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in making trading decisions for a pool, or who supervises, or has authority to allocate pool assets to, persons so engaged; and

(ii) With respect to a commodity trading advisor, a principal who participates in making trading decisions for the account of a client or who supervises or selects persons so engaged.

(f) *Direct*, 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.

(g) *Trading program* refers to the program pursuant to which a person (1) directs a client's commodity interest account, or (2) guides the client's commodity interest trading by means of a systematic program that recommends specific transactions.

(h) *Trading manager* means, with respect to a pool, any person, other than the commodity pool operator of the pool, having sole or partial authority to allocate pool assets to commodity trading advisors or investee pools.

(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 in-

vestment 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 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

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.

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 commu-

nication 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 registration under the Securities Act of 1933 or the Investment Company Act of 1940—(1) Eligibility.* Subject to compliance with the provisions of paragraph

(d) of this section, any person who is registered as a commodity pool operator, or has applied for such registration, may claim any or all of the relief available under paragraph (c)(2) of this section if, with respect to the pool for which it makes such claim:

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

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

(2) *Relief available to pool operator claiming relief under paragraph (c)(1)(i).* The commodity pool operator of a pool whose units of participation meet the criteria of paragraph (c)(1)(i) if 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 Internet Web site maintained by the pool operator; and

(2) The Internet address of such Web site.

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

(i) The pool operator of an offered pool will be exempt from the requirements of §§4.21, 4.24, 4.25, and 4.26; *Provided, that*

(A) The pool operator of an offered pool with less than a three-year operating history discloses the performance of all accounts and pools that are managed by the pool operator and that have investment objectives, policies, and strategies substantially similar to those of the offered pool; and,

(B) The disclosure provided with respect to the offered pool complies with the provisions of the Investment Company Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, the regulations promulgated thereunder, and any guidance issued by the Securities and Exchange Commission or any division thereof.

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(ii) Exemption from the Account Statement distribution requirement of §§ 4.22(a) and (b); *Provided, however*, that the pool operator:

(A) Causes the current net asset value per share to be available to participants;

(B) Causes the pool to clearly disclose:

(1) That the information will be readily accessible on an Internet Web site maintained by the pool operator or its designee or otherwise made available to participants and the means through which the information will be made available; and

(2) The Internet address of such Web site, if applicable; and

(iii) Exemption from the provisions of § 4.23 that require that a pool operator's books and records be made available to participants for inspection and/or copying at the request of the participant.

(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:

(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;

(B) The pool will be operated in compliance with paragraph (c)(1) of this section and the pool operator will comply with the requirements of paragraph (c)(2) of this section; or

(C) The pool will be operated in compliance with paragraph (c)(1) of this section and the pool operator will comply with the requirements of paragraph (c)(3) of this section;

(iv) Specify the relief sought under paragraph (b)(2), (c)(2), or (c)(3) of this section, as the case may be;

(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; 78 FR 52333, Aug. 22, 2013]