

## 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:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission proposes to amend its rules to create an exemption from registration requirements for commodity trading advisors that provide advice by means of media such as newsletters, Internet web sites, and non-customized computer software.

**DATES:** Comments must be received by February 7, 2000.

**ADDRESSES:** Comments on the proposed rule may be sent to Jean A. Webb, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581. In addition, comments may be sent by facsimile transmission to facsimile number (202) 418-5521, or by electronic mail to secretary@cftc.gov. Reference should be made to "Exemption from Registration as a Commodity Trading Advisor."

**FOR FURTHER INFORMATION CONTACT:** Martin White, Attorney, (202) 418-5120, electronic mail: mwhite@cftc.gov, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581; or Michael J. Garawski, (202) 418-5120, electronic mail: mgarawski@cftc.gov, Office of General Counsel, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

### SUPPLEMENTARY INFORMATION:

#### I. Background

The Commission proposes to exempt certain commodity trading advisors ("CTAs") from Section 4m(1) of the Commodity Exchange Act ("CEA" or "Act"), 7 U.S.C. 6m(1) (1994), which requires CTAs to register with the Commission. The precise scope of the exemption is described below. Generally speaking, the exemption is intended to apply to CTAs that provide commodity trading advice by means of media such as newsletters, Internet web sites, and non-customized computer software.<sup>1</sup> For purposes of convenience,

<sup>1</sup> In this notice, the term "commodity trading advice" refers to advice with respect to trading in

these CTAs will be referred to as "Section 4.14(a)(9) CTAs."<sup>2</sup>

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), and *Commodity Trend Service v. CFTC*, No. 97 C 2362 (N.D. Ill. Sept. 28, 1999), 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.<sup>3</sup> 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 plaintiffs in these cases 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 violates the Constitution or that the district court decisions in *Taucher* and *CTS* 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

a "commodity interest," as defined in Commission Rule 3.1(f), 17 CFR 3.1(f).

<sup>2</sup> "Section 4.14(a)(9)" is a shorthand reference to Section 4.14(a)(9) of the Commission's Rules, 17 CFR 4.14(a)(9), at which the proposed exemption would be codified, if promulgated.

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 Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657 (CFTC Feb. 8, 1993).

<sup>3</sup> 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.

determined that it may be appropriate to exempt Section 4.14(a)(9) CTAs from registration for the following reasons:

1. *Taucher* and *CTS* have created legal uncertainty as to whether Section 4.14(a)(9) CTAs may be required to register with the Commission. 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 investigation and prosecution of fraud by CTAs.

2. 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 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 communications through media such as newsletters, Internet web sites, and non-customized computer software.

#### II. The Proposed Rule

The proposed rule would add a new subsection 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 subsection. A CTA would have to meet all of the specified conditions to qualify for the proposed exemption. The general intent of the proposed rule is to retain the registration requirement for CTAs whose advisory activities may be licensed even under the constitutional standards implicit in the district court decisions in *Taucher* and *Commodity Trend Service*.

Proposed Subsection 4.14(a)(9)(i) provides that, to qualify 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." Such authority creates a business relationship between the CTA and the client that clearly goes beyond speech. Registration of CTAs that direct client accounts thus raises no First Amendment issue.

Proposed Subsection 4.14(a)(9)(ii) provides that a CTA qualifies for the exemption only if it does not provide

commodity interest trading 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 knowledge of their clients is limited to information concerning a particular commodity interest account or particular commodity interest trading activity, as well as to CTAs who base their advice on a broader range of information about the client. Moreover, so long as the CTA's advice was based on or tailored to such information, the CTA would have to register even if it gave the same advice to groups of similarly situated clients.

Proposed Subsection 4.14(a)(9)(iii) provides that a CTA qualifies for the exemption only if it does not provide commodity interest trading advice through personally interactive communications with individual clients, such as face-to-face conversations; telephone conversations; or electronic mail exchanges between individuals. 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-custom software and its readers or users.

It is the intent of the Commission that a CTA that manages a client's trading under some type of informal arrangement should be required to register even if the CTA is not authorized to cause transactions to be effected without the client's specific authorization, and therefore does not "direct" the client's accounts. The Commission, however, has not proposed that an explicit condition to this effect be included in the proposed exemption rule. The Commission believes that, in practice, a CTA that manages a client's trading, but does not "direct" the client's account, would almost certainly fail to meet the conditions set forth in the proposed subsections 4.14(a)(9)(ii) and 4.14(a)(9)(iii). As a result, the Commission does not believe that a separate subsection dealing with CTAs that manage their clients' trading under informal arrangements is necessary. The Commission invites comments on whether this belief is accurate and on whether a subsection dealing explicitly with CTAs that manage their clients' trading under informal arrangements

should be added to the proposed exemption.

Under the proposed rule, any CTA that meets all of the conditions of proposed Subsection 4.14(a)(9) would not be required to register with the Commission as a requirement for doing business as a CTA. Such a CTA, unless it chose to register voluntarily, also would be 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 would not be subject to the recordkeeping and production requirements of Section 4n(3)(A) of the CEA and Commission Rule 4.33, the ethics training requirement of Section 4p(b) of the CEA, or liability for reparations under Section 14 of the CEA.

An exempt CTA would still be 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 4o 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 would be subject to those provisions of the CEA that apply to any person, including, for example, Section 4b of the CEA, which prohibits certain forms of fraud. Similarly, the proposed exemption would 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.

Should the Commission proceed to adopt a final rule, an exempt CTA that wanted to register or retain its current registration, for example, to enhance the confidence of clients or potential clients, would be entitled to register voluntarily.

### III. Examples

In order to convey the intent of the proposed exemption, the following examples illustrate how the proposed rule would operate in specific situations:<sup>4</sup>

<sup>4</sup> In all of the following examples, the CTA remains subject to requirements of the Act or the

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. The CTA does not have powers of attorney from any of his clients to trade accounts. Under proposed Rule 4.14(a)(9), this CTA would be exempt from the Section 4m registration requirement.

B. A CTA provides specific commodity trading advice through e-mails, facsimiles, and an Internet web site. 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. The CTA does not have powers of attorney from any of his clients to trade accounts, although many clients follow the CTA's advice exactly. Under proposed Rule 4.14(a)(9), this CTA would be exempt from the Section 4m registration requirement.

C. A CTA sells a computerized trading system like the system described in example B. The CTA does not have powers of attorney from any of its clients to trade accounts. In telephone conversations with clients, the CTA discusses technical questions concerning the software, such as how to install the application and computer memory requirements. Such advice is not "trading" advice within the meaning of proposed Rule 4.14(a)(9)(iii). Under proposed Rule 4.14(a)(9), this CTA would be exempt from the Section 4m registration requirement.

D. A CTA provides commodity trading advice through a weekly print periodical and invites readers to contact him by telephone with further questions. Each week, several readers of the publication call the CTA to inquire about the CTA's confidence in his published recommendations. The CTA does not have a power of attorney to trade any of his subscribers' accounts. The CTA responds to readers' questions personally on the telephone but does so with no knowledge of the reader's

Commission's regulations that apply to all CTAs without regard to registration, such as Section 4o of the Act and Commission Rule 4.41(a) and (b), as well as to provisions that apply to any person, such as Section 4b of the Act, to the extent that the CTA's actions fall within the activities proscribed by those provisions.

investment portfolio, tolerance for risk, investment goals or other personal characteristics. Under proposed Rule 4.14(a)(9)(iii), this CTA would not be exempt from the Section 4m registration requirement, because it provides commodity trading advice through interactive communications with individual clients.

E. A CTA has a computerized trading system like the system described in example B. The CTA meets with his clients individually and face-to-face, and gives all of them identical trading advice that is based on what the computer system advises. The CTA does not have a power of attorney to trade any of his clients' accounts. Under proposed Rule 4.14(a)(9)(iii), this CTA would not be exempt from the Section 4m registration requirement, because he provides commodity trading advice through interactive communications with individual clients.

F. A CTA advises his clients only through facsimile messages and does not discuss his advice with them. The CTA does not have a power of attorney to trade any of his clients' accounts. Before advising any client, the CTA first gathers current knowledge about the client's current futures holdings and net cash available for futures investments. The CTA's advice is different for different clients, depending on their profile. However, the CTA sends similar advice to groups of clients with similar profiles. Under proposed Rule 4.14(a)(9)(ii), this CTA would not be exempt from the Section 4m registration requirement, 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.

#### IV. Request for Comments

The Commission specifically encourages members of the public to submit comments on the following issues, in addition to all other issues relevant to the proposed rule:

1. Should the rule include a provision explicitly stating that the proposed exemption does not apply to CTAs that manage their clients' commodity interest trading under informal arrangements? If so, what language should be used to characterize such CTAs for purposes of the exemption?

2. Should CTAs falling within the scope of the proposed exemption be subject to any regulatory requirements beyond the requirements, such as Section 4o of the CEA and Commission Rule 4.41, that apply to other exempt CTAs? If so, what should those requirements be? For example, should

Section 4.14(a)(9) CTAs still be subject to recordkeeping requirements?

3. Are there any categories of CTAs that are not included within the scope of the proposed exemption but should be?

4. Are there any categories of CTAs that are included within the scope of the proposed exemption but should not be?

#### V. Statutory Authority

Pursuant to Sections 4(c)(1) and 8a(5) of the CEA, 7 U.S.C. 6(c) and 12a(5), the Commission has statutory authority to promulgate the proposed rule. The proposed rulemaking would revise the authority citation for Part 4 to include 7 U.S.C. 6(c).

#### VI. 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 business. 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.<sup>5</sup> 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.

The proposed exemption would reduce or remove existing economic burdens. Moreover, the registration requirements that would be affected by the proposed rule involve only minimal economic burdens, except in the case of the limited number of CTAs who may fail to qualify for registration under Section 8a of the CEA because of disciplinary or other disqualifying factors. Therefore, the Chairman of the Commission hereby certifies, pursuant to 5 U.S.C. 605(b), that the proposed rule will not have a significant economic impact on a substantial number of small entities. Such a certification is consistent with the regulatory flexibility analysis conducted by the Commission in a previous rulemaking exempting certain persons from the CTA registration requirement.<sup>6</sup> Nonetheless, the Commission specifically requests comment on the impact this proposed rule may have on small entities.

<sup>5</sup> 47 FR 18618-21 (Apr. 30, 1982).

<sup>6</sup> See 52 FR 41983 n.57 (Nov. 2, 1987).

##### B. Paperwork Reduction Act

Proposed Rule 4.14(a)(9) affects information collection requirements. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Commission has submitted a copy of this section to the Office of Management and Budget (OMB) for its review.

1. Collection of Information: Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB Control Number 3038-0005.

The expected effect of the proposed rule will be to reduce the burden previously approved by OMB for this collection of information by 18,200 hours because it will exempt certain commodity trading advisors from the registration requirement in Section 4m(1) of the Commodity Exchange Act and associated recordkeeping requirements. Specifically the burden associated with Commission Rule 4.33 is expected to be reduced by 18,200 hours:

Estimated number of respondents (after proposed exemption): 2,000.  
Annual responses by each respondent: 1.  
Total annual responses: 2000.  
Estimated average hours per response: 26.  
Annual reporting burden: 52,000 hours.

This annual reporting burden of 52,000 hours represents a reduction of 18,200 hours as a result of the proposed new rule. (The estimated burden figure of 52,000 hours for Rule 4.33 is higher than the Rule 4.33 burden figure previously reported to the Office of Management and Budget. The Commission, however, believes that the previously reported figure may be based on an incorrect figure for the number of CTAs.)

2. Collection of Information: Rules, Regulations and Forms for Domestic and Foreign Futures and Options Relating to Registration with the Commission, OMB Control Number 3038-0023.

The expected effect of the proposed rule will be to reduce the burden previously approved by OMB for this collection of information by 311 hours because it will exempt certain commodity trading advisors from the registration requirement in Section 4m(1) of the Commodity Exchange Act and associated reporting and recordkeeping requirements.

Specifically:

The burden associated with Commission Rule 3.10(a), Form 7-R, as applied to CTAs is expected to be reduced by 72 hours:

Estimated number of respondents (after proposed exemption): 350.

Annual responses by each respondent: 1.  
Total annual responses: 350.  
Estimated average hours per response: .40.  
Annual reporting burden: 140 hours.

This annual reporting burden of 140 hours represents a reduction of 72 hours as a result of the proposed new rule.

The burden associated with Commission Rule 3.10(a), Form 8-R, is expected to be reduced by 99 hours:

Estimated number of respondents (after proposed exemption): 2800.  
Annual responses by each respondent: 1.  
Total annual responses: 2800.  
Estimated average hours per response: .33.  
Annual reporting burden: 924 hours.

This annual reporting burden of 924 hours represents a reduction of 99 hours as a result of the proposed new rule.

The burden associated with Commission Rule 3.10(d) is expected to be reduced by 140 hours:

Estimated number of respondents (after proposed exemption): 3100.  
Annual responses by each respondent: 1.  
Total annual responses: 3100.  
Estimated average hours per response: .20.  
Annual reporting burden: 620 hours.

This annual reporting burden of 620 hours represents a reduction of 140 hours as a result of the proposed new rule.

Organizations and individuals desiring to submit comments on the information collection requirements should direct them to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Commodity Futures Trading Commission.

The Commission considers comments by the public on this proposed collection of information in—

- Evaluating whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have a practical use;

- Evaluating the accuracy of the Commission's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected; and

- Minimizing the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

OMB is required to make a decision concerning the collection of information

contained in these proposed regulations between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment to the Commission on the proposed regulations.

Copies of the information collection submission to OMB are available from the CFTC Clearance Officer, 1155 21st Street, NW, Washington DC 20581, (202) 418-5160.

#### 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 proposes to amend 17 CFR part 4 as follows:

#### PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

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

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

2. Section 4.14 is amended 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) Direct client accounts;
- (ii) Provide commodity interest trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients; or
- (iii) Provide commodity interest trading advice through interactive communications with individual clients, such as face-to-face or telephone conversations or electronic mail exchanges between individuals.

\* \* \* \* \*

Dated: December 2, 1999.

**Jean A. Webb,**

*Secretary of the Commission.*

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**BILLING CODE 6351-01-P**

## DEPARTMENT OF JUSTICE

### 28 CFR Part 0

[USMS No. 100P; AG No. 2277-99]

RIN 1105-AA64

#### Revision to United States Marshals Service Fees for Services

**AGENCY:** United States Marshals Service, Justice.

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to revise the United States Marshals Service fees to reflect current costs to the United States Marshals Service for service of process in Federal court proceedings.

**DATES:** Written comments must be submitted on or before February 7, 2000.

**ADDRESSES:** Please submit written comments to the Office of General Counsel, United States Marshals Service, 600 Army Navy Drive, CS-3, Arlington, Virginia 22202. Comments are available for public inspection at the above address by calling (202) 307-9054 to arrange for an appointment.

**FOR FURTHER INFORMATION CONTACT:** Joe Lazar, Associate General Counsel, United States Marshals Service, 600 Army Navy Drive, CS-3, Arlington, Virginia 22202, telephone number (202) 307-9054.

#### SUPPLEMENTARY INFORMATION:

#### What Legal Authority Does the U.S. Marshals Service Have To Charge Fees?

The Attorney General must establish fees to be taxed and collected for certain services rendered by the United States Marshals Service in connection with Federal court proceedings. 28 U.S.C. 1921(b). These services include, but are not limited to, serving writs, subpoenas, or summonses, preparing of notices or bills of sale, keeping attached property, and certain necessary travel. To the extent practicable, these fees shall reflect the actual and reasonable costs of the services provided. The Attorney General initially established the fee schedule in 1991 based on the actual costs, e.g., salaries, overhead, etc., of the services rendered and the hours expended at that time. See 56 FR 2436 (January 23, 1991). Due to the increase in the salaries and benefits of United States Marshals Service personnel over time, the current fee schedule is inadequate and no longer reflects the actual and reasonable costs of the services rendered.