contain: The name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator; the name and identification number of the commodity pool for which the pool operator is claiming relief; and the beginning and end dates of the stub period of the pool;

(ii) The notice must include a representation that the commodity pool operator meets the criteria of paragraph (g)(2)(ii)(A) of this section and that it will comply with the condition of paragraph (g)(2)(ii)(B) of this section; and

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

(D)(1) Each unaudited Annual Report for which the relief available under paragraph (g)(2)(ii) of this section has been claimed must prominently disclose on the cover page thereof: “Pursuant to an exemption from the Commodity Futures Trading Commission, this unaudited Annual Report

covers the period from [beginning date of the stub period of the pool] to the end of the pool's first fiscal year, a period of [number] months.”

(2) The next Annual Report for the pool must prominently disclose on the cover page thereof: “Pursuant to an exemption from the Commodity Futures Trading Commission, this audited Annual Report covers the period from [beginning date of the stub period of the pool] to the end of the pool's first 12-month fiscal year, a period of [number] months.”

(E) The commodity pool operator must maintain in accordance with § 4.23 of this chapter each waiver it has obtained to claim the relief available under paragraph (g)(2)(ii) of this section.

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

(h)

(1) Each Account Statement and Annual Report, including an Account Statement or Annual Report provided pursuant to § 4.7(b) or 4.12(b), must contain an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete; *Provided, however,* That it shall be unlawful for the individual to make such oath or affirmation if the individual knows or should know that any of the information in the document is not accurate and complete.

(2) Each oath or affirmation must be made by a representative duly authorized to bind the pool operator, and

(i) for the copy of a commodity pool's Annual Report submitted to the National Futures Association, such representative shall satisfy the required oath or affirmation through compliance with the National Futures Association's electronic filing procedures, and

(ii) for a commodity pool Account Statement or Annual Report distributed to participants, a facsimile of the manually signed oath or affirmation of such representative may be used so long as the manually signed original is retained in accordance with § 4.23.

(3) For each manually signed oath or affirmation, there must be typed beneath the signed oath or affirmation:

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

(ii) The capacity in which he is signing;

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

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

(i) The Account Statement or Annual Report may be distributed to a pool participant by means of electronic media if the participant so consents; *Provided*, That prior to the transmission of any Account Statement or Annual Report by means of electronic media, a commodity pool operator must disclose to the participant that it intends to distribute electronically the Account Statement or Annual Report or both documents, as the case may be, absent objection from the participant, which objection, if any, the participant must make no later than 10 business days following its receipt of the disclosure.