

(i) *Major commodity trading advisor* means, with respect to a pool, any commodity trading advisor that is allocated or is intended to be allocated at least ten percent of the pool's funds available for commodity interest trading. For this purpose, the percentage allocation shall be the amount of funds allocated to the trading advisor by agreement with the commodity pool operator (or trading manager) on behalf of the pool, expressed as a percentage of the lesser of the aggregate value of the assets allocated to the pool's trading advisors or the net assets of the pool at the time of allocation.

(j) *Break-even point*—(1) Means the trading profit that a pool must realize in the first year of a participant's investment to equal all fees and expenses such that such participant will recoup its initial investment, as calculated pursuant to rules promulgated by a registered futures association pursuant to section 17(j) of the Act; and

(2) Must be expressed both as a dollar amount and as a percentage of the minimum unit of initial investment and assume redemption of the initial investment at the end of the first year of investment.

(k) *Draw-down* means losses experienced by a pool or account over a specified period.

(l) *Worst peak-to-valley draw-down* means the greatest cumulative percentage decline in month-end net asset value due to losses sustained by a pool, account or trading program during any period in which the initial month-end net asset value is not equaled or exceeded by a subsequent month-end net asset value. Such decline must be expressed as a percentage of the initial month-end net asset value, together with an indication of the months and year(s) of such decline from the initial month-end net asset value to the lowest month-end net asset value of such decline.¹ For purposes of §§ 4.25 and 4.35, a peak-to-valley draw-down which began prior to the beginning of the most recent five calendar years is

¹For example, a worst peak-to-valley draw-down of "4 to 8-92/25%" means that the peak-to-valley draw-down lasted from April to August of 1992 and resulted in a twenty-five percent cumulative draw-down.

deemed to have occurred during such five-calendar-year period.

(m) *Partially-funded account* means a client participation in the program of a commodity trading advisor in which the amount of funds in the client's commodity interest account over which such commodity trading advisor has trading authority is less than the account size that establishes the client's level of trading in a commodity trading advisor's program.

[46 FR 26013, May 9, 1981, as amended at 49 FR 8225, Mar. 5, 1984; 60 FR 38182, July 25, 1995; 66 FR 53522, Oct. 23, 2001; 68 FR 42967, July 21, 2003; 72 FR 63979, Nov. 14, 2007]

§ 4.11 Exemption from section 4n(3)(B).

The provisions of section 4n(3)(B) of the Act shall not apply to any commodity pool operator or commodity trading advisor that is registered under the Act as such or that is exempt from such registration.

§ 4.12 Exemption from provisions of part 4.

(a) *In general.* (1) The Commission may exempt any person or any class or classes of persons from any provision of this part 4 if it finds that the exemption is not contrary to the public interest and the purposes of the provisions from which the exemption is sought.

(2) The Commission may grant the exemption subject to such terms and conditions as it may find appropriate.

(b) *Exemption from Subpart B for certain commodity pool operators based on amount and nature of commodity interest trading*—(1) *Eligibility.* Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (b)(2) of this section if:

(i) The pool for which it makes such claim:

(A) Will be offered and sold pursuant to the Securities Act of 1933 or pursuant to an exemption from said Act;

(B) Will generally and routinely engage in the buying and selling of securities and securities derived instruments;

(C) Will not enter into commodity interest transactions for which the aggregate initial margin and premiums, and required minimum security deposit for retail forex transactions (as defined in §5.1(m) of this chapter) exceed 10 percent of the fair market value of the pool's assets, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; *Provided, however*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in §190.01(x) of this chapter may be excluded in computing such 10 percent; and

(D) Will trade such commodity interests in a manner solely incidental to its securities trading activities.

(ii) Each existing participant and prospective participant in the pool for which it makes such request is informed in writing of the restrictions set forth in paragraph (b)(1)(i) (C) and (D) of this section prior to the date the pool commences trading commodity interests. The pool operator may furnish this information by way of the pool's Disclosure Document, Account Statement, a separate notice or other similar means, including written communication delivered through electronic transmission.

(2) *Relief available to pool operator.* The commodity pool operator of a pool which meets the criteria of paragraph (b)(1) of this section may claim the following relief:

(i) In the case of §4.21, that the Commission accept in lieu and in satisfaction of the Disclosure Document specified by that section an offering memorandum for the pool which does not contain the information required by §§4.24(a), 4.24(b), and 4.24(n); *Provided, however*, that the offering memorandum:

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

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

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

(ii) In the case of §4.22 (a) and (b), that the Commission accept in lieu and

in satisfaction of the Account Statement and prescribed frequency respectively specified by those sections a statement which indicates the net asset value of the pool as of the end of the reporting period and the change in net asset value from the end of the previous reporting period, to be prepared and distributed no less frequently than quarterly; *Provided, however*, That each such statement complies with the other requirements of §4.22 (a) and (b), including the references in those sections to §4.22 (g) and (h).

(iii) In the case of §4.22 (c) through (e), that the Commission accept in lieu and in satisfaction of the financial information and statements in the Annual Report specified by those sections an annual report for the pool which contains, at a minimum, a Statement of Financial Condition as of the close of the pool's fiscal year and a Statement of Income (Loss) for that year; *Provided, however*, That:

(A) Each such annual report complies with the other requirements of §4.22(c), including the reference in that section to §4.22(h) and the requirement in §4.22(c)(5) that the annual report must contain appropriate footnote disclosure and further material information; and

(B) The financial statements in such annual report must be presented and computed in accordance with generally accepted accounting principles consistently applied and must be certified by an independent public accountant.

(iv) In the case of §4.23(a) (10) and (11), to exempt the pool operator from the requirements of those sections with respect to the pool.

(c) *Exemption from Subpart B for certain commodity pool operators based on listing of pool participation units for trading on a national securities exchange—(1) Eligibility.* Subject to compliance with the provisions of paragraph (d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (c)(2) of this section if the units of participation in the pool for which it makes such claim:

(i) Will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933; and

(ii) Will be listed for trading on a national securities exchange registered as such under the Securities Exchange Act of 1934.

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

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

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

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

(C) Clearly inform prospective pool participants with whom it has contact of the Internet address of such Web site and direct any broker, dealer or other selling agent to whom the pool operator sells units of participation in the pool to so inform prospective pool participants; and

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

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

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

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

(1) That the information required to be included in the Account Statements will be readily accessible on an Inter-

net Web site maintained by the pool operator; and

(2) The Internet address of such Web site.

(iii) In the case of §4.23, exemption from the requirement to keep the books and records specified by that section at the pool operator's main business office; *Provided, however,* that:

(A) The books and records that the pool operator will not keep at its main business office will 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;

(B) At the time it files electronically with the National Futures Association the notice required under paragraph (d) of this section, the pool operator files a statement that:

(1) 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;

(2) 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;

(3) Specifies, by reference to the respective paragraph of §4.23, the books and records that such person will be keeping; and

(4) Contains representations from the pool operator that:

(i) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by §4.23 changes, by identifying in such amendment the new location and any other information that has changed;

(ii) It remains responsible for ensuring that all books and records required by §4.23 are kept in accordance with §1.31;

(iii) Within forty-eight 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

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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 seventy-two hours of such a request; and

(iv) It will disclose in the pool's Disclosure Document the location of its books and records that are required under § 4.23.

(C) At the time it files the notice required under paragraph (d) of this section, the pool operator files 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:

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

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

(3) Agrees to keep such required books and records open to inspection by any representative of the Commission or the United States Justice Department in accordance with § 1.31 of this chapter and to make such required books and records available to pool participants in accordance with § 4.23 of this chapter.

(d)(1) *Notice of claim for exemption.* Any registered commodity pool operator, or applicant for commodity pool operator registration, who desires to claim the relief available under paragraph (b) or (c) of this § 4.12 must file electronically a claim of exemption with the National Futures Association through its electronic exemption filing system. Such claim must:

(i) Provide the name, main business address and main business telephone number of the registered commodity pool operator, or applicant for such registration, making the request;

(ii) Provide the name of the commodity pool for which the request is being made;

(iii) Contain representations that the pool will be operated in compliance with § 4.12(b)(1)(i) and the pool operator will comply with the requirements of § 4.12(b)(1)(ii);

(A) The pool will be operated in compliance with paragraph (b)(1)(i) of this

section and the pool operator will comply with the requirements of paragraph (b)(1)(ii) of this section; or

(B) The pool will be operated in compliance with paragraph (c)(1) of this section;

(iv) Specify the relief sought under paragraph (b)(2) or (c)(2) of this section, as the case may be, and

(v) Be filed by a representative duly authorized to bind the pool operator.

(2)(i) The claim of exemption must be filed before the date the commodity pool first enters into a commodity interest transaction.

(ii) The claim of exemption shall be effective upon filing; *Provided, however*, That any exemption claimed hereunder:

(A) Will not be effective unless and until the notice required by this paragraph (d) contains all information called for herein and any statements required under paragraph (c)(2)(iii) have been provided; and

(B) Will cease to be effective upon any change which would render the representations made pursuant to paragraph (d)(1)(iii) of this section inaccurate or the continuation of such representations false or misleading.

(3)(i) If a claim of exemption has been made under § 4.12(b)(2)(i), the commodity pool operator must make a statement to that effect on the cover page of each offering memorandum, or amendment thereto, that it is required to file with the National Futures Association pursuant to § 4.26.

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

(4)(i) Any claim of exemption effective hereunder shall be effective only with respect to the pool for which it has been made.

(ii) The effectiveness of such claim shall not affect the obligations of the commodity pool operator to comply with all other applicable provisions of this part 4, the Act and the Commission's rules and regulations issued thereunder with respect to the pool and

any other pool the pool operator operates or intends to operate.

[52 FR 41984, Nov. 2, 1987, as amended at 60 FR 38183, July 25, 1995; 67 FR 77411, Dec. 18, 2002; 72 FR 1663, Jan. 16, 2007; 75 FR 55428, Sept. 10, 2010; 76 FR 28644, May 18, 2011]

§ 4.13 Exemption from registration as a commodity pool operator.

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

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

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

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

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

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

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

(ii) The total gross capital contributions it receives for units of participa-

tion in all of the pools it operates or that it intends to operate do not in the aggregate exceed \$400,000.

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

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

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

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

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

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

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

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

(A) The aggregate initial margin, premiums, and required minimum security deposit for retail forex transactions (as defined in § 5.1(m) of this chapter) required to establish such positions, determined at the time the most recent position was established, will not exceed 5 percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01(x) of this chapter may be excluded in computing such 5 percent; or

(B) The aggregate net notional value of such positions, determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool's