

trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor.

Where the “person” is a legal entity, the CFTC has “looked through” the entity and counted its owners for the purpose of determining whether the “not more than fifteen persons” criterion has been met.

Congress patterned Section 4m(1) after Section 203(b)(3) of the IAA,<sup>53</sup> which provides an exemption from IA registration for any IA:

who, during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser nor acts as an investment adviser to [certain trading vehicles].

However, by Rule 203(b)(3) under the IAA,<sup>54</sup> the SEC has permitted IAs to count certain non-natural persons as a single client for the purpose of computing the “fewer than fifteen clients” criterion.

In response to Roundtable comments on this difference in regulatory treatment, the Commission is proposing in new Rule 4.14(a)(10) to provide an exemption from registration for any CTA who meets the criteria of Section 4m(1) of the Act. (Proposed paragraph (a)(10).) For the purpose of this exemption, the CTA may deem certain persons a single person. In making this proposal, the Commission is patterning the single “persons” specified therein on the single “clients” specified in SEC Rule 203(b)(3).

### 3. Additional Provisions Under Rule 4.14

Under the proposed amendments, Rule 4.14 would also contain introductory text and certain additional provisions, which would be based on the provisions of the current rule, the NFA Proposal and the comments on the ANPR. Generally speaking, these provisions concern: the notice of registration exemption that a CTA seeking exemption under paragraph (a)(8) must file (proposed paragraph (a)(8)(iii));<sup>55</sup> the CTA’s obligations with respect to books and records and special calls (proposed paragraph (a)(8)(iv)); and the effect of registration on a CTA who: (1) is eligible for exemption under Rule 4.14, but registers as a CTA nonetheless (proposed paragraph (c)(1)); or (2) provides commodity interest trading advice to one or more clients for

which it is required to register and one or more clients for which it is eligible to claim an exemption from registration under Rule 4.14(a)(8) (proposed paragraph (c)).

### D. Proposed Amendments to Rules 4.21, 4.22 and 4.31

#### 1. Permitting Communications Prior to Disclosure Document Distribution

Commission Rules 4.21 and 4.31 prohibit CPOs and CTAs from soliciting prospective pool participants or clients prior to providing a Disclosure Document. However, the Commission has increasingly received comments, including testimony from Roundtable participants, that Rules 4.21(a) and 4.31(a) unnecessarily restrict communications by CPOs and CTAs. In response, the Commission is proposing to amend these rules to provide that the Disclosure Documents referred to therein must be delivered by no later than the time a CPO delivers a subscription agreement for the pool for which it is soliciting or a CTA delivers an advisory agreement for the trading program for which it is soliciting.<sup>56</sup> To ensure compliance with the purpose of the Disclosure Document—*i.e.*, that prospective investors are fully informed about all material facts before committing their funds,<sup>57</sup> and consistent with the Roundtable comments, these proposed rule amendments would require that “any material distributed in advance of the delivery of the Disclosure Document is consistent with or amended by the information contained in the Disclosure Document and with the obligations of the [CPO or CTA] under the Act, the Commission’s regulations issued thereunder, and the laws of any other applicable federal or state authority.”<sup>58</sup>

#### 2. Removing Duplicative Requirements in the “Master/Feeder Fund” Context

As explained above, Rule 4.21 requires each person registered (or

required to be registered) as a CPO to deliver a Disclosure Document to prospective participants in the commodity pool for which it is soliciting. Rule 4.22 requires the CPO to distribute periodic Account Statements<sup>59</sup> and an Annual Report<sup>60</sup> to the participants in the pool. Where the prospective or actual participant is another commodity pool, the CPO need only deliver a Disclosure Document and distribute periodic Account Statements and an Annual Report to the pool operator of the other commodity pool; the CPO need not also deliver and distribute this information to each of the participants in the other pool.

Commission staff has provided relief on numerous occasions from the requirements of Rules 4.21 and 4.22 where the CPOs of two pools (*i.e.*, a master fund and a feeder fund) were closely affiliated,<sup>61</sup> a practice supported by Roundtable comments. Accordingly, the Commission is proposing to codify this relief in new Rules 4.21(a)(2), 4.22(a)(4) and 4.22(c)(6). Because Rules 4.7 and 4.12(b) provide relief from certain of the specific requirements of Rules 4.21 and 4.22, these proposed new rules would also include references to materials that must be furnished pursuant to Rule 4.7(b)(1) or 4.12(b)(2)(i), Rule 4.7(b)(2) or 4.12(b)(2)(ii), and Rule 4.7(b)(3) or 4.12(b)(2)(iii), respectively, thereby further reducing the reporting burdens under Rules 4.7 and 4.12.

#### 3. Distributing Account Statements Electronically

The Commission is also proposing to amend Rule 4.22 to establish the procedures pursuant to which a CPO may distribute periodic Account Statements to pool participants by electronic means, provided the CPO obtains the prior consent of each such participant. This proposal is patterned on the Commission’s recent amendments to Rules 1.33 and 1.46,<sup>62</sup> which permit futures commission merchants to deliver monthly

<sup>56</sup> Because this proposal would obviate the Rule 4.21(a)(2) “profile document” and “term sheet” exceptions to the current Disclosure Document delivery requirement of Rule 4.21(a)(1), the Commission also is proposing to delete these exceptions from the rule.

<sup>57</sup> See, *e.g.*, 44 FR 1918, 1920.

<sup>58</sup> See, *e.g.*, Section 4m(2) of the Act, 7 U.S.C. 6m(2) (2000), which provides in pertinent part that:

Nothing in this Act shall relieve any person of any right or remedy available to the Securities and Exchange Commission or any private party arising under the Securities Act of 1933 or the Securities Exchange Act of 1934 governing the issuance, offer, purchase, or sale of securities of a commodity pool, or of persons engaged in transactions with respect to such securities, or reporting by a commodity pool.

<sup>59</sup> Rule 4.22(a).

<sup>60</sup> Rule 4.22 (c).

In addition to the other amendments it is proposing to Rule 4.22, the Commission is proposing to delete from paragraph (c) of the rule the now obsolete requirement that the “first fiscal year for which an Annual Report is due shall be the first fiscal year that begins on or after January 1, 1979.”

<sup>61</sup> See, *e.g.*, CFTC Staff Letter No. 02–102 (Aug. 29, 2002).

<sup>62</sup> See 66 FR 53510 (Oct. 23, 2001).

<sup>53</sup> 15 U.S.C. 80b–3(b)(3) (2002).

<sup>54</sup> 17 CFR 275.203(b)(3) (2002).

<sup>55</sup> In addition to current requirements, the CTA would be required to provide its main facsimile number and main e-mail address.