

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 4

RIN 3038-AD49

### Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting From the Dodd-Frank Act

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rules.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend its regulations affecting the operations and activities of commodity pool operators (CPOs) and commodity trading advisors (CTAs) (Proposal) in order to have those regulations reflect changes made to the Commodity Exchange Act (CEA) by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act).

**DATES:** Comments must be received on or before May 2, 2011.

**ADDRESSES:** You may submit comments, identified by RIN 3038-AD49, by any of the following methods:

- *Agency Web Site, via its Comments Online process:* <http://comments.cftc.gov>. Follow the instructions for submitting comments through the Web site.
- *Mail:* David A. Stawick, Secretary, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581.
- *Hand delivery/Courier:* Same as mail above.
- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <http://www.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that is exempt from disclosure under the Freedom of Information Act (FOIA),<sup>1</sup> a petition for confidential treatment of the exempt information may be submitted according to the procedures set forth in Commission Regulation 145.9.<sup>2</sup>

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission

from <http://www.cftc.gov> that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

#### FOR FURTHER INFORMATION CONTACT:

Barbara S. Gold, Associate Director, or Christopher W. Cummings, Special Counsel, Division of Clearing and Intermediary Oversight, 1155 21st Street, NW., Washington, DC 20581. Telephone number: 202-418-5450 and electronic mail: [bgold@cftc.gov](mailto:bgold@cftc.gov) or [ccummings@cftc.gov](mailto:ccummings@cftc.gov).

#### SUPPLEMENTARY INFORMATION:

##### I. Background

On July 21, 2010, President Obama signed the Dodd-Frank Act.<sup>3</sup> Title VII of the Dodd-Frank Act<sup>4</sup> amended the CEA<sup>5</sup> to establish a comprehensive new regulatory framework for swaps and security-based swaps. The goal of this legislation was to reduce risk, increase transparency, and promote market integrity within the financial system by, among other things: (1) Providing for the registration and comprehensive regulation of SDs and MSPs; (2) imposing clearing and trade execution requirements on standardized derivative products; (3) creating robust recordkeeping and real-time reporting regimes; and (4) enhancing the Commission's rulemaking and enforcement authorities with respect to, among others, all registered entities and intermediaries subject to the Commission's oversight. Among the changes made by the Dodd-Frank Act to the CEA were to include within the CPO definition the operator of a collective investment vehicle that trades swaps, and to include within the CTA definition a person who provides advice concerning swaps.<sup>6</sup>

<sup>3</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The text of the Dodd-Frank Act may be accessed at [http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173\\_enrolledbill.pdf](http://www.cftc.gov/ucm/groups/public/@swaps/documents/file/hr4173_enrolledbill.pdf).

<sup>4</sup> Pursuant to Section 701 of the Dodd-Frank Act, Title VII may be cited as the "Wall Street Transparency and Accountability Act of 2010."

<sup>5</sup> 7 U.S.C. 1 *et seq.* (2006). The CEA also can be accessed through the Commission's web site.

<sup>6</sup> See Section 721(a) of the Dodd-Frank Act, which re-organized (and in some cases amended) existing definitions in, and added new definitions to, Section 1a of the CEA. The CPO and CTA definitions, as amended, are to be codified respectively at CEA sections 1a(11) and 1a(12).

Part 4 of the Commission's regulations sets forth a comprehensive regulatory scheme for the operations and activities of CPOs and CTAs. It includes disclosure, reporting and recordkeeping requirements for registered CPOs and CTAs, registration and compliance exemptions for CPOs and CTAs, and other provisions, including anti-fraud provisions, applicable to CPOs and CTAs regardless of registration status. Many of the Part 4 regulations generally apply to CPOs and CTAs and, thus, they will be applicable to CPOs and CTAs with respect to their swap activities.<sup>7</sup> In other instances, however, the text of certain Part 4 regulations is specific to activities involving futures contracts, commodity options, and off-exchange retail foreign currency transactions, and it does not include, refer to or otherwise take account of swap activities.<sup>8</sup> The Proposal is intended to clarify and ensure that the requirements governing the operations and activities of CPOs and CTAs continue to apply to these intermediaries in the context of their involvement with swap transactions.<sup>9</sup>

The Commission is proposing still other rulemakings in response to the Dodd-Frank Act that could affect the Part 4 regulations.<sup>10</sup> The Commission intends to resolve any discrepancies that may arise between any of these other rulemakings and the Proposal in

<sup>7</sup> See, e.g., Regulations 4.21 and 4.31, which respectively require registered CPOs and CTAs to deliver a Disclosure Document to prospective pool participants and clients. See also Regulation 4.41, which proscribes fraudulent advertising by CPOs, CTAs, and their principals.

<sup>8</sup> See, e.g., Regulations 4.24(l) and 4.34(k), which currently do not include "swap dealer" among the intermediaries for whom a CPO or CTA must provide information concerning material litigation in its Disclosure Document. See also Regulations 4.24(g) and 4.34(g), which do not specify any risks unique to trading swaps in calling for disclosure of principal risk factors.

<sup>9</sup> Part 4 applies to CPOs with respect to their activities affecting pool participants and to CTAs with respect to their activities affecting clients. Depending on the nature of its activities, a CPO or CTA may also come within the definition of the term "swap dealer" or "major swap participant" in new CEA Section 1a(49) or 1a(33), respectively (added to the CEA by Section 721(a) of the Dodd-Frank Act). As directed by the Dodd-Frank Act, the Commission has proposed new regulations that would establish business conduct standards for swap dealers and major swap participants. See 75 FR 80638 (Dec. 22, 2010). These new regulations would apply to swap dealers and major swap participants with respect to the counterparties with whom they transact swap business, and would govern different activity than that to which the Part 4 regulations apply.

<sup>10</sup> See, e.g., *Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations*, 76 FR 7976 (Feb. 11, 2011); and *Swap Data Recordkeeping and Reporting Requirements: Proposed Rule*, 75 FR 76574 (Dec. 8, 2010).

<sup>1</sup> 5 U.S.C. 552.

<sup>2</sup> The Commission's regulations are found at 17 CFR Ch. I (2010) and can be accessed through the Commission's Web site, <http://www.cftc.gov>.

the course of finalizing its rulemaking under the Dodd-Frank Act.

## II. The Proposal

The Part 4 regulations employ the term “commodity interest” throughout.<sup>11</sup> This term currently is defined in Regulation 1.3(yy) to mean:

(1) Any contract for the purchase or sale of a commodity for future delivery;

(2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act; and

(3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act.

To ensure that the Part 4 regulations adequately and accurately encompass swap transactions, the Proposal would adopt in new Regulation 4.10(a) a definition of the term “commodity interest” to be employed for the purposes of Part 4. That definition would include the text of existing Regulation 1.3(yy) along with reference to the term “swap” as defined in Section 1a(47) of the CEA.<sup>12</sup>

At various regulations throughout Part 4, the Proposal would insert “swap,” “swap transaction” or a similar term. See the proposed amendments to Regulations 4.23(a)(1), 4.24(g), (h)(1), and (i)(2) for CPOs and Regulations 4.34(g) and 4.34(i)(2) for CTAs. For example, regulation 4.23(a)(1) would be amended to include “swap type and counterparty” in the itemized daily record that a CPO must make and keep with respect to a pool’s commodity interest transactions.

At other Part 4 regulations, the Proposal would include the term “swap dealer” among the persons for whom a CPO or CTA must provide information in its Disclosure Document and a CPO must provide information in a pool’s periodic Account Statement. See the proposed amendments to Regulations 4.22(a)(3), 4.24(j)(1), (j)(3), (l)(1), and (l)(2) for CPOs and Regulations 4.34(j)(1), (j)(3), (k)(1) and (k)(2) for CTAs. For example, Regulations 4.24(j) and 4.34(j) would be amended to

include swap dealers in the group of persons as to which conflicts of interest must be disclosed by CPOs and CTAs. Also, the Proposal would include a registered swap dealer among the persons listed in Regulation 4.7(a)(2) that do not have to satisfy a portfolio requirement in order to be a qualified eligible person (QEP), such that a CPO or CTA that has claimed relief under Regulation 4.7 may accept the swap dealer as a pool participant or advisory client without regard to the size of its investment portfolio. This would be consistent with the current treatment of other financial intermediaries registered with the Commission (such as futures commission merchants and retail foreign exchange dealers) as QEPs under Regulation 4.7(a)(2).

Yet other proposed amendments would require a CPO or CTA to make and keep certain books and records generated by the swap transactions in which they engage on behalf of not only their pool participants and clients, but also themselves. See the proposed amendments to Regulations 4.23(a)(7) and (b)(1) for CPOs and Regulations 4.33(a)(6) and (b)(1) for CTAs. The proposed amendments to Regulations 4.23(a)(7) and 4.33(a)(6) would require CPOs and CTAs to retain each acknowledgment of a swap transaction received from a swap dealer. The proposed amendments to Regulations 4.23(b)(1) and 4.33(b)(1) would make clear that if a CPO or CTA was a counterparty to a swap transaction, then it would be subject to the swap data recordkeeping and reporting requirements of Part 45.<sup>13</sup>

The Proposal would also amend Regulation 4.30. Currently, this regulation provides:

No commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor’s name (or extend credit in lieu thereof) to purchase, margin, guarantee or secure any commodity interest of the client; *Provided, however*, That this section shall not apply to a futures commission merchant that is registered as such under the Act or to a leverage transaction merchant that is registered as a commodity trading advisor under the Act or to a retail foreign exchange dealer that is registered as such under the Act.

Because swap dealers will generally fall within the statutory definition of CTA,

<sup>13</sup> See Proposed Regulation 45.2, 75 FR 76574. In this regard, the Commission notes that it intends to propose regulations concerning recordkeeping and reporting requirements for “pre-enactment swaps” and “transition swaps,” as those terms will be defined in that proposal. The Commission further intends to provide a cross-reference in Regulations 4.23(b)(1) and 4.33(b)(1) to any such requirements it may adopt.

and because a swap dealer engaging in uncleared swap transactions may be accepting funds or other property from its counterparties as variation and initial margin payments,<sup>14</sup> the Commission is proposing to amend Regulation 4.30 by excluding a registered swap dealer from the regulation’s prohibition in connection with a swap that is not cleared through a derivatives clearing organization. This action would result in four distinct categories of intermediaries being excluded from the operative requirements of Regulation 4.30. Accordingly, the Commission also is proposing to amend the regulation by reorganizing its text where applicable to these exclusions.

Finally, the Proposal would delete Regulation 4.32. This regulation deals with trading by a registered CTA on or subject to the rules of a derivatives transaction execution facility (DTEF) for non-institutional numbers. Section 734(a) of the Dodd-Frank Act repeals Section 5a of the CEA, which is the section establishing and providing for the regulation of DTEFs. Accordingly, because subsequent to the effective date of the Dodd-Frank Act<sup>15</sup> Regulation 4.32 will no longer have a statutory basis or purpose, the Proposal would remove and reserve Regulation 4.32.

The Commission requests comment on the foregoing. In addition, the Commission seeks comment on any other amendments it should make to the Part 4 regulations to clarify and ensure that that the requirements governing the operations and activities of CPOs and CTAs continue to apply to these intermediaries in the context of their involvement with swap transactions.

## III. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) <sup>16</sup> requires that agencies, in proposing rules, consider the impact of those rules on small businesses.<sup>17</sup> The Commission previously has 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

<sup>14</sup> The Commission intends to address the circumstances in which non-bank swap dealers may be required or permitted to accept margin payments in uncleared swap transactions in a future proposed rulemaking. Accordingly, this proposed amendment to Regulation 4.30 should not be interpreted to impose or authorize any such margin requirements.

<sup>15</sup> Subject to certain limited exceptions, the provisions of the Dodd-Frank Act become effective 360 days after its enactment (Jul. 21, 2010).

<sup>16</sup> 5 U.S.C. 601 *et seq.*

<sup>17</sup> By its terms, the RFA does not apply to “individuals.” See 48 FR 14933, n. 115 (Apr. 6, 1983).

<sup>11</sup> See, e.g., Regulations 4.10(f) and (g), which respectively define the terms “direct” and “trading program;” 4.12(b)(1)(i)(D), which provides an exemption from CPO registration where, among other things, the pool at issue “will trade \* \* \* commodity interests in a manner solely incidental to its securities trading activities;” 4.22(a)(1), which requires itemization in a pool’s periodic Account Statement of certain information concerning commodity interest trading; 4.23 and 4.33, which respectively require CPOs and CTAs to make and keep certain books and records relating to commodity interest trading; and 4.24 and 4.34, which respectively require CPOs and CTAs to disclose specified information with respect to “commodity interests.”

<sup>12</sup> Section 721(a) of the Dodd-Frank Act added this new definition to Section 1a of the CEA.

RFA.<sup>18</sup> With respect to CPOs, the Commission previously has determined that a CPO is a small entity for the purpose of the RFA if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).<sup>19</sup> Thus, because the Proposal applies to registered CPOs, the RFA is not applicable to it. As for CTAs, the Commission previously 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 the particular rule. In this regard, the Commission notes that the Proposal applies to registered CTAs. Moreover, the Proposal would not have a significant economic impact on any CPO or CTA who would be affected thereby, because it would merely bring within the current Part 4 regulatory structure of disclosure, reporting and recordkeeping information with respect to swap activities. It would not impose any additional operative requirements or otherwise direct or confine the activities of CPOs and CTAs.<sup>20</sup> Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the Proposal would not have a significant economic impact on a substantial number of small entities. However, the Commission invites the public to comment on this certification.

#### B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)<sup>21</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Proposal would not, if adopted, require any new collection of information from any entity that would be subject to the affected regulations. Accordingly, for purposes of the PRA, the Chairman, on behalf of the Commission, certifies that the proposed amendments to Part 4, if adopted, would not impose any new reporting or recordkeeping requirements.

#### C. Cost-Benefit Analysis

Section 15(a) of the CEA<sup>22</sup> requires the Commission to consider the costs and benefits of its actions before issuing

a rulemaking under the CEA. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a rule or to determine whether the benefits of the rulemaking outweigh its costs; rather, it simply requires that the Commission “consider” the costs and benefits of its actions. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission may in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest or to effectuate any of the provisions or accomplish any of the purposes of the CEA.

*Summary of Proposed Amendments.* As is explained above, the proposed amendments to Part 4 would ensure that the Commission’s regulations governing the operations and activities of CPOs and CTAs reflect changes made to the CEA by the Dodd-Frank Act by, e.g., including swap dealers among the intermediaries for whom CPOs and CTAs must disclose information to prospective pool participants and clients, and swap transaction confirmations among the books and records that CPOs and CTAs must make and keep.

*Costs.* With respect to costs, the Commission has determined that the costs of the Proposal would not be significant. This is because the Proposal would simply conform the language of the existing Part 4 regulatory scheme to take into account the changes made to the Commission’s overall regulatory scheme as a result of the Dodd-Frank Act. There will be additional disclosure and recordkeeping requirements on CPOs and CTAs as a result of the Proposal. The information required for compliance should be readily available, with minimal administrative burdens, to CPOs and CTAs.

*Benefits.* With respect to benefits, the Commission has determined that the benefits of the Proposal would be significant. This is because it would enhance the customer protections currently provided under Part 4 by increasing the transparency of swap activities by CPOs and CTAs to their pool participants and clients. This will be accomplished by including

information on swap activities in the disclosure, reporting and recordkeeping scheme already existing under Part 4.

*Public Comment.* The Commission invites public comment on its cost-benefit considerations. Commenters are also invited to submit any data or other information that they may have quantifying or qualifying the costs and benefits of the Proposal with their comment letters.

#### List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Customer protection, Reporting and recordkeeping requirements, Swaps.

For the reasons presented above, the Commission proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

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

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

**Authority:** 7 U.S.C. 1a, 2, 6b, 6c, 6l, 6m, 6n, 6o, 12a and 23, as amended by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (Jul. 21, 2010).

2. Section 4.7 is amended by adding paragraph (a)(2)(i)(C) to read as follows:

**§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.**

\* \* \* \* \*

- (a) \* \* \*  
(2) \* \* \*  
(i) \* \* \*

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

\* \* \* \* \*

3. Section 4.10 is amended by adding paragraph (a) to read as follows:

#### § 4.10 Definitions.

\* \* \*

(a) *Commodity interest* means:

(1) Any contract for the purchase or sale of a commodity for future delivery;

(2) Any contract, agreement or transaction subject to Commission regulation under section 4c or 19 of the Act;

(3) Any contract, agreement or transaction subject to Commission jurisdiction under section 2(c)(2) of the Act; and

<sup>18</sup> See 47 FR 18618 (Apr. 30, 1982).

<sup>19</sup> *Id.* at 18619–20.

<sup>20</sup> While the Proposal would amend Regulation 4.30, which concerns prohibited activities by a CTA regardless of registration status, that amendment would extend to persons registered as a swap dealer the existing exclusion from the regulation’s scope.

<sup>21</sup> 44 U.S.C. 3501 *et seq.*

<sup>22</sup> 7 U.S.C. 19(a).

(4) A swap as defined under section 1a(47) of the Act and any Commission regulations implemented thereunder.

4. Section 4.22 is amended by revising paragraph (a)(3) to read as follows:

§ 4.22 Reporting to pool participants.

(a) \* \* \*

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

\* \* \* \* \*

5. Section 4.23 is amended by:

a. Revising paragraphs (a)(1) and (a)(7); and

b. Revising paragraph (b)(1), to read as follows:

§ 4.23 Recordkeeping.

\* \* \* \* \*

(a) \* \* \*

(1) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized.

\* \* \* \* \*

(7) Copies of each confirmation or acknowledgment of a commodity interest transaction of the pool, and each purchase and sale statement and each monthly statement for the pool received from a futures commission merchant or retail foreign exchange dealer or swap dealer.

\* \* \* \* \*

(b) \* \* \*

(1) An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike

price, underlying contract for future delivery or underlying physical, the futures commission merchant or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized; Provided, however, that if the pool operator is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of part 45 of this chapter.

\* \* \* \* \*

6. Section 4.24 is amended by:

- a. Revising paragraph (g);
b. Revising paragraph (h)(1)(i);
c. Revising paragraph (i)(2)(xii);
d. Revising paragraphs (j)(1)(vi) and (j)(3); and

e. Revising paragraphs (l)(1)(iii), (l)(2) introductory text and (l)(2)(i), to read as follows:

§ 4.24 General disclosures required.

\* \* \* \* \*

(g) Principal risk factors. A discussion of the principal risk factors of participation in the offered pool. This discussion must include, without limitation, risks relating to volatility, leverage, liquidity, counterparty creditworthiness, as applicable to the types of trading programs to be followed, trading structures to be employed and investment activity (including retail forex and swap transactions) expected to be engaged in by the offered pool.

(h) \* \* \*

(1) \* \* \*

(i) The approximate percentage of the pool's assets that will be used to trade commodity interests, securities and other types of interests, categorized by type of commodity or market sector, type of swap, type of security (debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating, as applicable;

\* \* \* \* \*

(i) \* \* \*

(2) \* \* \*

(xii) Any costs or fees included in the spread between bid and asked prices for retail forex or, if known, swap transactions; and

\* \* \* \* \*

(j) \* \* \*

(1) \* \* \*

(vi) Any other person providing services to the pool, soliciting participants for the pool, or acting as a counterparty to the pool's retail forex transactions, acting as a swap dealer with respect to the pool, or acting as a

counterparty to the pool's swap transactions.

\* \* \* \* \*

(3) Included in the description of such conflicts must be any arrangement whereby a person may benefit, directly or indirectly, from the maintenance of the pool's account with the futures commission merchant and/or retail foreign exchange dealer and/or from the maintenance of the pool's positions with a swap dealer, or from the introduction of the pool's account to a futures commission merchant and/or retail foreign exchange dealer and/or swap dealer by an introducing broker (such as payment for order flow or soft dollar arrangements) or from an investment of pool assets in investee pools or funds or other investments.

\* \* \* \* \*

(l) \* \* \*

(1) \* \* \*

(iii) The pool's futures commission merchants and/or retail foreign exchange dealers and/or swap dealers and its introducing brokers, if any.

(2) With respect to a futures commission merchant and/or retail foreign exchange dealer and/or swap dealer or an introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant's, retail foreign exchange dealer's, swap dealer's or introducing broker's financial statements prepared pursuant to generally accepted accounting principles;

\* \* \* \* \*

7. Section 4.30 is revised to read as follows:

§ 4.30 Prohibited activities.

(a) Except as provided in paragraph (b) of this section, no commodity trading advisor may solicit, accept or receive from an existing or prospective client funds, securities or other property in the trading advisor's name (or extend credit in lieu thereof) to purchase, margin, guarantee or secure any commodity interest of the client.

(b) The prohibition in paragraph (a) of this section shall not apply to:

(1) A futures commission merchant that is registered as such under the Act;

(2) A leverage transaction merchant that is registered as a commodity trading advisor under the Act;

(3) A retail foreign exchange dealer that is registered as such under the Act; or

(4) A swap dealer that is registered as such under the Act, with respect to funds, securities or other property accepted to purchase, margin, guarantee

or secure any swap that is not cleared through a derivatives clearing organization.

#### § 4.32 [Removed and Reserved]

7. Section 4.32 is removed and reserved.

8. Section 4.33 is amended by  
a. Revising paragraph (a)(6); and  
b. Revising paragraph (b)(1), to read as follows:

#### § 4.33 Recordkeeping.

\* \* \* \* \*

(a) \* \* \*

(6) Copies of each confirmation or acknowledgment of a commodity interest transaction, and each purchase and sale statement and each monthly statement received from a futures commission merchant or a retail foreign exchange dealer or a swap dealer.

\* \* \* \* \*

(b) \* \* \*

(1) An itemized daily record of each commodity interest transaction of the commodity trading advisor, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying physical, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized; *Provided, however*, that if the trading advisor is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of part 45 of this chapter.

\* \* \* \* \*

9. Section 4.34 is amended by

- a. Revising paragraph (g);
- b. Revising paragraph (i)(2);
- c. Revising paragraph (j)(3); and
- d. Revising paragraphs (k)(1)(iii),

(k)(2) introductory text and (k)(2)(i), to read as follows:

#### § 4.34 General disclosures required.

\* \* \* \* \*

(g) *Principal risk factors.* A discussion of the principal risk factors of this trading program. This discussion must include, without limitation, risks due to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable to the trading program and the types of transactions and investment activity expected to be engaged in pursuant to such program (including

retail forex and swap transactions, if any).

\* \* \* \* \*

(i) \* \* \*

(2) Where any fee is determined by reference to a base amount including, but not limited to, “net assets,” “gross profits,” “net profits,” “net gains,” “pips” or “bid-asked spread,” the trading advisor must explain how such base amount will be calculated. Where any fee is based on the difference between bid and asked prices on retail forex or swap transactions, the trading advisor must explain how such fee will be calculated;

\* \* \* \* \*

(j) \* \* \*

(3) Included in the description of any such conflict must be any arrangement whereby the trading advisor or any principal thereof may benefit, directly or indirectly, from the maintenance of the client’s commodity interest account with a futures commission merchant and/or retail foreign exchange dealer, and/or from the maintenance of the client’s positions with a swap dealer or from the introduction of such account through an introducing broker (such as payment for order flow or soft dollar arrangements).

(k) \* \* \*

(1) \* \* \*

(iii) Any introducing broker through which the client will be required to introduce its account to the futures commission merchant and/or retail foreign exchange dealer and/or swap dealer.

(2) With respect to a futures commission merchant, retail foreign exchange dealer, swap dealer or introducing broker, an action will be considered material if:

(i) The action would be required to be disclosed in the notes to the futures commission merchant’s, retail foreign exchange dealer’s, swap dealer’s or introducing broker’s financial statements prepared pursuant to generally accepted accounting principles;

\* \* \* \* \*

Issued in Washington, DC, on February 24, 2011, by the Commission.

David A. Stawick,

Secretary of the Commission.

#### Appendices to Amendments to Commodity Pool Operator and Commodity Trading Advisor Regulations Resulting from the Dodd-Frank Act—Commission Voting Summary and Statements of Commissioners

**Note:** The following appendices will not appear in the Code of Federal Regulations.

#### Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Dunn, Sommers, Chilton and O’Malia voted in the affirmative; no Commissioner voted in the negative.

#### Appendix 2—Statement of Chairman Gary Gensler

I support the proposed rule that will amend certain provisions of Part 4 of the Commission’s regulations regarding the operations and activities of commodity pool operators (CPOs) and commodity trading advisors (CTAs). The proposed amendments would ensure that CFTC regulations with regard to CPOs and CTAs reflect changes made to the Commodity Exchange Act by the Dodd-Frank Act. Consistent with the Dodd-Frank Act revisions to the definitions of CPOs and CTAs to include pools involved in swaps and advising on swaps, the proposed amendments will enhance current customer protections by increasing the transparency of swap activities by CPOs and CTAs to their pool participants and clients. The proposed rule would require that this information be included in the disclosure, reporting and recordkeeping scheme that currently exists for CPOs and CTAs under Part 4.

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#### DEPARTMENT OF JUSTICE

#### 28 CFR Part 26

[Docket No. OJP (DOJ) 1540; AG Order No. 3255–2011]

RIN 1121–AA77

#### Office of the Attorney General; Certification Process for State Capital Counsel Systems

**AGENCY:** Department of Justice.

**ACTION:** Proposed rule.

**SUMMARY:** Section 2265 of title 28, United States Code, instructs the Attorney General to promulgate regulations to implement certification procedures for States seeking to qualify for the expedited Federal habeas corpus review procedures in capital cases under chapter 154 of title 28. The procedural benefits of chapter 154 are available to States that establish mechanisms for providing counsel to indigent capital defendants in State postconviction proceedings that satisfy certain statutory requirements. This proposed rule sets forth the required regulations for the certification procedure.

**DATES:** Written comments must be postmarked and electronic comments must be submitted on or before June 1, 2011. Comments received by mail will be considered timely if they are