not apply to independent regulatory agencies such as CPSC. The Commission does not expect that the rule will have any substantial direct effects on the States, the relationship between the national government and the States, or the distribution of power and responsibilities among various levels of government.

List of Subjects in 16 CFR Part 1632

Consumer protection, Flammable materials, Incorporation by reference, Labeling, Mattresses and mattress pads, Records, Textiles, Warranties.

Conclusion

Therefore, pursuant to the authority of section 30(b) of the Consumer Product Safety Act (15 U.S.C. 2079(b)) and sections 4 and 5 of the Flammable Fabrics Act (15 U.S.C. 1193, 1194), the Commission hereby amends title 16 of the Code of Federal Regulations, Chapter II, Subchapter D, Part 1632 to read as follows:

PART 1632—STANDARD FOR THE FLAMMABILITY OF MATTRESSES AND MATTRESS PADS

1. The authority for part 1632 continues to read as follows:

Authority: 15 U.S.C. 1193, 1194; 15 U.S.C. 2079(b).

2. Section 1632.5 is amended by revising paragraphs (b)(2)(i) through (iv) and by removing the undesignated paragraph following (b)(2)(iv) to read as follows:

§ 1632.5 Mattress pad test procedure.

* * * * *

(b)* * *

(2) Laundering procedure. (i) Washing shall be performed in accordance with sections 8.2.2 and 8.2.3 of AATCC Test Method 124–1996, using wash temperature V (60°±3°C, 140°±5°F) specified in Table II of that method, and the water level, agitator speed, washing time, spin speed and final spin cycle specified for ''Normal/Cotton Sturdy'' in Table III.

(ii) Drying shall be performed in accordance with section 8.3.1(A) of AATCC Test Method 124–1996 ''Appearance of Fabrics after Repeated Home Laundering,'' Tumble Dry, using the exhaust temperature (66°±5°C, 150°±10°F) and cool down time of 10 minutes specified in the ''Durable Press'' conditions of Table IV.

(iii) Maximum washer load shall be 3.64 Kg (8 pounds) and may consist of any combination of test samples and dummy pieces.

(iv) AATCC Test Method 124–1996 ''Appearance of Fabrics after Repeated Home Laundering,'' is found in Technical Manual of the American Association of Textile Chemists and Colorists, vol. 73, 1997, which is incorporated by reference. Copies of this document are available from the American Association of Textile Chemists and Colorists, P.O. Box 12215, Research Triangle Park, North Carolina 27709. This document is also available for inspection at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

* * * * *

Dated: March 2, 2000.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

List of Relevant Documents

1. American Association of Textile Chemists and Colorists, ''Appearance of Durable Press Fabrics After Repeated Home Laun-derings,'' AATCC Test Method 124–1969. AATCC Technical Manual, Vol. 46, 1970.
2. American Association of Textile Chemists and Colorists, ''Appearance of Fabrics After Repeated Home Laundering,'' AATCC Test Method 124–1996. AATCC Technical Manual, Vol. 73, 1997.
3. Briefing memorandum from Margaret Neily, Project Manager, Directorate for Engineering Sciences, to the Commission, ''Proposed Amendments to Flammable Fabrics Act Standards to Replace Obsolete Standard Detergent and Update Laundering Procedures Required for Tests,'' November 18, 1998.
4. Memorandum from Gail Stafford, Directorate for Laboratory Sciences, to Margaret Neily, Project Manager, ''Amending the Laundering Provisions of the CPSC Flammability Regulations,'' August 18, 1998.
5. Memorandum from Gail Stafford, Directorate for Laboratory Sciences, to Margaret Neily, Project Manager, ''Textile Laundering Standards,'' August 18, 1998.
6. Memorandum from Gail Stafford and Shing-Bong Chen, Directorate for Laboratory Sciences, to Margaret Neily, Project Manager, ''Detergent Comparison Tests,'' August 19, 1998.
7. Log of Meeting on January 21, 1998 concerning Flammability Test of Pyrovatex-treated Flame Resistant Fabrics.
8. Memorandum from Terrance R. Karels, Directorate for Economic Analysis, to Margaret Neily, Project Manager, ''Amendments to FFA Standards,'' August 10, 1998.
9. Memorandum from Margaret Neily, Project Manager, Directorate for Engineering Sciences, to the Commission, ''Briefing Package Supplement: Laundering/Detergent Update for Flammable Fabrics Act Standards—The Soap and Detergent Association (SDA) Laundering Procedures,'' January 11, 1999.
10. Memorandum from Gail Stafford, Directorate for Laboratory Sciences, to Margaret Neily, Project Manager, ''Soap and Detergent Association Proposed Laundering Procedure,'' December 23, 1998.
11. Letter from Jenan Al-Atrash, Director, Human Health & Safety, The Soap and Detergent Association, to Margaret Neily, Technical Program Coordinator, Office of the Executive Director, including SDA Recommended Wash Conditions for CFR 1615.4, September 15, 1998.
12. Letter from Jenan Al-Atrash, Director, Human Health & Safety, The Soap and Detergent Association, to Margaret Neily, Technical Program Coordinator, Office of the Executive Director, follow-up comments to September 15, 1998, letter, November 12, 1998.
13. Memorandum from Margaret L. Neily, Project Manager, Directorate for Engineering Sciences, to the Commission, ''Laundering/Detergent Updates—FR notice supplements,'' February 19, 1999.
14. Briefing Memorandum, from Ron Medford, AED, Office of Hazard Identificaiton and Reduction and Margaret L. Neily, Project Manager, ESME, to the Commission, ''Final Rule Updating Standard Detergent and Laundering Procedures for Flammable Fabrics Act Standards,'' January 6, 2000.
15. Memorandum from Martha A. Kosh, OS, ''Comments on Children's Sleepwear Laundering Procedures, Mattress Pads Laundering Procedures, Carpet and Rugs Laundering Procedures,'' June 1, 1999.
16. Memorandum from Gail Stafford, Directorate for Laboratory Sciences, to Margaret Neily, Project Manager, ''Response to Comments Received as a Result of the Notice of Proposed Rulemaking (NPR) for the Laundering/Detergent Update for the Flammable Fabrics Act Standards,'' October 25, 1999.

[FR Doc. 00–5529 Filed 3–9–00; 8:45 am]

BILLING CODE 6355–01–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AB48

Exemption From Registration as a Commodity Trading Advisor

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission has amended Commission Rule 4.14 to create an exemption from the Commodity Exchange Act's registration requirements for commodity trading advisors that provide standardized advice by means of media such as newsletters, prerecorded telephone newslines, Internet web sites, and non-customized computer software.

DATES: March 10, 2000.

FOR FURTHER INFORMATION CONTACT: J. Douglas Richards, Deputy General Counsel; Martin White, Attorney; or Michael J. Garawski, Attorney at (202) 418–5120.

SUPPLEMENTARY INFORMATION:

I. Background

The Commodity Futures Trading Commission (''Commission'') is adopting CFTC Rule 4.14(a)(9), which exempts certain commodity trading advisors (''CTAs'') from Section 4m(1) of the Commodity Exchange Act (''CEA'' or ''Act''), 7 U.S.C. 6m(1) (1994). Section 4m(1) requires CTAs to register with the Commission. The exemption adopted today is intended to apply to CTAs that provide standardized commodity trading advice by means of media such as newsletters, prerecorded telephone newslines, Internet web sites, and non-customized computer software.[1] For purposes of convenience, these CTAs will be referred to as ''Section 4.14(a)(9) CTAs.''[2]

Over the last several years, the Commission has been involved in several litigated cases that address whether CTAs that provide advice through newsletters, Internet web sites, or similar means can be required to register under Section 4m(1) of the CEA. In two of those cases, *Taucher* v. *Born,* 53 F. Supp. 2d 464 (D.D.C. 1999), *appeal pending,* No. 99–5293 (D.C. Cir.) and *Commodity Trend Service* v. *CFTC,* No. 97 C 2362 (N.D. III. Sept. 28, 1999), *appeals pending,* No. 99–4142 (7th Cir.), federal district courts held that the Section 4m(1) registration requirement constitutes an unconstitutional prior restraint in violation of the First Amendment as applied to the plaintiffs.[3] In both cases, the plaintiffs provided only standardized commodity trading advice through a variety of media, including Internet web sites, computer software, voice recordings accessible by telephone, e-mails, facsimiles, and periodicals. Moreover, the district courts found in these cases that the plaintiffs did not have discretionary control over their clients' accounts, did not provide advice tailored to the financial situation of any specific client, and had no personal contact with their clients. All of the information provided to each client was identical.

The Commission has not itself determined that applying Section 4m(1) to Section 4.14(a)(9) CTAs represent a complete and accurate statement of the constitutional limits of Congress's power with respect to the regulation of Section 4.14(a)(9) CTAs. The Commission has nevertheless determined that it is appropriate to exempt Section 4.14(a)(9) CTAs from registration.

An implicit purpose of the Act is to achieve a regulatory scheme that is consistent with the public interest and that promotes just and equitable principles of trade. This purpose is evident in provisions dealing with the CTA registration scheme, including Sections 41, 4n(1), 4p, 8a(8), as well as other provisions of the Act (*see, e.g.,* Sections 4(c), 4c, 4g, 4j(a)(5)(C), 5, 6(f), 15, 17). Consistent with that, the Act reflects a corollary purpose that the Commission continue to refine its regulatory framework, including its registration scheme, where appropriate in light of other purposes of the Act. *See, e.g.,* Sections 3, 4b, 4k, 4n, 4*o*. The rule adopted today advances these purposes.

Taucher and *CTS* have created legal uncertainty as to whether Section 4.14(a)(9) CTAs may be required to register with the Commission.[4] Absent a Supreme Court decision on the issue, continued litigation is unlikely to eliminate this uncertainty for a considerable period of time. Moreover, litigation of First Amendment issues has required the expenditure of considerable resources by the Commission and, in some instances, has complicated the Commission's investigation and prosecution of fraud by CTAs.

Furthermore, whatever the courts may determine to be the precise constitutional limits of Congressional authority in this area, the Commission believes that minimizing impact on speech, other than false, deceptive or misleading speech, is a relevant policy consideration in determining the Commission's regulatory approach toward CTAs whose relationship with their clients is limited to standardized advice through media such as newsletters, prerecorded telephone newslines, Internet web sites, and non-customized computer software.

On December 2, 1999, the Commission proposed to exempt from Section 4m1) of the CEA certain CTAs that are not engaged in the type of advisory activities specified in proposed Section 4.14(a)(9) and invited comments. 64 FR 68304 (Dec. 7, 1999). The Commission received eight comment letters on this proposal: One from a bar association committee on futures regulation; two from nonprofit legal advocacy groups; one from a trade association; three from clients of CTAs; and one from a member of the general public. All generally supported the adoption of a rule like CFTC Rule 4.14(a)(9). In light of comments received on that proposed rule, the Commission is adopting a modified version of the proposed rule.

II. CFTC Rule 4.14(a)(9)

CFTC Rule 4.14(a)(9) (to be codified at 17 CFR 4.14(a)(9)) adds a new paragraph to Commission Rule 4.14 to create an additional exemption from registration for certain CTAs. The new exemption is expressed in negative terms: the rule exempts CTAs that are *not* engaged in the types of advisory activities specified in the new paragraph. A CTA must meet both of the specified conditions to qualify for the proposed exemption.

Paragraph 4.14(a)(9)(i) provides that, to quality for the exemption, a CTA may not direct client accounts. As defined by Commission Rule 4.10(f), ''[*d*]*irect*, as used in the context of trading commodity interest accounts, refers to agreements whereby a person is authorized to cause transactions to be effected for a client's commodity interest account without the client's specific authorization.'' The granting of such authority creates a business relationship between the CTA and the client that goes beyond speech. Registration of CTAs that direct client accounts thus raises no First Amendment issue.[5]

Paragraph 4.14(a)(9)(ii) also provides that, to qualify for the exemption, a CTA may not provide commodity trading

[1] In this final rulemaking, the term ''commodity trading advice'' refers to advice with respect to trading in a ''commodity interest,'' as defined in Commission Rule 3.1(f), 17 CFR 3.1(f).

[2] ''Section 4.14(a)(9) is a reference to CFTC Rule 4.1(a)(9), to be codified at 17 CFR 4.14(a)(9).

A person that provides commodity trading advice by means of newsletters, Internet web sites, or similar means falls within the statutory definition of ''commodity trading advisor'' unless the person is a ''publisher or producer of print or electronic data of general and regular dissemination'' and the furnishing of commodity trading advice is ''solely incidental to the conduct of their business or profession.'' *See* Sections 1a(5)(B) and (C) of the Act, 7 U.S.C. 1a(5)(B) and (C) (1994); *In re R&W Technical Services, Ltd.,* [Current Transfer Binder] Comm. Fut. L. Rep.: (CCH) ¶ 27,582 (CFTC Mar. 16, 1999); *In re Armstrong,* [1992–1994 Transfer Binderl Comm. Fut. L. Rep. (CCH) ¶ 25,657 (CFTC Feb. 8, 1993).

[3] Both district courts relied on *Lowe* v. *SEC,* 472 U.S. 181 (1985), in which the Supreme Court held that the Investment Advisers Act of 1940, which regulates investment advisers in the securities industry, should be interpreted to apply only to persons who provide personalized advice. The district courts relied primarily on the concurring opinion in *Lowe,* which rested on constitutional grounds.

[4] Significantly, *CTS* and *Taucher* left the Commission's fraud jurisdiction intact.

[5] One commenter, expressed a similar opinion, stating that paragraph (a)(9)(i) does not raise First Amendment concerns.

advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients. A CTA that provides this kind of advice carries out a function comparable to that of a traditional professional. *See Lowe* v. *SEC*, 472 U.S. 181, 232–33 (1985) (White, J., concurring). This provision is intended to preserve the registration requirement for CTAs whose commodity trading advice depends on and reflects information concerning its advisee(s), such as information concerning a particular commodity interest account, particular commodity interest trading activity, and/or other similar types of information. Moreover, so long as the CTA's advice is based on or tailored to such information, the CTA remains required to register even if it gives the same advice to groups of similarly situated clients.

Retaining the registration scheme for those that engage in the activities described by Rule 4.14(a)(9) is justified because the nature of these activities creates a professional relationship. A client that provides a power of attorney to trade his or her account, or that receives commodity trading advice that is based on or tailored to his or her circumstances, will very likely substitute the CTA's expertise for his or her own judgment and use the advice as a direct basis for action.

The Commission received several comments concerning proposed paragraph 4.14(a)(9)(ii). One commenter suggested that the Commission adopt a proviso to the rule that would, in effect, narrow the activities described in paragraph (ii), thereby expanding the scope of the exemption. The commenter maintained that a CTA that provides advice via a web site that is interactive in nature and that requires a client to select among inquiry paths or categories of information should be exempt from the registration requirement. The commenter suggested that the Rule adopt a proviso that explains that nothing in paragraph (9) be construed to prohibit the use of electronic or other interactive exchanges between clients and advisors that do not include individualized investment advice.

A second commenter voiced a similar concern and suggested that proposed Rule 4.14(a)(9)(ii) be narrowed to maintain the registration requirement only for CTAs that provide commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients ''with whose circumstances or characteristics the CTA is directly acquainted.''

The Commission has determined not to adopt these proposals.[6] These commenters' suggestions fail to reflect that the medium through which advice is communicated is, for the most part, not relevant to whether the CTA can be said to be ''exercis[ing] judgment on behalf on the client in the light of the client's individual needs and circumstances.'' *See Lowe,* 472 U.S. at 232 (J. White, concurring). Instead, the Commission agrees with the statement of another commenter that ''the new rule * * * should emphasize that the exemption is based on the nature of the advice that is provided, *regardless of how it is communicated to the client.*'' [7] As explained by the district court in *Taucher,* ''[i]n today's technologically advanced society a professional can exercise judgment on behalf of another without ever having 'personal' [or direct] contact.'' [8]

Given the specific comments received on paragraph 4.14(a)(9)(ii), however, further clarity as to the scope of that paragraph may be desirable. Section III of this preamble provides examples of how Rule 4.14(a)(9)(ii) would be applied in specific situations. To the extent that the examples do not resolve how the Commission would apply the new rule to other specific situations, such situations are best addressed in response to specific facts and circumstances.[9]

The Commission has decided not to adopt proposed paragraph 4.14(a)(9)(iii), which provided that a CTA would qualify for the exemption only if it does not provide commodity trading advice through personally interactive communications with individual clients, such as face-to-face conversations, telephone conversations, or electronic mail exchanges between individuals. In the Notice of Proposed Rulemaking, the Commission explained that the use of such means of communications implies that the advisor is giving advice in the context of a relationship with the client that is more personal than the remote and standardized relationship between the publisher of a newsletter or non-customized software and its readers or users.

Several commenters opposed the adoption of proposed paragraph (a)(9)(iii). One commenter anticipated two serious problems in implementing proposed paragraph (a)(9)(iii). First, the rapid development of communications technology may require periodic reexamination of the language of paragraph (iii), and second, the emphasis in paragraph (iii) on the method of communication would complicate policing the terms of the exemption.

Other commenters questioned whether paragraph (a)(9)(iii) would be constitutionally permissible. One commenter opined that the references in proposed paragraph (a)(9)(iii) to the mode of communication are not appropriate given the recent judicial decisions in this area. Similarly, other commenters opposed proposed paragraph (a)(9)(iii) on the ground that it would be inconsistent with the First Amendment, except in cases where the advice is given in light of the client's individual needs and circumstances.

The Commission has not determined that the application of proposed paragraph (a)(9)(iii) would violate the Constitution under any particular circumstances. The Commission notes that none of the cases upon which the commentators rely for their constitutional positions involved the ''interactive communications'' situation involved in paragraph (a)(9)(iii). Rather, those cases involved only the provision of advice in a non-interactive setting,

[6] The Commission notes that paragraph (a)(9)(ii), as interpreted in Example C below, substantially accomplishes the result intended by the proviso suggested by one commenter.

[7] In a borderline case as to whether advice is ''based on or tailored to'' within the meaning of Section (a)(9)(ii), however, the context of the advice might be taken into account. For example, in such a borderline case, if the advice is provided in a book or a periodical, that factor may weigh against a finding that the CTA is providing advice ''based on or tailored to'' the client's characteristics, since such modes of communication are ordinarily used as sources of information and ideas that the reader assimilates into his or her own thought process. On the other hand, if the advice is provided to a particular client in a face-to-face communication or over the telephone, that factor may weigh in favor of a finding that the CTA's advice is ''based on or tailored to'' the customer's characteristics, since such a context suggests that the CTA is being responsive to the client's particular needs.

[8] *Taucher* v. *Born,* No. 97–1711 (RMU) (Jan. 14, 1999) (denying plaintiff's motion for summary judgment). In its later decision finding that the plaintiff CTAs did not ''exercise judgment'' on behalf of their clients, the district court found that the plaintiffs had no personal contact with their customers. The court, however, did not rely exclusively on this factor, which was only one of several circumstances supporting the court's finding. *Taucher,* 53 F. Supp. 2d at 478. In light of the court's statement made in denying the motion for summary judgment, its position appear to be that lack of personal contacts is a factor, but not a dispositive one, in determining whether the CTA is exercising judgment on behalf of its clients.

[9] The Commission uses various means to assess the applicability of a rule in light of specific factual situations, such as determinations made in its adjudicated decisions. Commission staff also provides interpretative guidance, such as issuing interpretative letters or responding to requests for no-action relief.

such as through periodicals, books, newsletters, or software programs.[10]

Nevertheless, the Commission has decided not to adopt proposed paragraph 4.14(a)(9)(iii). By this rulemaking, the Commission intends to reduce the legal uncertainty created by the First Amendment decisions in this area and to curtail the impediments that such First Amendment litigation imposes on the Commission's enforcement of the antifraud provisions of the CEA. Considering the comments received, adoption of proposed paragraph (a)(9)(iii) might undermine the accomplishment of those purposes.[11]

As explained in the Notice of Proposed Rulemaking, the Commission intends that a CTA who manages a client's trading under some type of informal arrangement be required to register even if the CTA is not authorized to effect transactions without the client's specific authorization, and therefore does not ''direct'' the client's accounts. In the Notice of Proposed Rulemaking, the Commission solicited comments on whether a separate paragraph dealing with CTAs that manage their clients' trading under informal arrangements would be necessary to realize this intention.

One commenter supported clarifying the breadth of the proposed rule to retain the registration requirement for CTAs that have informal arrangements with clients and that perform any of the activities outlined in the rule. Although the commenter did not advocate defining the meaning of ''informal arrangements,'' it proposed that the introductory language of Section 4.14(a)(9) be expanded to add the words ''directly or indirectly'' after the word ''engage.'' [12] The Commission has decided not to adopt the commenter's suggested language in Rule 4.14(a)(9) and instead to rely on the language of paragraph 4.14(a)(9)(ii) to cover CTAs that informally manage their customers' trading.

Any CTA that meets the conditions of Rule 4.14(a)(9) is no longer required to register with the Commission as a requirement for doing business as a CTA. Such a CTA, unless it chooses to register voluntarily, also is now exempt from the various regulatory requirements set forth in the CEA and the Commission's rules that, by their terms, apply only to registrants or persons required to be registered. For example, an exempt CTA is not subject to the recordkeeping and production requirements of Section 4n(3)(A) of the CEA and Commission Rule 4.33, or the ethics training requirement of Section 4p(b) of the CEA. Moreover, an exempt CTA is not subject to the CFTC's reparations jurisdiction under Section 14 of the CEA.[13]

An exempt CTA is still subject to those provisions of the CEA and the Commission's rules that, by their terms, apply to CTAs without regard to registration. These include Section 4*o* of the CEA, which prohibits fraud by CTAs; Commission Rule 4.30, which, broadly speaking, prohibits CTAs from handling clients' funds; Commission Rule 4.41(a), which prohibits deceptive advertising by CTAs; and Commission Rule 4.41(b), which requires representations concerning simulated or hypothetical performance results by CTAs to be accompanied by disclosures describing the limitations of such results as an indicator of actual performance. Exempt CTAs also are subject to those provisions of the CEA that apply to any person, including, for example, Section 4b of the CEA, which is the Act's general anti-fraud provision. Similarly, the proposed exemption does not alter the duty of a Section 4.14(a)(9) CTA to register with the Commission in a capacity other than as a CTA, if the CTA, in addition to its advisory activities, engages in other business activities that require such registration.

A CTA exempt under rule 4.14(a)(9) that wishes to apply for registration or retain its current registration may do so. Pursuant to Rule 4.14(c), a CTA that registers voluntarily is subject to those provisions of the Act and the Commission's regulations that apply to registered CTAs (*i.e.,* the disclosure requirements of Rules 4.31, 4.35 and 4.36, and the recordkeeping requirements of Rule 4.33) as if it were not exempt from registration. The decision to register voluntarily also would subject the CTA to ethics training requirements and the Commission's reparations jurisdiction.

III. Examples [14]

In order to convey the intent of the exemption that we adopt today, the Commission offers the following illustrative examples: [15]

A. A CTA provides commodity trading advice only through newsletters, books and periodicals. The advice includes specific recommendations, such as recommendations to buy or sell specific futures contracts should a particular price level be reached. Recipients of publications all receive the same advice. Under Rule 4.14(a)(9), this CTA is exempt from the Section 4m registration requirement.

B. A CTA provides specific commodity trading advice through e-mails, facsimiles, an Internet web site, telephone calls and face-to-face meetings with customers. The advice is based on a computerized trading system, which also is available for purchase and use on a personal computer. Such advice is provided on a daily basis and is reactive to the latest market activity. The advice consists only of an instruction to buy or sell a futures contract and where, if at all, to place a stop order. The CTA's clients all receive the same advice. Under Rule 4.14(a)(9), this CTA is exempt from the Section 4m registration requirement.

C. A CTA provides commodity trading advice through an Internet web site. The web site requires the user to indicate whether he or she has a preference for trading agricultural futures contracts or financial futures contracts. Users who indicate that their preference is agricultural futures contracts receive different advice from those who indicate that financial futures contracts are their preference. The CTA's advice is not ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients,'' within the meaning of Rule 4.14(a)(9)(ii). Rather, the CTA is merely allowing its clients to select which advisory services they wish to

[10] These cases include *Lowe* v. *SEC,* 472 U.S. 181 (1985), and the *Taucher* and *CTS* district court decisions.

[11] In light of the decision not to adopt proposed paragraph (a)(9)(iii), the Commission need not address whether implementation problems would provide an independent reason not to adopt that paragraph.

[12] The commenter's proposed introductory language would read: ''A person is not required to register under the Act as a commodity trading advisor if * * * [i]t does not engage, *directly or indirectly,* in any of the following activities * * *''

[13] In response to a question posed in the Notice of Proposed Rulemaking, one commenter stated that exempt CTAs should not be subject to the recordkeeping, production or ethics training requirements because to do so would raise ''significant constitutional issues.'' The Commission has not determined that applying these requirements would violate the Constitution. The Commission, however, agrees that CTAs that are exempt from registration under Rule 4.14(a)(9) should not be subject to regulatory requirements like these, which apply only to registered CTAs.

[14] The following examples of the application of Rule 4.14(a)(9) supercede the examples provided in the Notice of Proposed Rulemaking. Examples are illustrative and not intended to be statements of law. As noted above, persons are free to seek advice regarding their specific activities.

[15] In each of the following examples, the CTA does not have powers of attorney from any of its clients to trade accounts. In addition, the CTA in each example remains subject to requirements of the Act and the Commission's regulations that apply to all CTAs without regard to registration, such as Section 4*o* of the Act and Commission Rules 4.30, 4.41(a) and 4.41(b), as well as to provisions that apply to any person, such as Section 4b of the Act.

purchase. Therefore, this CTA is exempt from the Section 4m registration requirement under Rule 4.14(a)(9).

D. A CTA conducts seminars at which it teaches attendees how to trade commodity futures contracts aided by a software program that the CTA sells. After the seminar, the CTA invites seminar attendees to participate in a question-and-answer session. In response to questions, the CTA provides commodity trading advice without asking or receiving information about the personal characteristics of the attendees. Such advice is not ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients,'' within the meaning of Rule 4.14(a)(9)(ii). Consequently, this CTA is exempt from the Section 4m registration requirement.

E. A CTA conducts seminars at which it teaches attendees how to trade commodity futures contracts aided by a software program that the CTA sells. Before each seminar commences, the CTA polls the attendees to discover their level of ability and knowledge. The CTA presents a more advanced seminar for classes that have a higher degree of experience. Because such advice is not ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients,'' within the meaning of Rule 4.14(a)(9)(ii), this CTA is exempt from the Section 4m registration requirement.

F. A CTA provides commodity trading advice only through facsimile messages, without further discussion with its clients. Before advising any client, the CTA gathers current information about the client, such as information about his or her net assets and liabilities, annual income, annual expenses, imminent large purchases, tolerance for risk, purposes for trading, investment goals and expectations, preferred contracts for trading, any existing futures positions, and other current investments. The CTA's advice is different for different clients, depending on their profile, but the CTA sends similar advice to groups of clients with similar profiles. Under Rule 4.14(a)(9)(ii), this CTA provides commodity trading advice ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients'' and, consequently, is not exempt from the registration requirement.

G. A CTA gives seminars on commodity interest trading. During the seminar, the CTA takes questions from the attendees concerning the trades that the CTA recommends for the upcoming week. Before responding to the question of an attendee, the CTA asks the attendee for specific information about him or herself, such as the types of information listed in Example F. The CTA provides different recommendations to different attendees, based on the information provided. Under Rule 4.14(a)(9)(ii), this CTA provides commodity trading advice ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients'' and therefore is not exempt from the registration requirement.

H. A CTA monitors a client's trading positions and amount of margin in the client's account. Based on that information, along with general technical and fundamental market information, the CTA gives the client commodity trading advice. Because he provides commodity trading advice ''based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients,'' this CTA is not exempt from the registration requirement under Rule 4.14(a)(9)(ii).

IV. Statutory Authority

Pursuant to Section 8a(5) of the CEA, 7 U.S.C. 12a(5), the Commission has statutory authority to promulgate the proposed rule. As explained above, this rule is consistent with the legislative purposes of the CEA.

In the Notice of Proposed Rulemaking, the Commission indicated that it also would rely on Section 4(c)(1) of the Act, 7 U.S.C. 6(c)(1), as authority to adopt Rule 4.14(a)(9). Upon further consideration, the Commission has determined that reliance on Section 4(c) is unnecessary. The Commission previously has relied upon its rulemaking power, as provided in Section 8a(5), to exempt CTAs from the registration requirement. The authority citation for Part 4 of the Commission's rules, therefore, is unchanged.

V. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601 *et seq.,* requires that agencies, in proposing rules, consider the impact of those rules on small entities. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[16] With respect to CTAs, the Commission has stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of any rule.

As the Commission noted when proposing the rule, some of the CTAs that would be affected by Rule 4.14(a)(9) could reasonably be considered to be small entities. The rule amendment adopted herein, however, will reduce or remove existing economic burdens. Moreover, the registration requirements that will be affected by the proposed rule involve only minimal economic burdens.

B. Paperwork Reduction Act

Rule 4.14(a)(9) affects information collection requirements. As required by the Paperwork Reduction Act of 1995, the Commission has submitted a copy of Rule 4.14(a)(9) to the Office of Management and Budget (OMB) for its review. 44 U.S.C. 3507(h). In response to the Commission's invitation in the notice of proposed rulemaking to comment on any potential paperwork burden associated with this regulation, no comments were received.

As described in detail above, the Commission received comments concerning the substance of the Rule 4.14(a)(9). In recognition of certain comments received, the Commission has decided not to adopt proposed paragraph 4.14(a)(9)(iii) as part of the final rule. This modification, however, is not expected to change the information collection burden information as described in the notice of proposed rulemaking.

C. Administrative Procedure Act

The Administrative Procedure Act provides that the required publication of a substantive rule shall be made not less than 30 days before its effective date, but provides an exception for ''a substantive rule which grants or recognizes an exemption or relieves a restriction.'' 5 U.S.C. 553(d). Because Rule 4.14(a)(9) grants an exemption from registration, the Commission has determined to make the rule effective immediately.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity Pool Operators, Commodity Trading Advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 4 as follows:

[16] 47 FR 18618–21 (Apr. 30, 1982).

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

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

2. Section 4.14 is amended by removing the word ''or'' at the end of paragraph (a)(5), by removing the period at the end of paragraphs (a)(6), and (a)(7) and adding a semicolon in its place, by removing the period at the end of paragraph (a)(8)(v)(D) and adding ''; or'' in its place, and by adding paragraph (a)(9) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

(a) * * *

(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.

* * * * *

Issued in Washington, D.C. on March 3, 2000, by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 00–5823 Filed 3–9–00; 8:45 am]

BILLING CODE 6351–01–M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 270

[Release Nos. 33–7728A, IC–23958A, IA–1815A; File No. S7–25–95]

RIN 3235–AG27

Personal Investment Activities of Investment Company Personnel

AGENCY: Securities and Exchange Commission.

ACTION: Correction to final rule.

SUMMARY: This release contains a correction to the final amendments to rule 17j–1 under the Investment Company Act of 1940, which were published Friday, August 27, 1999 (64 FR 46821). Rule 17j–1 addresses conflicts of interest that rise from personal securities activities of investment company personnel.

EFFECTIVE DATE: March 6, 2000.

FOR FURTHER INFORMATION CONTACT: Penelope W. Saltzman, Senior Counsel, (202) 942–0690, or C. Hunter Jones, Assistant Director, Office of Regulatory Policy, Division of Investment Management, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0506.

SUPPLEMENTARY INFORMATION: The amendments to rule 17j–1 under the Investment Company Act of 1940 were designed to improve the regulation of conflicts of interest that arise when registered investment company (''fund'') personnel buy and sell securities for their own accounts. The amendments include a requirement that the board of directors of a fund approve the code of ethics of the fund, and any of its investment advisers and principal underwriters. Section 17j–1(c)(1(ii) also was intended to provide that before approving any of these codes, the fund's board must receive a certification from the fund and each of its investment advisers and principal underwriters that the organization providing the certification has adopted certain procedures.

As adopted, section 17j–1(c)(1)(ii) contains an error that may be misleading and should be clarified.

Accordingly, the publication on August 27, 1999 of the final regulation (33–7728), which was the subject of FR Doc. 99–22310, is corrected as follows:

§ 270.17J–1 [Corrected]

On page 46835, first column, fourteenth and fifteenth lines, the phrase ''the investment adviser's or principal underwriter's code of ethics'' is corrected to read ''the Fund's, investment adviser's, or principal underwriter's code of ethics.''

Dated: March 6, 200.

Jonathan G. Katz,

Secretary.

[FR Doc. 00–5914 Filed 3–9–00; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD05–00–003]

Drawbridge Operation Regulations; Darby Creek, Pennsylvania

AGENCY: Coast Guard, DOT.

ACTION: Notice of temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has approved a temporary deviation from the regulations governing the operation of the CONRAIL Railroad Bridge across Darby Creek, mile 0.3, in Essington, Pennsylvania. Beginning at 7 a.m. on March 20, through 5 p.m. on April 3, 2000, the bridge may remain in the closed position. This closure is necessary to conduct the installation of a new bridge control house.

DATES: This deviation is effective from 7 a.m. on March 20 until 5 p.m. on April 3, 2000.

FOR FURTHER INFORMATION CONTACT: Ann B. Deaton, Bridge Administrator, Fifth Coast Guard District, at (757) 398–6222.

SUPPLEMENTARY INFORMATION: The Coast Guard received a letter from the Consolidated Rail Corporation (CONRAIL) on February 22, 2000, requesting a temporary deviation from the current operating schedule of the Darby Creek bridge set out in 33 CFR 117.903. CONRAIL intends to install a new bridge control house. To facilitate the installation, disassembly of the machinery including electrical and mechanical components of the bridge will be performed. This work requires completely immobilizing the operation of the bascule span. In the event of an emergency, openings of the span will be provided as quickly as possible, but may take two hours or longer to accomplish. Requests for emergency openings can be made by contacting Conrail's resident engineer at (609) 820–7784.

In accordance with 33 CFR 117.35, the District Commander approved Conrail's request for a temporary deviation from the governing regulations in a letter dated February 25, 2000.

The Coast Guard has informed the known commercial users of the waterway of the bridge closure so that these vessels can arrange their transits to minimize any impact caused by the temporary deviation.

The temporary deviation allows the CONRAIL Railroad Bridge across Darby Creek, mile 0.3, in Essington, Pennsylvania to remain closed from 7 a.m. on March 20, until 5 p.m. on April 3, 2000.

Dated: March 3, 2000.

James W. Underwood,

Captain, U.S. Coast Guard Acting Commander, Fifth Coast Guard District.

[FR Doc. 00–5959 Filed 3–9–00; 8:45 am]

BILLING CODE 4910–15–P