

The Special Conditions

Accordingly, pursuant to the authority delegated to me by the Administrator, the following special conditions are issued as part of the type certification basis for the Cessna Model 550, when equipped with avionics/electronics systems which perform critical functions.

1. *Protection from Unwanted Effects of High-Intensity Radiated Fields (HIRF)*. Each electrical and electronic system that performs critical functions must be designed and installed to ensure that the operation and operational capability of these systems to perform critical functions are not adversely affected when the airplane is exposed to high-intensity radiated fields.

2. For the purpose of this special condition, the following definition applies: *Critical functions*. Functions whose failure would contribute to or cause a failure condition that would prevent the continued safe flight and landing of the airplane.

Issued in Renton, Washington, on August 6, 1996.

Darrell M. Pederson,
*Acting Manager, Transport Airplane
Directorate, Aircraft Certification Service,
ANM-100.*

[FR Doc. 96-20756 Filed 8-13-96; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 95-AWP-40]

Establishment of Class E Airspace; Coolidge, AZ

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action establishes a Class E airspace area at Coolidge, AZ. The development of a Global Positioning System (GPS) Standard Instrument Approach Procedure (SIAP) to Runway (RWY) 23 and a VHF Ominidirectional Range/Distance Measuring Equipment (VOR/DME) approach to RWY 05 has made this action necessary. The intended effect of this action is to provide adequate controlled airspace for Instrument Flight Rules (IFR) operations at Coolidge Municipal Airport, Coolidge, AZ.

EFFECTIVE DATE: 0901 UTC October 10, 1996.

FOR FURTHER INFORMATION CONTACT: William Buck, Airspace Specialist, Operations Branch, AWP-530, Air Traffic Division, Western-Pacific Region, Federal Aviation

Administration, 15000 Aviation Boulevard, Lawndale, California 90261, telephone (310) 725-6556.

SUPPLEMENTARY INFORMATION:

History

On June 27, 1996, the FAA proposed to amend part 71 of the Federal Aviation Regulations (14 CFR part 71) by establishing a Class E airspace area at Coolidge, AZ (61 FR 33390). This action will provide adequate controlled airspace to accommodate a GPS RWY 23 and a VOR/DME RWY 05 SIAP at Coolidge Municipal Airport, Coolidge, AZ.

Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposals to the FAA. No comments to the proposals were received. Class E airspace designations are published in paragraph 6005 of FAA Order 7400.9C dated August 17, 1995, and effective September 16, 1995, which is incorporated by reference in 14 CFR 71.1. The E airspace designations listed in this document will be published subsequently in this Order.

The Rule

This amendment to part 71 of the Federal Aviation Regulations (14 CFR part 71) establishes a Class E airspace area at Coolidge, AZ. The development of a GPS SIAP to RWY 23 and a VOR/DME SIAP to RWY 05 has made this action necessary. The effect of this action will provide adequate airspace for aircraft executing the GPS RWY 23 and VOR/DME RWY 05 SIAP at Coolidge Municipal Airport, Coolidge, AZ.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. Therefore, this regulation—(1) is not a “significant regulatory action” under Executive Order 12866; (2) is not a “significant rule” under DOT Regulatory Policies and Procedures (44 FR 10034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—[AMENDED]

1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959-1963 Comp., p. 389; 14 CFR 11.69.

§71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9C, Airspace Designations and Reporting Points, dated August 17, 1995, and effective September 16, 1995, is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

AWP AZ E5 Coolidge, AZ [New]

Coolidge Municipal Airport, AZ
(Lat. 32°56'00" N, long. 111°25'32" W)

That airspace extending upward from 700 feet above the surface bounded by a line beginning at lat. 32°19'55" N, long. 111°24'00" W; thence west to lat. 32°17'20", long. 111°44'30" N; thence north to lat. 32°58'50" N, long. 111°46'00" W; thence northeast to lat. 33°08'10" N, long. 111°10'20" W; thence southwest to lat. 32°58'50" N, long. 111°04'15" W, thence southwest to the point of beginning.

* * * * *

Issued in Los Angeles, California, on August 1, 1996.

Harvey R. Riebel,
*Acting Manager, Air Traffic Division,
Western-Pacific Region.*

[FR Doc. 96-20761 Filed 8-13-96; 8:45 am]

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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

Interpretation Regarding Use of Electronic Media by Commodity Pool Operators and Commodity Trading Advisors

AGENCY: Commodity Futures Trading Commission.

ACTION: Interpretation; Solicitation of comment.

SUMMARY: The Commodity Futures Trading Commission (the “Commission” or “CFTC”) is publishing its views with respect to the use of electronic media for transmission and delivery of Disclosure Documents,

reports and other information by commodity pool operators ("CPOs"), commodity trading advisors ("CTAs"), and associated persons ("APs") thereof, under the Commodity Exchange Act and the Commission's rules promulgated thereunder. This interpretative guidance is intended to assist CPOs, CTAs and their respective APs in using electronic media to comply with their disclosure and reporting obligations, and to encourage continued research, development and use of electronic media for such purposes. The Commission also is announcing a pilot program for the electronic filing of CPO and CTA Disclosure Documents with the Commission. The Commission seeks comment on the issues discussed in this release and any related issues, including other areas as to which the Commission could provide guidance concerning use of electronic media for filing with the Commission or delivery to customers of required reports.

DATES: This interpretation is effective on October 15, 1996. Comments should be received on or before October 15, 1996.

ADDRESSES: Comments should be submitted to Jean A. Webb, Secretary of the Commission, Commodity Futures Trading Commission, 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.

FOR FURTHER INFORMATION CONTACT: Susan C. Ervin, Deputy Director/Chief Counsel, Gary L. Goldsholle, Attorney/Advisor, Christopher W. Cummings, Attorney/Advisor, or Tina Paraskevas Shea, Attorney/Advisor, Division of Trading and Markets, Commodity Futures Trading Commission, 1155 21st Street, N.W., Washington D.C. 20581. Telephone number: (202) 418-5450. Facsimile number: (202) 418-5536. Electronic mail: tm@cftc.gov

SUPPLEMENTARY INFORMATION:

I. Background

By this release, the Commission is publishing its views with respect to the use of electronic¹ media by CPOs, CTAs and their respective APs,² for

transmission and delivery of Disclosure Documents, reports and other information in a manner consistent with the Commodity Exchange Act (the "CEA" or "Act")³ and the Commission's regulations promulgated thereunder.⁴

The Expanding Electronic Marketplace. In recent years, personal computers have gained widespread entry into the mass market.⁵ Advances in personal computers and related electronic media technology have enabled large sectors of the general population to use computers to access the Internet, proprietary on-line services, and multi-media applications such as those stored on CD-ROMs. The use of personal computers to access the Internet and proprietary on-line services has been growing at a spectacular rate.⁶ This trend appears likely to continue or even accelerate.⁷

The growing use of electronic media is significantly affecting the financial services industry. Specifically, it has caused many changes in the way industry participants gather, store, and communicate information. Electronic media enable private investors as well as market professionals to enjoy ready access to "real-time" trade data and financial news. Similarly, industry professionals and private investors can now quickly perform complex analyses of trade and market data. Both private investors and market professionals use electronic mail and message boards to communicate and disseminate information.

Within the financial services industry, a wide range of businesses, both large

and introducing brokers ("IBs") at this time but has such issues under review.

³ 7 U.S.C. 1 *et seq.* (1994).

⁴ Commission rules are found at 17 CFR Ch. I (1996). The rules governing the obligations of CPOs and CTAs, including rules relating to disclosure and reporting, recordkeeping and advertising, are found at 17 CFR Part 4 (1996).

⁵ Current estimates are that between thirty-five and thirty-nine percent of households in the United States possess a computer. G. Christian Hill, "Tally of Homes With PCs Increased 16% Last Year," *Wall Street Journal*, May 21, 1996, at B10; "Too Good to Last," *Economist*, March 23, 1996, at 62.

⁶ The actual number of Internet users in the United States above age 16 is the focus of debate and has been estimated between 16.4 and 22.0 million, as of August 1995. Peter H. Lewis, "New Estimates in Old Debate on Internet Use," *New York Times*, April 17, 1996, at D1.

⁷ Daniel Akst, "Postcard from Cyberspace: Proof of Skyrocketing Net Growth," *Los Angeles Times*, February 28, 1996, at D4. The trend towards Internet usage appears to be so strong that certain participants in the computer industry are developing "network computers," low cost computers whose primary purpose will be to connect to the Internet. Don Clark, "Oracle Chief to Unveil: 'Info Appliances,' But Will Consumers Want to Buy Them?" *Wall Street Journal*, May 16, 1996, at B1.

and small, have established a presence on the World Wide Web and on the Internet. For instance, many securities brokerage houses now allow customers to place trades and to review account information over the Internet.⁸ Many mutual fund companies have established sites on the World Wide Web or on proprietary on-line services. These sites allow potential investors to download prospectuses, transfer investments among multiple mutual funds, and complete subscription applications without having to wait for such materials to arrive by postal mail.⁹

The futures industry has similarly been affected by developments in electronic media. Many CTAs (including publishers of market newsletters), CPOs, FCMs and IBs have established a presence on the Internet, generally by operating or otherwise being listed on the World Wide Web. Use of the World Wide Web and the Internet appears to be an increasingly important component of the business strategies of futures professionals. For the most part, these registrants currently are using electronic media to supplement their traditional paper-based activities. However, many registrants have expressed strong interest in using electronic media to comply with various requirements of the Act and Commission regulations. In particular, registrants have indicated that they are interested in electronically providing Disclosure Documents, obtaining acknowledgments of receipt of Disclosure Documents, compiling indices of CTA and CPO performance and Disclosure Documents, and filing Disclosure Documents and other materials with the Commission. The rapid technological advances in computers and growth of electronic media have brought the regulatory issues raised by these developments to the forefront of the Commission's agenda.¹⁰

⁸ Estimates of the number of on-line brokerage accounts indicate rapid growth. According to one source, there were 412,000 on-line accounts in 1994, and the number is expected to surpass 1.3 million by 1998. Greg Miller and Tom Petruno, "For Investors, the Internet has Promise, Perils," *Los Angeles Times*, June 4, 1996, at A1, A6.

⁹ "Mutual Funds in Cyberspace," *The Investment Lawyer*, Vol. 2, No. 10, November 1995.

¹⁰ As Acting Chairman John E. Tull noted in March 14, 1996, in testimony before the Subcommittee on Agriculture, Rural Development, Food and Drug Administration and Related Agencies of the House Committee on Appropriations:

The Commission is actively working to address market participants' interest in using new technologies to increase their efficiency and competitiveness. These efforts include: consulting

¹ For purposes of this release, the term "electronic" media refers to media such as audiotapes, videotapes, facsimiles, CD-ROM, electronic mail, bulletin boards, Internet World Wide Web sites and computer networks (e.g., local area networks and commercial on-line services) used to provide documents and information required by or otherwise affected by the Commodity Exchange Act and the regulations promulgated thereunder.

² The Commission is not addressing the use of electronic media by other Commission registrants, such as futures commission merchants ("FCMs")

Electronic media, most dramatically the Internet and the World Wide Web, present regulators with a complex of issues that differ significantly from those presented by traditional paper-based or telephonic activities. The Internet allows users to reach millions of people at very low cost, permitting real-time, simultaneous communication by large numbers of persons, with varying degrees of anonymity. Communications over the Internet can combine text, audio and video. Another unique characteristic of the Internet is that information posted thereon can be updated or changed instantaneously, and Internet sites can be created and eliminated virtually at will. The Internet also is geographically unconstrained; a party using the Internet can be located anywhere, even internationally.¹¹ As the Internet's popularity has grown, so too has the volume of information that can be readily accessed via so-called "search engines." Finally, Internet sites can be connected to other sites through hyperlinks, which enable users to move readily from place to place within a website or to a new website.

A number of federal agencies, including the Securities and Exchange Commission ("SEC"), have begun to formally address regulatory issues presented by activities involving the Internet. In October 1995, the SEC issued an interpretative release addressing electronic delivery of documents such as prospectuses, annual reports to shareholders, and proxy solicitation materials by issuers, third parties (such as persons making tender offers or soliciting proxies) and persons

with industry representatives concerning current and prospective uses of the Internet for communicating with the public and with other futures professionals; creating a program for monitoring solicitation activity on the Internet; and developing mechanisms for electronic filing of reports and other ways to facilitate innovative uses of computer technology in a manner consistent with customer protection.

¹¹ The Commission recognizes that the worldwide availability of material placed on the Internet presents important issues concerning the scope of the regulatory and enforcement jurisdiction of individual nations. For example, solicitation materials posted on the Internet by CPOs and CTAs registered with the Commission and acting in compliance with Commission rules may be accessed by persons in foreign jurisdictions under whose laws such a solicitation may not be lawful. The International Organization of Securities Commissions ("IOSCO"), an international association of securities and futures regulatory and self-regulatory organizations, has several initiatives underway to address these issues. In particular, IOSCO is examining a number of issues, including the enforcement and other regulatory challenges for securities and futures regulators presented by the increasing use of public computer networks. The Commission invites comment from interested persons as to how the issues created by application of multiple jurisdictions' laws to an international mode of communication such as the Internet should be resolved.

acting on their behalf. In that release, the SEC set forth its views on the requirements and standards to be met by securities issuers and mutual funds using electronic media to deliver such documents to persons who consent to such delivery.¹² In a subsequent release dated May 15, 1996, the SEC extended its guidance with respect to electronic media to broker-dealers, transfer agents, investment advisers and persons acting on their behalf.¹³ In these releases, the SEC articulated its view that in most instances, "the use of electronic media should be at least an equal alternative to the use of paper-based media."¹⁴

In addition, the SEC has indicated that, subject to certain conditions, Spring Street Brewing Co. ("Spring Street") may operate Wit-Trade, an on-line bulletin board-based trading system on the World Wide Web that allows individuals to buy and sell shares of Spring Street stock over the Internet. Spring Street had voluntarily suspended trading on Wit-Trade on March 20, 1996, apparently due to concern that the system, as then structured, did not satisfy SEC requirements.¹⁵ However, in a March 22, 1996, letter to Spring Street, the SEC's Divisions of Corporation Finance and Market Regulation expressed support for securities market innovations such as Wit-Trade, which they described as "an innovative mechanism that has the potential to provide [Spring Street] shareholders with greater liquidity in their investments."¹⁶ However, to ensure protection of public investors, the SEC also imposed several conditions upon Wit-Trade's resumption of trading. In order to continue its on-line trading

system, Wit-Trade, which is not a registered broker-dealer, was required to use an independent agent to handle investor funds, to supplement the information provided about Spring Street on the World Wide Web in order to highlight the risks inherent in investing in illiquid and speculative securities and to provide on the website a transaction history, including price and volume data, to facilitate informed investment decisions. Finally, the SEC stated that Spring Street was required to maintain and deliver an offering circular in accordance with Regulation A.¹⁷

Regulatory programs to address new commercial uses of the Internet and World Wide Web have been accompanied by law enforcement actions to address apparent abuses involving the use of such media. The Federal Trade Commission ("FTC") has brought several enforcement actions involving fraud on the Internet. On May 29, 1996, the FTC announced that it had obtained a federal court order against Fortuna Alliance, L.L.C., temporarily halting an alleged pyramid scheme advertised over the Internet that had taken in over \$6 million.¹⁸ On June 12, 1996, the FTC obtained a preliminary injunction, keeping in effect the identical provisions of the temporary restraining order. The FTC has also established an electronic forum

¹⁷ 17 CFR 230.251 *et seq.* (1996). Regulation A is an exemption from registration available to issuers that are neither Securities Exchange Act of 1934 reporting companies or investment companies and permits interstate offerings of up to \$5 million during any twelve month period, including up to \$1.5 million in non-issuer resales. An offering pursuant to Regulation A requires that the issuer file an "offering circular" with the SEC.

The SEC also noted that its regulatory authority over Wit-Trade extends to some categories of Wit-Trade's users. Specifically, the SEC cautioned that Spring Street should inform users of the system that if they post quotations simultaneously on both the Buyer and Seller Bulletin Boards, they may be considered a "dealer" and required to register as such and comply with the requirements applicable to broker-dealers under the federal securities laws. The SEC also stated that any transactions facilitated through Wit-Trade would be subject to the antifraud provisions of the federal securities laws.

Further, by letter dated June 21, 1996, the SEC's Divisions of Market Regulation, Investment Management and Corporation Finance granted approval to Real Goods Trading Corp. ("RGTC"), permitting it to operate a bulletin board system on the World Wide Web whereby persons may post notices regarding purchases or sales of RGTC stock in light of representations that, *inter alia*, RGTC will not receive any compensation for creating or maintaining the system and that it will not receive, transfer or hold any funds or securities in connection with its operation of the system. Real Goods Trading Corp., 1996 SEC No-Act. Lexis 566 (June 24, 1996); Jeffrey Taylor, "SEC to Allow Firm to Run Market For Its Own Shares on the Internet," *Wall Street Journal*, June 27, 1996, at B12.

¹⁸ *FTC v. Fortuna Alliance, L.L.C.*, Civ. Docket 96-CV-799, W.D. Wa. 1996.

¹² 60 FR 53458 (October 13, 1995). In a companion release, the SEC proposed technical revisions to certain of its rules in light of the interpretations proffered in the interpretative release. 60 FR 53468 (October 13, 1995). Much of the guidance provided in the SEC interpretative release took the form of fifty-one examples of particular uses of electronic media by securities professionals.

¹³ 61 FR 24644 (May 15, 1996).

¹⁴ 60 FR at 53459. On January 7, 1996, the North American Securities Administrators Association, Inc. adopted a resolution concerning offerings of securities over the Internet. In general, this resolution encouraged states to exempt certain offerings over the Internet from registration provisions and to take appropriate steps to allow such offers and sales to occur subject to specified conditions.

¹⁵ See Rob Wells, "SEC Allows Brewer to Trade Stock on Internet," *Washington Times*, March 26, 1996, at 5B. The developer of Spring Street Brewing Co. has created Wit Capital Corporation to act as agent in the public offering of securities through the Internet and to create an electronic marketplace for the shares of such companies. "Brewer That Began IPOs on Web Plans On-Line Exchange," *The Washington Post*, April 3, 1996, at G1.

¹⁶ Spring Street Brewing Co., SEC No-Action Letter, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,201 (April 17, 1996).

intended to develop a set of voluntary principles applicable to the use of consumer information in electronic media generally.¹⁹ This electronic forum is presently soliciting comment from all sources, including consumers, industry representatives, and privacy advocates.

NASD Regulation, Inc. ("NASDR"), the self-regulatory organization responsible for oversight of securities firms and professionals and over-the-counter securities trading, recently issued a Notice to Members addressing supervisory and other obligations related to the use of electronic media.²⁰ In that notice, NASDR explained that electronic communications are subject to the same approval, recordkeeping, and filing requirements as communications by other means and emphasized that all communications by its members with the public remain subject to the antifraud provisions of the federal securities laws. Further, it explained that members must comply with the NASD's suitability rule, disclose material adverse facts to customers, and implement appropriate supervisory procedures to ensure that their associated persons do not misuse electronic communications or engage in misconduct while on-line. NASDR also solicited comment from members concerning their use of electronic media and whether there is a need for "prophylactic regulatory measures."²¹

Regulatory Implications of New Electronic Media. Like its sister agencies, the CFTC has been alert to the potential regulatory and law enforcement implications of the Internet and electronic media generally. For example, like businesses and other government agencies, the Commission is using electronic media to increase public awareness of and access to its services. The Commission initiated its website on the World Wide Web on October 10, 1995. The Commission now regularly provides information on its website concerning a broad range of topics, including enforcement actions, opinions and orders, commitments of traders reports, interpretative letters, press releases, sanctions in effect and reparations proceedings (including the

necessary forms to institute reparations claims).²²

In addition to its World Wide Web site, the Commission has undertaken a variety of initiatives relating to the application of technology and electronic media to regulated futures activities. The Commission recently concluded five market automation briefings, soliciting input from four exchanges and from the brokerage community, through representatives of the Futures Industry Association.²³ In these briefings, the exchanges described the current status and planned improvements to clearing, order-routing, trade tracking, surveillance and automation systems. The brokerage representatives identified technological enhancements, including electronic transaction confirmations and recordkeeping capacity, relevant to the continuing efficiency and competitiveness of United States futures markets.

To date, the Commission has facilitated the use of electronic media by providing relief from or interpretations of regulatory requirements in a variety of contexts. Recently, the Division of Trading and Markets issued a "no-action" letter and a related advisory allowing FCMs to use facsimile transmissions to send daily confirmation statements to certain institutional customers in fulfillment of their obligations under Commission Rule 1.33(b).²⁴ The Division of Trading and Markets also has issued an advisory concerning the attestation of financial reports filed electronically with a self-regulatory organization.²⁵ Pursuant to Advisory 28-96, FCMs and IBs who file financial reports electronically with a self-regulatory organization that operates a program for electronic filing approved by the Commission, such as the Chicago Board of Trade ("CBT") or the Chicago Mercantile Exchange ("CME"), may use a personal identification number ("PIN") in lieu of

a signature, which will be deemed to be the equivalent of a manual signature for purposes of attestation under Commission Rule 1.10(d)(4).²⁶ The PIN, therefore, will constitute a representation by the user that the information contained in the financial report is true, correct and complete. The Division of Trading and Markets also is encouraging the CME and the CBT to license the electronic filing system developed jointly by these exchanges, and currently used by their members to file financial reports electronically, at reasonable cost to other markets and is evaluating whether to require electronic filing for all but certified financial statements. The Division of Trading and Markets also has encouraged the use of electronic media to achieve greater efficiency by allowing firms to directly enter certain registration filings in connection with the National Futures Association ("NFA") direct entry program.²⁷

The Commission's Division of Enforcement ("DOE") is actively monitoring activity on the Internet and proprietary on-line services. The DOE investigates and prosecutes violations of the CEA by persons who use electronic media, as well as any other media, to accomplish such violations. For instance, the Commission recently brought an action in the United States District Court for the Southern District of Florida against certain persons alleging fraud in connection with the solicitation and receipt of funds for the purchase and use of computer-generated trading systems.²⁸ The complaint alleges that the defendants in that case marketed the systems in national newspapers and on the Prodigy on-line service Money Talk Bulletin Board. On October 16, 1995, the District Court issued an *ex parte* order freezing defendants' assets. On October 25, 1995, the defendants, without admitting or denying the allegations, consented to the entry of an Order of Preliminary Injunction which, among other things, prohibited them from acting as CTAs without benefit of registration.

In addition, the DOE will shortly introduce a section of the Commission's website through which members of the public can provide it with information regarding possible violations of the CEA

²² The address of the site is <http://www.cftc.gov>. It is visited by thousands of users each month.

²³ Advisory No. 25-96 (May 13, 1996); "Market Automation Examined," [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) Report Letter No. 528 at 5 (June 7, 1996).

²⁴ Advisory No. 22-96, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,679 (May 2, 1996). Throughout this Interpretation the Commission refers to various staff interpretative letters and advisories. These letters and advisories represent interpretations by the Commission's staff and do not necessarily represent interpretations by the Commission. The Commission intends to issue a separate Federal Register release addressing electronic communications and disclosures by FCMs and IBs. Prior to the issuance of such a release, the Commission's Division of Trading and Markets will continue to resolve issues in this area on a case-by-case basis.

²⁵ Advisory No. 28-96, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,711 (May 28, 1996).

²⁶ The Commission approved rules of the CME and CBT permitting electronic filing of financial reports prior to issuing this advisory. See CME Rule 970 (approved by the Commission on September 27, 1993); CBT Capital Rule 311, Appendix 4B (approved by the Commission on September 21, 1993). The Commission expects to propose its own rules on this subject in the near future.

²⁷ 57 FR 60799 (December 22, 1992).

²⁸ *CFTC v. Maseri, et al.*, Case No. 95-6970-Civ-Davis (S.D. Fla. 1995).

¹⁹ See FTC's website at <http://www.ftc.gov/ftc/privacy.htm>.

²⁰ NASD Notice to Members 96-50, July 1996. In a previous notice, NASDR provided guidance to its members concerning the regulatory implications of certain conduct occurring over various electronic media, including the World Wide Web, "bulletin boards," electronic mail, "chat rooms," and hyperlinked sites. "Ask the Analyst About Electronic Communications," *NASD Regulatory & Compliance Alert*, April 1996.

²¹ NASD Notice to Members 96-50, July 1996.

occurring on the Internet or elsewhere. This section will be an important part of the DOE's and the Commission's surveillance and information gathering activities over the Internet.

The Commission's Office of Information Resources Management ("OIRM") performs ongoing assessments of the opportunities offered by the use of new technology to streamline or otherwise improve the effectiveness of the Commission's programs. For example, in addition to implementing and maintaining the Commission's website, OIRM has recently provided a firewall-protected connection between the Commission's internal network and the Internet. This connection provides all Commission staff with Internet electronic mail addresses, thereby enabling them to receive industry inquiries electronically and to respond to such inquiries more rapidly. It also provides select Commission staff with full web-browsing capabilities to facilitate surveillance and other information gathering activities.

In sum, the Commission supports the use of new technologies to enhance efficiency and competitiveness and believes that electronic media can provide an effective alternative to traditional paper-based media. The Commission encourages industry participants to consult with the Commission as they develop and refine electronic media applications in order to assure that transitions to electronic media occur efficiently and without loss of regulatory protections.

The Commission is issuing this release to provide guidance concerning a range of issues presented by existing and contemplated uses of electronic media by the managed futures industry. The release addresses: the applicability of the CEA and Commission regulations to the use of electronic media, including registration duties and other regulatory requirements applicable to persons who use electronic media to provide commodity trading advice or to solicit managed futures accounts or pool participations; the criteria and requirements applicable to CPOs and CTAs seeking to use electronic media for the delivery of Disclosure Documents, reports and other information; and a mechanism whereby CPOs and CTAs may use electronic media to file Disclosure Documents with the Commission. The Commission invites comment on each of these topics, and any related issues of interest to futures professionals or other market users.

II. Applicability of the Commodity Exchange Act and Regulations Thereunder to Use of Electronic Media: Registration and Other Requirements for Commodity Trading Advisors and Commodity Pool Operators

The advent of electronic media, such as the Internet, as common modes of commercial communication has given rise to numerous questions concerning the applicability of existing regulatory structures to these media. Although this release is principally directed toward the use of electronic media by managed futures professionals, the Commission also wishes to emphasize that, as a general matter, the nature and effect of a person's conduct, not the medium of communication chosen, determine the applicability of the Commission's regulatory framework. Consequently, persons using electronic media are subject to the same statutory and regulatory requirements under the Commission's regulatory framework as persons employing other modes of communication.

This conclusion follows from the breadth of the mandates codified in the CEA, as well as their express terms. The definition of CPO, for example, includes "any person engaged in a business that is of the nature of an investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts or receives from others funds, securities or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in any commodity for future delivery on or subject to the rules of any contract market * * *." ²⁹ Similarly, the CTA definition includes "any person who * * * for compensation or profit, engages in the business of advising others, either directly or through publications, writings or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market * * *." ³⁰ Section 4l of the Act confirms the national public interest in the activities of CTAs and CPOs whose advice to and arrangements with clients "take place and are negotiated and performed by the use of the mails and other means and instrumentalities of

interstate commerce." ³¹ More generally, Section 18 of the Act directs the Commission to establish and maintain, "as part of its ongoing operations," research and information programs to determine, *inter alia*, "the feasibility of trading by computer, and the expanded use of modern information system technology, electronic data processing, and modern communication systems by commodity exchanges, boards of trade, and by the Commission itself for purposes of improving, strengthening, facilitating, or regulating futures trading operations." ³²

However, although Congress's intent that the Act should encompass and accommodate new technologies is clear, market participants may nevertheless benefit from guidance as to the manner in which the Act and Commission rules apply in specific contexts. This release is intended to facilitate the use of electronic information and communications systems by Commission registrants in conducting their businesses and in making required filings with the Commission. In particular, this release is intended to facilitate the use of electronic communication systems by clarifying the manner in which Commission rules, generally written to address either oral or hardcopy written communications, may be translated into the context of electronic media.

As a threshold matter, the Commission wishes to emphasize the registration duties of persons using electronic media to engage in activity subject to the Act and Commission regulations. The Act's registration requirements for commodity professionals are a cornerstone of the regulatory framework enacted by Congress. Determinations as to whether a person must register, and in what capacity, require an evaluation of all of the "circumstances surrounding such person's commodity-related activities." ³³ Section 4m(1) of the Act makes it unlawful for any CTA or CPO, unless excluded or exempted from registration, "to make use of the mails or any instrumentality of interstate commerce in connection with his business as such commodity trading advisor or commodity pool operator" ³⁴ without being registered under the Act. Thus, the Act requires the registration of persons who use any instrumentality of interstate commerce, including

²⁹ 7 U.S.C. 1a(4) (emphasis added).

³⁰ 7 U.S.C. 1a(5)(A) (emphasis added). The definition of the term "commodity trading advisor" was amended by the Futures Trading Act of 1982, Pub. L. No. 97-444, 96 Stat. 2204 in order to refer expressly to "electronic media." Similarly, the exclusions from the CTA definition for newspaper reporters and publishers were amended to add "electronic media" to the exclusion for print media.

³¹ 7 U.S.C. 6l (emphasis added).

³² 7 U.S.C. 22 (emphasis added).

³³ 48 FR 35248, 35253 n.27 (August 3, 1983).

³⁴ 7 U.S.C. 6m(1).

electronic media, in connection with their business as a CTA or CPO.

A. Commodity Trading Advisory Activities

1. Trading Advice Communicated Electronically

The Act defines the term "commodity trading advisor" to include, subject to specified exclusions, any person who: "(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in" futures contracts, commodity options, or leverage transactions; or "(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i)." ³⁵ Thus, subject to certain statutory exclusions, any persons who for compensation or profit engage in the business of advising others concerning trading in futures or commodity options or of issuing analyses or reports concerning such trading, are deemed CTAs under the Act.

A threshold requirement of the CTA definition is that the trading advisory activity be undertaken for "compensation or profit." This does not, however, require that "the 'compensation or profit' flow directly from the person or persons advised * * * [i]t is sufficient that the compensation or profit is to result wholly or in part from the furnishing of the services specified in section [1a(5)]." ³⁶ Accordingly, this requirement has been interpreted by Commission staff to include direct or indirect forms of compensation or profit received by a CTA, including the attraction of new customers or maintenance of a customer base. ³⁷

The term "commodity trading advice" has been interpreted expansively and

includes particularized trading advice that recommends specific transactions or trading methodologies as well as advice concerning the "value of or advisability" of trading in futures or commodity options. Consequently, one who advises others concerning the value of using futures generally, without providing specific trading recommendations, nonetheless is providing commodity trading advice. Further, persons may provide commodity trading advice even though they "are neither directly or indirectly involved in the solicitation of funds or trades or the trading of accounts." ³⁸ For example, Commission staff have found that a publication that includes general information on trading in commodity interests, detailed information on price forecasting and specific advice on market conditions that signal when persons should trade in the futures markets provides trading advice. ³⁹ Commodity trading advice may include information already contained in the public domain ⁴⁰ and is not limited to trading "recommendations." ⁴¹

In applying the CTA definition, the Commission has recognized that commodity trading advice may be provided through all forms of communication, including electronic media. This conclusion is compelled by the Act's express terms; as noted by Commission staff, "[i]n distinguishing between trading advice offered directly or through publications, writings or electronic media, [the statutory CTA definition] is clearly intended to reach 'impersonal,' indirect forms of trading advice and explicitly recognizes that commodity trading advice may be given

in forms other than personalized trading advice." ⁴²

Commission staff have applied the CTA definition to "persons who make commodity interest trading advice available to the public through mass media, such as newsletters, telephone hotlines or electronic devices including computer software, rather than through direct communication with individual persons." ⁴³ Staff letters have applied the CTA definition to, for example, designers and distributors of computer software programs that generated commodity trading recommendations or strategies; ⁴⁴ a professor who received compensation for applying research and periodically updating a computer model used for trading commodity interests; ⁴⁵ the distributor of software that analyzed a United States dollar index; ⁴⁶ and the licensor of a computer software program who had developed and licensed to more than fifty licensees various computerized trading systems that allowed the licensees to input data setting the parameters of futures transactions. ⁴⁷ These staff positions are consistent with applications of the CTA definition to other impersonal or indirect forms of communication, such

⁴² Division of Trading and Markets Interpretative Letter No. 95-101, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,565 (November 21, 1995). The Commission has recently filed complaints addressing certain forms of alleged CTA activity conducted by means of electronic media. For example, the Commission and the Attorney General for the State of Florida jointly filed a complaint, which was later amended to include a new defendant, in *CFTC v. JDI Limited Inc. d/b/a Future Vision*, Case No. 95-6221-Civ-Gonzalez (S.D. Fla.), charging defendants with, *inter alia*, acting as unregistered CTAs and violating the antifraud provisions of the Act in the marketing, sale and support of a computerized trading program. Similarly, the Commission's complaint in *In the Matter of R&W Technical Services, Ltd.*, CFTC Docket No. 96-3, alleged that the respondents had marketed and sold a computerized futures trading system generating trading signals for transactions in various financial futures contracts without being registered as CTAs. The complaint also charged the parties with violations of antifraud provisions of the Act by falsely advertising money-back guarantees and hypothetical profits in magazines, telephone solicitations and written promotional materials. The Commission expresses no opinion on the merits or ultimate outcome of these cases.

⁴³ Division of Trading and Markets Interpretative Letter No. 95-68, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,498 (August 10, 1995).

⁴⁴ *Id.*

⁴⁵ Division of Trading and Markets Interpretative Letter No. 94-51, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,115 (May 10, 1994).

⁴⁶ Division of Trading and Markets Interpretative Letter No. 93-27, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,704 (April 2, 1993).

⁴⁷ Division of Trading and Markets Interpretative Letter No. 84-9, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,092 (March 1 and April 6, 1984).

³⁸ Division of Trading and Markets Interpretative Letter No. 96-56, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ _____ (July 8, 1996).

³⁹ *Id.*

⁴⁰ Unpublished letter from Andrea M. Corcoran, Director, Division of Trading and Markets, dated March 14, 1990 ("even assuming that information contained in the [publication] is available elsewhere in the public domain, it is our opinion that the CTA definition includes an enterprise which is devoted to compiling advice, reports or analyses of others with respect to futures markets and to publishing such data in a book such as the [publication] on a regular basis").

⁴¹ Unpublished letter from Susan C. Ervin, Deputy Director/Chief Counsel, Division of Trading and Markets, dated March 14, 1989 (noting that the absence of interpretative or analytical information does not exclude a person from the definition of a CTA). "The plain terms of the statute indicate * * * that Congress intended to cover all types of analyses and reports * * *, not just those that advise, interpret or make recommendations." CFTC Interpretative Letter No. 76-25, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,239 (Office of the General Counsel, December 6, 1976). Thus, a person may provide commodity trading advice despite neither analyzing nor making any predictions or representations about the information provided.

³⁵ 7 U.S.C. 1a(5)(A).

³⁶ CFTC Interpretative Letter No. 75-11, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,098, at 20,763 n.6 (Office of the General Counsel, Trading and Markets, September 15, 1975).

³⁷ CFTC Interpretative Letter No. 76-10, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,157 (Office of the General Counsel, April 22, 1976); CFTC Interpretative Letter No. 75-6, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,093 (Office of the General Counsel, Trading and Markets, August 13, 1975). For example, Commission staff have found the "compensation or profit" requirement of the CTA definition satisfied where a CTA's customers receive commission rebates from an FCM that are then credited toward payment of the CTA's commodity information service subscription fees. Division of Trading and Markets Interpretative Letter No. 95-51, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,420 (May 1, 1995).

as newsletters and other print media⁴⁸ and telephone hotlines.⁴⁹

The Commission wishes to make clear that the nature and scope of regulation of trading advisory activity under the CEA depends upon the type of activity in which the advisor engages. For example, persons who provide commodity trading advice but do so in a manner that is solely incidental to the conduct of certain businesses or professions, such as banking, news publishing or news reporting, are wholly excluded from the definition of a CTA. Persons who provide commodity trading advice but do not qualify for a statutory exclusion from the CTA definition due to the fact that their trading advice is not incidental to the conduct of their business or profession as, e.g., a publisher, are required to register as CTAs and maintain specified records; however, unless they are managing customer accounts, they are not subject to the requirement to deliver a Disclosure Document. Finally, persons who manage customer accounts, *i.e.*, direct or guide accounts,⁵⁰ are required to register with the CFTC, deliver a Disclosure Document to each prospective customer at or before the

time at which he solicits such customer, obtain a signed acknowledgment of receipt of the Disclosure Document from the customer and maintain specified books and records. Persons who solicit managed accounts for a CTA must be registered as an AP of the CTA and provide the required Disclosure Document at the time of or prior to solicitation of the customer. The Commission provides guidance on a case-by-case basis concerning the application of these requirements to particular business activities or arrangements.

a. Exclusions From the CTA Definition

The CEA provides an exclusion from the CTA definition for banks and trust companies (and their employees), news reporters, columnists and editors, lawyers, accountants and teachers, floor brokers or FCMs, publishers or producers of print or electronic data of general and regular dissemination (and their employees), contract markets, and "such other persons not within the intent of this paragraph as the Commission may specify by rule, regulation, or order."⁵¹ These exclusions apply only if the furnishing of such services by the specified persons "is solely incidental to the conduct of their business or profession."⁵²

(1) Publisher or Producer of Electronic Data of General and Regular Dissemination

The CEA's express exclusion from the CTA definition for publishers and producers of print or electronic media applies only if two criteria are met.⁵³

⁵¹ 7 U.S.C. 1a(5)(B). For instance, Commission Rule 4.14 exempts from CTA registration various categories of persons, including certain dealers, processors, brokers or sellers in the cash market for commodities; a registered AP who provides trading advice solely in connection with his employment as an AP; registered CPOs who provide trading advice solely to pools for which they are registered; persons who are exempt from CPO registration who provide trading advice solely to pools for which they are exempt from registration; and certain persons who are registered as investment advisers under the Investment Advisers Act of 1940 or are excluded from the definition of the term "investment adviser." 17 CFR 4.14.

⁵² 7 U.S.C. 1a(5)(C). Pursuant to statutory amendments adopted in 1982, the Act also provides that the Commission may, "by rule or regulation, include within the term [CTA] any person advising as to the value of commodities or issuing reports or analyses concerning commodities if the Commission determines that the rule or regulation will effectuate the purposes of this paragraph." 7 U.S.C. 1a(5)(D).

⁵³ 7 U.S.C. 1a(5) provides in pertinent part: (B) Subject to subparagraph (C), the term "commodity trading advisor" does not include—

* * * * *

(iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees;

First, a person must be "the publisher or producer of any print or electronic data of *general and regular dissemination*." (emphasis added). Second, "the furnishing of such services * * * [must be] solely incidental to the conduct of their business or profession." As construed by CFTC staff, the phrase "general and regular dissemination" applies to publications whose "*primary purpose [is] to disseminate news and other items appealing to the interest of all segments of the business and financial community.*"⁵⁴ In contrast, "if a publication concentrates on disseminating analyses, reports or recommendations bearing on a narrow area of interest, such as * * * commodity futures trading," the staff has construed the publication not to be "a bona fide business or financial publication of general and regular circulation" for purposes of the statutory exclusion from the CTA definition.⁵⁵

(2) Solely Incidental

In defining "solely incidental," the Commission does not rely on a specific numerical standard or percentage of revenues or business but, rather, considers the nature of the overall business and the factual context in which the advisory services are rendered.⁵⁶ Thus, "a planned or periodic expression of views as to the advisability of trading in commodity futures made by an FCM may be solely incidental to its business[,] while the same advice rendered by a publisher or bank may not."⁵⁷ Generally, if a publication has a specialized focus upon futures transactions or is largely devoted to futures trading, the commodity trading advice furnished therein will not be considered to be solely incidental to the conduct of the

* * * * *

(C) INCIDENTAL SERVICES—Subparagraph (B) shall apply only if the furnishing of such services by persons referred to in subparagraph (B) is solely incidental to the conduct of their business or profession.

⁵⁴ Division of Trading and Markets Interpretative Letter No. 76-1, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,135 (February 26, 1976) (emphasis added).

⁵⁵ *Id.*

⁵⁶ *In the Matter of Armstrong*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,657 (February 8, 1993), *rev'd on other grounds sub nom., Armstrong v. Commodity Futures Trading Commission*, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,914 (December 21, 1993) [hereinafter *Armstrong*]; see also 52 FR 41975, 41978 (November 2, 1987) (discussing "solely incidental" as used in Commission Rule 4.6).

⁵⁷ Division of Trading and Markets Interpretative Letter No. 76-1, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,135 (February 26, 1976).

⁴⁸ Division of Trading and Markets Interpretative Letter No. 93-18, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,694 (February 23, 1993) (publications issued on a monthly or bimonthly basis which contained analyses and advice concerning trading commodity interests, including gold, silver and platinum contracts required registration as a CTA); CFTC Interpretative Letter No. 75-3, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,090 (Office of the General Counsel, Trading and Markets, July 31, 1975) (publisher of newsletter focusing on cash commodity markets and that occasionally prints advice concerning the use of agricultural futures for hedging purposes is a CTA); Division of Trading and Markets Interpretative Letter No. 94-29, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,020 (March 15, 1994) (responding to general questions regarding newsletter publications and CTA registration and concluding that publisher of newsletter offering market advice is not a CTA only if advice is solely incidental to the publisher's business).

⁴⁹ Division of Trading and Markets Interpretative Letter No. 93-43, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,734 (May 19, 1993) (requiring CTA registration of IB using a "900 line" that provided prerecorded trade recommendations as well as research, market and trade ideas); see also *CFTC v. Ehrenberg*, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,640, at 26,429 (E.D. Ill. 1982) (party who advertised services as pork belly trading specialist in commodities magazine and gave commodity trading advice over telephone for a fee was required to register as CTA).

⁵⁰ Commission staff have stated that it is not necessary for a person to have a power of attorney in order to be "directing" or "guiding" accounts. See, e.g., Division of Trading and Markets Interpretative Letter No. 86-15, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,165 (July 22, 1986) ("[i]t should be noted that, although the CTA has no power of attorney over the account, he does have the power to control the client's trades").

publisher's business.⁵⁸ Conversely, if a publication covers a broad range of topics and futures are not its predominant focus, the commodity trading advice provided therein may be "solely incidental" to the conduct of the publisher's business. For example, Commission staff have found that "reprinting" by an electronic information service of, among other things, specific trading recommendations was solely incidental to its broader business as an electronic information and communications service, a general computer library whose files included a "broad range of many different types of information."⁵⁹ However, advice furnished in a financial publication (and related telephone newswire service) that was substantially focused on metals futures, was not solely incidental to that entity's publishing business, but in the words of the Commission, was "the very point of that business."⁶⁰ Similarly, where a newsletter devoted a substantial number of issues to analyses of the futures markets and specific trading recommendations, Commission staff found such advice to be "fundamental," rather than solely incidental, to the company's business.⁶¹

b. Exemption From Registration for Persons Who Furnish Trading Advice to Fifteen or Fewer Persons and Who Do Not Hold Themselves Out as CTAs

Section 4m(1) of the CEA provides an exemption from registration for CTAs who during the preceding twelve months have not furnished trading advice to more than fifteen persons and who do not "hold [themselves] out generally to the public as a commodity trading advisor."⁶² A CTA who identifies himself as a CTA or otherwise refers to his advisory services or history on a public electronic forum such as portions of the Internet or a proprietary on-line service may not avail himself of the exemption under Section 4m(1). Such conduct constitutes "holding out" to the public as a CTA.⁶³ This view is consistent with the SEC's views concerning the ineligibility of offerings posted on the Internet for the Regulation D safe harbor from registration. As stated by the SEC, "[t]he placing of the offering materials on the Internet would not be consistent with the prohibition against general solicitation or advertising in Rule 502(c) of Regulation D."⁶⁴

2. Directories and Compilations

In addition to using electronic media to communicate specific commodity trading advice, market participants may engage in activities that implicate registration duties and other CFTC requirements by operating sites on the World Wide Web that compile information about other registrants or futures-related subjects. For example, many locations on the Internet provide central repositories for, directories of, or mechanisms to access information compiled from multiple sources.

⁶² 7 U.S.C. 6m(1).

⁶³ See examples *infra*, at the conclusion of this section. Likewise, a CPO who advertises a pool on the Internet, e.g., by identifying himself as a CPO of a pool, may not obtain an exemption from registration relief under Commission Rule 4.13(a)(1), inasmuch as such advertising plainly negates one of the required elements of the exemption. Commission Rule 4.13(a)(1) provides an exemption from registration for a CPO if, among other things, "it does not receive any compensation, directly or indirectly, for operating the pool, except reimbursement for ordinary administrative expenses of operating the pool;" "[i]t operates only one pool at a time;" and "[n]either the person nor any other person involved with the pool does any advertising in connection with the pool * * *." 17 CFR 4.13(a)(1) (emphasis added).

⁶⁴ 60 FR at 53464. SEC Rule 502(c) prohibits "any form of general solicitation or general advertising" and applies to Regulation D offerings pursuant to SEC Rules 505 and 506. 17 CFR 230.502(c). Thus, CPOs who use electronic media in a manner inconsistent with Regulation D may not obtain relief pursuant to Commission Rule 4.8, which is available only with respect to offerings pursuant to SEC Rules 505 and 506. 17 CFR 4.8.

Persons who compile and reprint information, whether electronically or on paper media, may be subject to the Commission's registration requirements notwithstanding the fact that they did not originally prepare the information disseminated. The terms "advising" and "issues or promulgates" are not limited to the author of such materials but include the "dissemination of another's views to third persons."⁶⁵

Compilations of information may range from listings of performance data for all publicly offered commodity pools, comparable to newspaper listings of mutual fund returns, to narrowly focused descriptions of the trading strategies and history of a single CTA. In determining whether such compilations constitute either advice as to "the value of or the advisability of trading" futures or commodity options or "analyses or reports" concerning such trading, as well as the applicability of various statutory exclusions, the Commission considers all of the relevant facts and circumstances. However, to facilitate use of the Internet by commodity professionals, the Commission wishes to clarify the status of certain types of publications of futures-related data.

Publications that compile trading results for commodity pools selected on an objective, neutral basis, e.g., all commodity pools of a certain size or geographic location, could be viewed as providing "reports or analyses" concerning futures transactions and thus as within the CTA definition. To the extent that such compilations are presented by a publisher of print or electronic media of "general and regular dissemination" in a manner solely incidental to that business, the publisher would qualify for the statutory exclusion from the CTA definition. The publisher of a newspaper of general circulation could therefore publish, in a manner incidental to that business, the performance results for all commodity pools or for all publicly traded commodity pools without registration as a CTA or compliance with the statutory and regulatory requirements applicable thereto.

If a compilation of performance data for publicly offered pools were published by a firm that does not qualify as a publisher of data of general and regular dissemination, e.g., a business devoted exclusively or primarily to operating Internet sites

⁶⁵ CFTC Interpretative Letter No. 76-24, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,234 (Office of the General Counsel, August 17, 1976).

⁵⁸ *Armstrong*; CFTC Interpretative Letter No. 75-4, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,091 (Office of the General Counsel, Trading and Markets, August 11, 1975).

⁵⁹ Division of Trading and Markets Interpretative Letter No. 83-3, [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,842, at 27,538 (May 25, 1983) (describing the computer information and communications service as "computer library and information distribution business").

⁶⁰ *Armstrong*, at 40,149.

⁶¹ CFTC Interpretative Letter No. 75-4, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,091, (Office of the General Counsel, Trading and Markets, August 11, 1975). The United States Supreme Court's interpretation of the term "investment adviser" in *SEC v. Lowe*, 472 U.S. 181 (1985), as used in the Investment Advisers Act of 1940 ("IAA"), does not mandate a different result. In *Lowe*, after reviewing the language and legislative history of the IAA, the Court held that Congress had excluded publishers of generalized securities advice from the definition of investment adviser. Although a "facial parallel" exists between the Section 1a(5)(B)(iv) of the CEA and Section 203(c) of the IAA (the exclusion for "the publisher of a bona fide newspaper, magazine or business of financial publication of general and regular circulation"), unlike the investment adviser definition of the IAA, the CTA definition in Section 1a(5)(C) of the CEA limits the exclusions in Section 1a(5)(B), including the publishers' exclusion of Section 1a(5)(B)(iv), to cases where "the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession." *Armstrong*, at 40,149. Consequently, as the Commission noted in *Armstrong*, "[g]iven this clear distinction between Congress' exclusionary language in [the IAA and the CEA, the Commission is] not persuaded that the holding in *Lowe* mandates a broad construction of the exclusion from the definition of CTA for certain publishers." *Id.*

providing data concerning CTAs and CPOs, the statutory "publisher" exclusion would not apply. However, the Commission believes that provided such data are developed using objective, neutral criteria, such as size or geographical location, and presented as such by a bona fide news organization for the purpose of providing current market data, registration as a CTA should not be required.⁶⁶ Similarly, an unbiased compilation of all registered CTAs in a given location, clearly described as such and without any express or implied evaluation or suggestions as to the quality of the services such persons provide, may be viewed as equivalent to the telephone "yellow pages" directory, and would not implicate the Commission's registration requirements. However, compilations of selected CTAs, or of CTAs who pay a fee for inclusion in a list, may not be neutrally developed compilations and may, in effect, promote the services of selected CTAs. If the provider of this information is compensated for or receives profit from such activities, absent the applicability of a specific exclusion, that person is required to register as a CTA.⁶⁷ Moreover, even absent such compensation, the presenter of such data may be soliciting discretionary accounts on behalf of one or more CTAs and thus required to register as an AP of such CTA, or as a CTA.

Compilations presented on electronic media may contain actual descriptive data or simply a collection of hyperlinks. Hyperlinks, a prominent feature of the World Wide Web, enable a user to connect from one location or document to another, a facility without apparent analogy in paper-based media. Hyperlinks consist of an address or phrase which, when activated by a click

of the mouse, connects the user to another location on the Internet. The Commission's website, for example, has hyperlinks to a number of World Wide Web sites, including each of the United States contract markets. Internet directories such as Yahoo and Magellan are basically organized collections of hyperlinks. Hyperlinks, although fundamentally a connective mechanism between websites, nonetheless can be used in such a manner as to communicate advice about the value of or advisability of trading in commodity interests, e.g., by labeling, describing, or otherwise introducing the hyperlinked sites. This would be the case, for example, where the operator of a website provides editorial comment about the hyperlinks or provides a list of hyperlinks that represent a pre-selected, defined category of persons or services, whose attributes or qualifications are thereby highlighted.⁶⁸ In such a case, the person providing the hyperlinks would be required to register as a CTA.

However, hyperlinks can also be used in a manner that would not require a person to register as a CTA. For example, the Commission believes that merely providing a list of hyperlinks that is the equivalent of a telephone directory or other broad-based source of "locational" data, without more, would not make one a CTA because hyperlinks in this context do not necessarily speak "as to the value of or the advisability of trading in" commodity interests. Similarly, a website that contains a search or query function that allows visitors to construct searches to obtain data responsive to certain criteria they select would not be considered to be providing trading advice, provided that the website merely provides the "data library" and the search vehicle for the viewer's use.⁶⁹

3. Applicability of Antifraud Provisions

Persons using electronic media are subject to the same statutory and regulatory requirements under the CEA, including the statutory and regulatory antifraud prohibitions and related rules pertaining to CTAs and CPOs, as those

using other media. These include the antifraud provisions of the CEA, including Section 4o,⁷⁰ as well as the provisions of Commission Rule 4.41. Rule 4.41 prohibits CPOs, CTAs, or any principals thereof from advertising in a manner which employs any fraudulent device or involves any transaction or course of business which operates as a fraud or deceit upon any pool participant or client or prospective participant or client. Rule 4.41 also bars the presentation of any hypothetical or simulated performance data unless it is "prominently" accompanied by a prescribed cautionary statement.⁷¹ Both the statutory antifraud provisions and Rule 4.41 apply to CTAs, CPOs, and their principals, regardless of whether they are exempt from registration under the CEA.⁷² Rule 4.41 expressly applies to "any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations."⁷³ The requirements of Rule 4.41 thus apply fully to electronic media such as the Internet.

The Commission also notes that capabilities peculiar to the Internet, such as anonymity and the ability to operate through aliases (e.g., electronic mail addresses, user names), that obscure a person's true identity or business affiliation may be exploited in a manner that operates as a fraud. For example, the use of "testimonials" purportedly from third parties but actually created by the CTA or CPO that is the subject of the "testimonial" would constitute a fraudulent practice under statutory antifraud provisions and Rule 4.41.

⁷⁰ 7 U.S.C. 6o provides that no CPO, CTA, or any associated persons thereof, may use "any means or instrumentality of interstate commerce, directly or indirectly—(A) to employ any device, scheme or artifice to defraud any participant or client or prospective client; or (B) to engage in any transaction, practice or course of business which operates as a fraud or deceit upon any participant or prospective client or participant."

⁷¹ 17 CFR 4.41(b); *In re Armstrong*, [Current Transfer Binder] Comm. Fut. L. Rep (CCH) ¶ 26,332 (CFTC March 10, 1995), *aff'd sub nom. Armstrong v. CFTC*, No. 95-3161 (3d Cir. January 19, 1996), *cert. denied*, 64 U.S.L.W. 3821 (June 10, 1996). Commission Rule 4.41(b) requires that hypothetical or simulated performance data be accompanied either by the statement specified in Rule 4.41(b)(1) or a comparable statement promulgated by a registered futures association. The NFA's cautionary statement can be found in NFA Rule 2-29.

⁷² See 7 U.S.C. 6o; 17 CFR 4.41(c)(2).

⁷³ 17 CFR 4.41(c)(1).

⁶⁶ The Commission stresses, however, that providing even objective market or performance history data in the context of a publication that has the purpose or effect of providing or marketing trading advisory services would require CTA registration. Thus, a newsletter published to communicate the trading advice of a particular CTA or to promote a CTA "hotline" service and also including performance data for commodity pools would implicate the CTA definition, notwithstanding that such performance data are objectively developed, because the publication is predominantly one designed to provide trading advice. Thus, whether a particular presentation constitutes trading advice depends upon the facts and circumstances in which the presentation is made and the representations, express or implied, made concerning the content of the presentation.

⁶⁷ As noted above, compensation in this context does not require that payment be received for the communication in question. Rather, if the provider of such data profits from presenting it, even indirectly, such as by promoting its own services, the statutory "compensation or profit" standard is satisfied.

⁶⁸ In this case, the hyperlink communicates the views of the website operator as to the quality of the services addressed or referred to at the hyperlinked site.

⁶⁹ This analysis would apply without regard to the criteria selected by the viewer, which could, for example, call for all pools with rates of return above a specified threshold or for presentation of pools in order of rates of return (e.g., high-to-low). However, a website that contained this search feature, but also contained evaluative or mathematical services (e.g., for the calculation of relative rates of return or volatility of returns) would, however, indicate a different result.

The following examples are illustrative of the requirements discussed above.

(1) *(General Internet Directory Not a CTA)* Company XYZ operates a website that provides a directory of hyperlinks to the World Wide Web. XYZ has broad listings under such topics as Arts, Business and Economy, Computer and Internet, Education, Entertainment, Government, Health, News, Recreation and Sports, Reference, Regional, Science, Social Science and Society and Culture. Within the Business and Economy section is a subsection covering Futures and Options. Among the hyperlinks in the Futures and Options sections are those of a number of CTAs. XYZ does not charge CTAs for listings in its directory; XYZ's revenues are derived solely from advertising on its homepage. XYZ does not exercise any discretion as to the inclusion of any CTA on its directory, and any CTA requesting inclusion will be included; these facts are prominently disclosed. XYZ provides no information about the content of the CTA sites to which hyperlinks are provided. XYZ qualifies for the exclusion from the definition of a CTA for a producer or publisher of information of general and regular dissemination since its homepage provides information across all subject matters and the information provided by such links is solely incidental to its business, which is to provide an index of the World Wide Web.

(2) *(Recommending or Evaluating CTAs)* Company XYZ operates a website that contains a list of hyperlinks to CTAs described as the "Ten Best CTAs for 1996." Each of the ten CTAs featured on XYZ's homepage is required to pay XYZ a fixed fee. In this scenario, XYZ is a CTA and is required to register as such. By making evaluative representations about the featured CTAs, XYZ is providing advice about the value of or advisability of trading in commodity interests. Since XYZ receives a fee from each of the ten featured CTAs, the compensation element of the CTA definition is satisfied. Absent the availability of an exclusion from the CTA definition, XYZ must register as a CTA.

(3) In the same factual scenario as in Example (2), XYZ does not receive a fee from each of the listed CTAs, but instead receives revenues from various advertisers on its website. In this case too, XYZ is required to register as a CTA. The profit or compensation element of the CTA definition includes fees received from advertisers and need not flow directly from the person or persons advised or from the featured CTAs.

(4) *(Disclaimers)* Same facts as Example (2) above, except that XYZ also provides a disclaimer on its website that states "All materials and information provided with respect to the CTAs contained herein are not intended as commodity trading advice and we make no specific recommendations with respect to which CTA best suits your investment needs. The information is intended to enhance your futures investment decisions, not make them for you." Again, XYZ would be required to register as a CTA. XYZ has provided trading advice and cannot by disclaimer alter the reasonably

anticipatable effects of the information provided or the consequent registration requirements under the Act.

(5) *(Providing Leads)* WXY is in the business of generating leads and mailing lists for third party vendors who are engaged in various businesses. For a monthly fee, WXY's lead generating services are open to all businesses who wish to obtain mailing lists to solicit customers. WXY's website on the World Wide Web allows site visitors to "sign up" to receive information on products and services that are of particular interest to the site visitors by allowing the site visitors to click on various listed categories (e.g., "Click here if you would like to receive information on computers; Click here if you would like to receive information on insurance products"). One of the categories allows site visitors to click on a particular location if they are interested in receiving commodity trading and investment information. Site visitors are asked to register in a guest book which requests their name, electronic mail address, street address, income and other information.

WXY forwards to various CTAs the names of and other information concerning the persons who requested information on commodity trading and investments. By engaging in such activities, WXY would be operating as a "finder" since its purpose would be to seek clients on behalf of Commission registrants. WXY must therefore register as an AP of the CTAs to whom it furnishes customer names, or as a CTA.

(6) *(Electronic Mail to Specific Address May Not Defeat 4m(1) Exemption)* John Doe, a school teacher who studies the stock and futures markets for his own financial benefit and trades futures contracts for his own account, discusses his trades with his college roommate and friend, George, and two other friends whom he has known for twenty years. The three friends ask John to furnish commodity trading advice to them and John agrees to act as their CTA. John is not registered with the Commission in any capacity, has not previously furnished commodity trading advice to any other persons, and has not held himself out generally to the public as a CTA. John and his three friends all have computers and electronic mail addresses and all four persons use electronic mail on a regular basis to communicate with one another. John's three friends agree that John may provide them with commodity trading advice and other information relating to their commodity accounts through electronic mail to their electronic mail addresses to which only they have access. John's use of an individual electronic mail address for purposes of communicating commodity-related information to his three friends would not in this case defeat a potential Section 4m(1) exemption from CTA registration because the electronic mail communication in this instance is personal and direct and is limited to electronic correspondence with those three individuals.

(7) *(Placing Performance Data on a Generally Accessible Internet Site Would Be Inconsistent With 4m(1) Exemption)* Same facts as above except John also operates a website and he posts the performance data of

his friends' trading accounts on his website. By placing the performance data on a public electronic forum that can be readily accessed by others, John would be holding himself out as a CTA and thus would not satisfy one of the criteria of the Section 4m(1) exemption from CTA registration.

(8) *(Providing Telephone Directory for CTAs Does Not Require Registration as CTA)* XYZ operates a website that contains a directory which it represents to be a list of each registered CTA, containing the name, address, and telephone number for each CTA. Although XYZ may receive compensation from advertisers on its website, XYZ is not required to register as a CTA. In this case, the limited information provided on each CTA does not constitute commodity trading advice. Further, by providing a complete directory of all registered CTAs, and representing it as such, XYZ is making clear that it is not promoting or recommending any particular CTA but, rather, is providing a directory which interested persons can use to contact CTAs of their choice. Further, as XYZ provides an equivalent level of data for each registered CTA, it does not implicitly recommend or favor one CTA over another.

(9) *(Providing Biographical and Descriptive Information on Selected CTAs in a Manner That Implies Evaluation or Recommendation Requires Registration as CTA)* XYZ operates a website that contains a directory listing each registered CTA, containing the name, address, and telephone number for each CTA. Additionally, for certain CTAs, XYZ provides information concerning the types of trading programs they utilize and certain performance data. XYZ does not charge visitors to its website for access to this information but is compensated by CTAs for displaying advertisements at the top of certain web pages. Under these circumstances, XYZ must register as a CTA. Presentation of a compilation of biographical and descriptive data on certain CTAs has the effect, whether intended or otherwise, of promoting, recommending, or marketing the services provided by such CTAs. This conclusion is not affected by the fact that XYZ provides very basic biographical data on all CTAs, since XYZ has plainly distinguished among CTAs and highlighted certain CTAs for specialized attention. Moreover, XYZ is compensated for providing this information. As a result, absent the applicability of a specific exclusion, XYZ is required to register as a CTA.

(10) *(Compensation or Profit Includes Offer of Free Services for a Limited Time)* RST has created a new daily "e-zine" on the World Wide Web that is principally devoted to commodity trading advice provided by RST and promotion of RST's advisory services. To promote this new e-zine, RST is offering free trial subscriptions for a limited time, e.g., ninety days. After this initial trial period, users must pay RST's rate of \$20 per week. RST is required to register as a CTA. Even though RST is offering free subscriptions to all persons during its start-up period, it is nonetheless operating the "e-zine" and providing commodity trading advice for compensation or profit. As discussed above, the "compensation or profit" element of the

CTA definition includes the attraction of new customers.

(11) (*Gratuitous Leads, Discussions in Chat Rooms*) Sally Smith, an accountant, frequently interacts with other persons via a financial investment "chat room" on a major on-line service. During the course of these interactions, she advises other persons in the chat room concerning a recent investment she made in a commodity pool. She informs others in the chat room that she is exceptionally pleased with the returns on her investment and that she believes that the CPO is an excellent investment manager. In support of her remarks, she also provides the pool's performance data. Neither the CPO, its principals or anyone involved in the pool's operation is affiliated with Sally Smith or her employer. She does not receive any compensation or other consideration for her participation in the chat room, from the CPO, others in the chat room, the site provider, or otherwise, whether directly or indirectly. Sally Smith would not be required to register with the Commission as her chat room activity and the information that she is providing is strictly gratuitous.

(12) (*Compensated Leads, Discussions in Chat Rooms*) If in the same factual scenario as above in Example (11), Sally Smith is compensated by the CPO for soliciting members from the chat room, then Sally Smith would be required to register as an AP of the CPO.

(13) (*Use of Aliases, if Undisclosed, May Be Fraudulent*) In the same factual scenario as Example (11), Dave Doe, the CPO for the "Futures Pool," is also in the chat room. Unlike Sally Smith, Dave Doe does not use his real name when communicating with others in chat rooms; he uses the alias "HonestMan." Under this alias, Dave Doe tells others in the chat room that he has heard that the "Futures Pool" is an ideal pool for first time investors because it offers excellent performance and low fees. In response to an inquiry from someone in the chat room, "HonestMan" also states that "he has never heard of anyone losing money who invested in the Futures Pool," which he knows to be untrue. Dave Doe is in violation of the antifraud provisions of Section 4o of the CEA and Commission Rule 4.41. Additionally, Dave Doe has violated Commission Rule 4.21(a) because he has solicited prospective pool participants for the "Futures Pool" but has not delivered its Disclosure Document.

(14) (*Hypothetical Performance Must Be Accompanied by Cautionary Statement of Rule 4.41(b)*) LMN is a registered CTA who operates a website. LMN's website contains a table of contents. One of the items listed is a hyperlink to "Hypothetical Performance." On the Hypothetical Performance section of its website, which can be accessed only after a person has received a copy of LMN's Disclosure Document, LMN demonstrates that based upon hypothetical performance results, its trading program yields an annualized return of in excess of 60 percent. LMN does not provide any statements about the significance of hypothetical performance. LMN only states, in bold faced type, that "Past Performance is No Guarantee of Futures Results" and

"Futures Trading Entails Substantial Risk and May Not be for Everyone." LMN is in violation of Commission Rule 4.41(b), which requires that hypothetical or simulated performance be accompanied by the legend set forth in Rule 4.41(b)(i) or prescribed by the NFA pursuant to 4.41(b)(ii). In order to comply with Rule 4.41(b), LMN is required to post either the CFTC's or NFA's legend regarding hypothetical performance on the same webpage as, and presented so as to "prominently" accompany, the presentation of the hypothetical performance. LMN also may be in violation of the antifraud provisions of Section 4o of the CEA.

(15) (*Editing Unfavorable Comments From Guestbook May Violate Rule 4.41*) ABC is a CTA who maintains as part of its website an interactive guestbook on which individuals post comments or questions concerning ABC's trading system. ABC, which operates the website, has the ability to edit the comments received. ABC's website description of the guestbook implies that any person can post comments on the guestbook, both favorable or unfavorable. If ABC then edits any unfavorable comments he receives without indicating this fact to visitors, ABC may violate Rule 4.41. ABC also may be in violation of the antifraud provisions of Section 4o of the CEA.

B. Solicitation Activity

1. Registration

Other types of communication by means of electronic media may constitute solicitation activity, which gives rise to both registration and disclosure duties. Section 4k(3) of the Act requires registration as an AP of a CTA of any person associated with a CTA "as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity which involves (i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged." ⁷⁴ Similarly, Section 4k(2) requires the registration as APs of persons associated with a commodity pool operator "as a partner, officer, employee, consultant, or agent (or any person occupying a similar status or performing similar functions), in any capacity that involves (i) the solicitation of funds, securities, or property for a participation in a commodity pool or (ii) the supervision of any person or persons so engaged." ⁷⁵

"Solicitation" activity has been construed by Commission staff to include conduct that "influences even indirectly the investment of customer funds." ⁷⁶ For example, Commission

staff have found that initiating telephone contacts to identify persons interested in receiving information about futures trading ⁷⁷ and introduction of potential investors to a CPO for compensation, ⁷⁸ may constitute solicitation activity requiring registration. The breadth of the media encompassed by the definition of "solicitation" is comparable to that of the underlying CTA and CPO definitions, which are written broadly to reach all modes of communication and conduct. For instance, the CPO definition uses several alternative formulations of the transfer of consideration to the CPO, i.e., "solicit," "accept" and "receive" funds, securities, or property for the purpose of trading in futures contracts. As stated by CFTC staff, these formulations indicate that Congress "intended to achieve the broadest possible effect—namely, to cover all of the means by which a person can obtain control over pool participants funds." ⁷⁹ Similarly, as

In Congressional discussions occurring prior to the establishment of the Commission as an independent regulatory authority, the Subcommittee on Special Business Problems of the Permanent Committee on Small Business noted that:

In order to adequately protect the investing public, the subcommittee feels that registration requirements and fitness checks should be imposed on commodity solicitors, advisors, and all other individuals who are involved either directly or indirectly in influencing or advising the investment of customers' funds in commodities. This would include any individuals or organizations identified as influencing or actually investing funds in the commodities markets.

Subcommittee on Special Business Problems of the House Permanent Select Committee on Small Business, H.R. Rep. No. 93-963, 93d Cong., 2d Sess. at 36-37 (1974) (emphasis added).

⁷⁷ See Division of Trading and Markets Interpretative Letter No. 90-11, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,872 (June 12, 1990); Division of Trading and Markets Interpretative Letter 90-8, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,831 (May 7, 1990). The Commission's Office of the General Counsel ("OGC") has stated that employees of a registered FCM are required to register as APs if they initiate customer contact by telephoning prospective customers even if their responsibilities are limited to determining customer interest in speaking with a registered representative or receiving promotional literature and referring interested customers to a registered AP. OGC concluded that the initiation of telephone contact constituted a solicitation requiring registration as an AP. CFTC Interpretative Letter No. 77-8, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,430 (Office of the General Counsel, May 16, 1977).

⁷⁸ See, e.g., Division of Trading and Markets Interpretative Letter No. 90-4, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,588 (January 31, 1990) (a person who introduces a potential investor to a CPO and who is compensated as a "finder" would be soliciting on behalf of the CPO and thus required to register as an AP thereof).

⁷⁹ CFTC Interpretative Letter No. 75-17, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,112 (Office of the General Counsel, Trading and Markets, November 4, 1975).

⁷⁴ 7 U.S.C. 6k(3).

⁷⁵ 7 U.S.C. 6k(2).

⁷⁶ Division of Trading and Markets Interpretative Letter No. 90-11, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,872 (June 12, 1990).

noted above, the CTA definition refers to multiple types of media, including electronic media, as vehicles for providing trading advice.

The Internet provides a medium for a potentially broad range of solicitation and promotional activity, as well as for conveying trading advice. Plainly, CTAs and CPOs who use electronic media to inform members of the public of their futures activities are engaged in the solicitation of prospective customers. Thus, most websites of CTAs and CPOs on the World Wide Web are forms of solicitation. This is true even if the website is limited to biographical or descriptive information, for such data announces the CTA's or CPO's business to prospective clientele and can reasonably be assumed to elicit the interest of potential customers.

Similarly, a website that is not operated by a CTA or CPO, but which identifies potential customers for one or more CTAs or CPOs or evokes potential customer interest in such CTAs or CPOs generally would constitute a solicitation. For example, a website marketing the trading programs of selected CTAs would constitute a solicitation on behalf of such CTAs. Likewise, the operator of a website that accepts and forwards to a CTA or CPO the names and addresses of potential customers, and receives compensation for such referrals from the CTA or CPO, would be soliciting on behalf of the CTA or CPO. Consequently, the operators of such sites may be required to register as APs of the CTA on whose behalf the solicitation was undertaken,⁸⁰ and as an AP of the CPO on whose behalf the solicitation occurs.

2. Required Delivery of Disclosure Document

Commission regulations require that at or before the time a CTA solicits or enters into an agreement to direct or guide a customer's account,⁸¹ or a CPO

directly or indirectly solicits its, accepts or receives funds from a pool participant,⁸² such CTA or CPO must "deliver or cause to be delivered" to the prospective client or pool participant a Disclosure Document that conforms to the applicable rules.⁸³ The requirement to deliver a Disclosure Document attaches irrespective of the medium through which solicitation occurs. Consequently, a CTA or CPO soliciting prospective customers or pool participants by means of electronic media must "delive[r] or caus[e] to be delivered" a required Disclosure Document prior to such solicitation by prominently providing a copy of that document at, or through hyperlinks with, the same site at which the solicitation occurs or by delivering a hardcopy Disclosure Document to a prospective customer prior to providing access to any electronic solicitation.⁸⁴ Application of the delivery requirement in the context of electronic media is discussed below in the following section.

With respect to CTAs, the requirement to deliver a Disclosure Document applies only where the CTA solicits a prospective client to "direct" or "guide" his account.⁸⁵ The term "direct" as used in Rule 4.31 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."⁸⁶ Although the term "guide" is not defined in Part 4, the Commission referred to the term

agreement (whichever is earlier), delivers or causes to be delivered to the prospective client a Disclosure Document for the trading program pursuant to which the trading advisor seeks to direct the client's account or to guide the client's trading, containing the information set forth in §§ 4.34 and 4.35.

17 CFR 4.31(a).

⁸² Rule 4.21(a) provides:

No commodity pool operator registered or required to be registered under the Act may, directly or indirectly, solicit, accept or receive funds, securities or other property from a prospective participant in a pool that it operates or that it intends to operate unless, on or before the date it engages in that activity, the commodity pool operator delivers or causes to be delivered to the prospective participant a Disclosure Document for the pool containing the information set forth in § 4.24; * * *.

17 CFR 4.21(a).

⁸³ The Disclosure Document required to be furnished by a CTA must contain the information set forth in Rules 4.34 and 4.35. The Disclosure Document required to be furnished by a CPO must contain the information set forth in Rules 4.24 and 4.25.

⁸⁴ As discussed below, CTAs and CPOs may provide an outline or table of contents of the website prior to the reader receiving a Disclosure Document.

⁸⁵ See discussion of managing customer accounts, *supra* note 50.

⁸⁶ 17 CFR 4.10(f).

"guide" in implementing regulations requiring the delivery of a Disclosure Document by CTAs.⁸⁷ In that release, the Commission stated that Rule 4.31 "established disclosure requirements for CTAs that seek to control clients' accounts (e.g., through managed accounts) or influence clients' commodity interest trading by means of a systematic advisory program (e.g., through guided accounts)."⁸⁸ Thus, CTAs who solicit actual or prospective clients through electronic media for purposes of directing or guiding customer accounts must provide each such customer with a Disclosure Document at or before the time of solicitation. CTAs who do not direct or guide customer accounts, e.g., those who provide trading advice in a newsletter, would not be required to provide prospective clients with a Disclosure Document.

The following examples are illustrative of the requirements discussed above.

(16) (*Posting Promotional Materials is a Solicitation Requiring Disclosure Document Delivery*) XYZ is a CTA who operates a site on the World Wide Web. On its website, XYZ provides a description of its principals and a brief summary of its trading strategy and the types of accounts it manages. XYZ also provides its phone number and electronic mail address for interested persons to contact it. XYZ does not provide a copy of its Disclosure Document. In this case, XYZ is violating Rule 4.31(a) because it is soliciting prospective clients without delivering a Disclosure Document.⁸⁹

(17) (*Posting Descriptive Performance Information or Performance Data is a Solicitation Requiring Disclosure Document Delivery*) JKL, a registered CPO, operates a site on the World Wide Web. The website provides biographical information about the principals of the CPO and investment opportunities that the CPO offers, including various commodity pools with differing risk parameters and performance histories. JKL's website also posts summary performance information for the various commodity pools. The posting of biographical and investment information operates as a solicitation, as does posting of summary performance data. Thus, JKL would be required to provide the Disclosure Documents for its various pools to the website visitors at or before the time it engages in the solicitation. JKL must provide its Disclosure Documents either directly on its website or by means of prominently highlighted hyperlinks from its website and ensure that visitors receive the Disclosure Documents at the same time as or before their viewing of other website materials, i.e., the time at which the solicitation occurs. The

⁸⁷ 44 FR 1918, 1923 (January 8, 1979).

⁸⁸ *Id.*

⁸⁹ Guidance regarding the manner by which CTAs and CPOs may deliver Disclosure Documents by means of a website is provided in the following section.

⁸⁰ If such persons are already registered as CTAs or CPOs, registration as an AP of that registration category is not required. Further, the definition of an AP of a CTA includes only persons who are involved in "(i) the solicitation of a client's or prospective client's discretionary account or (ii) the supervision of any person or persons so engaged." 7 U.S.C. 6k(3). Thus, the appropriate registration category for persons who solicit on behalf of CTAs who do not manage accounts is that of CTA, as they are providing trading advice by advising concerning or marketing the services of certain CTAs.

⁸¹ Rule 4.31(a) provides:

No commodity trading advisor registered or required to be registered under the Act may solicit a prospective client, or enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading by means of a systematic program that recommends specific transactions, unless the commodity trading advisor, at or before the time it engages in the solicitation or enters into the

reader must review the Disclosure Document before being permitted access to the biographical and other information. JKL also must inform visitors that, in addition to reviewing the various Disclosure Documents on-line, they may obtain printed copies of the Disclosure Documents upon request.

(18) Same facts as above, except JKL's website does not provide a copy of JKL's Disclosure Documents or hyperlink to them. Rather, following the performance data, the website provides a telephone number that persons can call to request the delivery of specific commodity pool Disclosure Documents. The placement of performance information on a website followed by a telephone number that visitors can call to request a Disclosure Document would be insufficient to satisfy the requirements of Rule 4.21(a) as delivery of the Disclosure Document would not accompany or precede the solicitation.

(19) (*Delivering a Disclosure Document Necessary for Solicitation of Prospective Pool Participants*) ABC is a registered CPO who operates a website on the World Wide Web. On its website, ABC provides a brief description of the various commodity pools it offers. ABC also provides copies of each of its Disclosure Documents, in an acceptable format, which visitors to its website must access from a menu of options at the beginning of its homepage, before proceeding to any further information concerning one of the offered commodity pools. By providing access to each of its Disclosure Documents and assuring that the prospective participant accessed the relevant Document before receiving any information other than a brief description of the pool, ABC has complied with Rule 4.21(a), which requires that at or before the time a CPO solicits a prospective participant, the CPO deliver to the prospective client a Disclosure Document for such commodity pool.

(20) (*Term Sheet Cannot Replace Disclosure Document*) In the same example as above, instead of providing the Disclosure Documents for each of the pools, ABC provides a notice of intended offering and statement of the terms of the intended offering ("term sheet"). ABC's pools do not accept investors who are not "accredited investors," as defined in 17 CFR 230.501(a). Nevertheless, ABC has not satisfied the criteria of Rule 4.21(a). Since ABC's term sheet can be accessed by persons who are not "accredited investors," ABC is soliciting such persons without having provided a copy of its Disclosure Document.

(21) (*Distribution of Promotional Materials Through Personal Electronic Mail is a Solicitation Requiring Disclosure Document Delivery*) ABC is a CTA who operates a site on the World Wide Web. Visitors to ABC's website, who may not have reviewed ABC's Disclosure Document, are invited to give their electronic mail address so that ABC can put them on its electronic mailing list. Periodically, ABC sends to those persons who have provided electronic mail addresses information concerning ABC's monthly performance results. Use of electronic mail in this manner operates as a form of solicitation. Accordingly, ABC may not send performance data or comparable information to

prospective clients by means of electronic mail unless it has previously delivered its Disclosure Document to them. Failure to deliver a Disclosure Document to persons whom it solicits by electronic mail would constitute a violation of Rule 4.31.

ABC may periodically send electronic mail to prospective clients after they have received a copy of its Disclosure Document for as long as that Disclosure Document remains valid. If, however, ABC revises its Disclosure Document to reflect changes in its trading program, or the Document becomes out of date, ABC would be required to cease sending electronic mail to prospective clients until after it has delivered to each such client a copy of its new Disclosure Document.

III. Electronic Delivery of Disclosure Documents

The Commission is cognizant of the potential benefits of electronic communication of information among participants in the futures markets generally and in the managed futures marketplace in particular. Electronic technology may enhance information access by market users and facilitate communication by brokers and other commodity professionals. A number of CTAs and CPOs have expressed interest in using electronic media to provide existing and prospective clients or pool participants with Disclosure Documents and other required disclosures. A central goal of this release is to provide guidance as to the circumstances in which electronic media may be used for these purposes.

The Commission believes that, as a general matter, the requirements that CTAs and CPOs deliver Disclosure Documents to prospective clients and pool participants, respectively, may be satisfied by the use of electronic media, provided appropriate measures are taken to assure that the purposes of the delivery requirement are achieved. By this release, the Commission is giving notice that CTAs and CPOs may use electronic media in accordance with the criteria discussed below⁹⁰ to satisfy the Disclosure Document delivery requirement as to consenting prospective customers and pool participants and to provide certain related documents, as specified below. The Commission invites comment on these criteria and any additional criteria that commenters believe to be relevant in this context.

A. Criteria

Consistency. The Commission believes that it is important to maintain consistency in the application of regulatory requirements as between

electronic and non-electronic media. Information conveyed electronically must achieve the same objectives as paper-based communications. Further, the rules applicable to such communications should not favor one form of communication over another; to the extent possible, they should be "form neutral." The medium for providing required information should be selected based upon the relative merits of the two methods of communication, not the application of the Commission's regulations.

Choice/Consent. Although the Commission supports the use of electronic media to enhance the speed and efficiency of communications by futures professionals with market participants, it recognizes that even among those persons who have access to electronic delivery, many may prefer to receive information in paper form. Accordingly, a CTA or CPO may use electronic delivery in lieu of traditional paper-based delivery of a Disclosure Document only where the intended recipient provides informed consent to receipt of the document by means of electronic delivery. Similarly, informed consent also must be obtained from a pool participant if a CPO plans to use electronic media to deliver monthly or quarterly account statements required under Rule 4.22.⁹¹

CTAs and CPOs who intend to make electronic delivery must inform potential recipients concerning: (1) the requirement that prospective managed account customers and commodity pool participants receive a Disclosure Document for the relevant trading program or commodity pool at or prior to the time of solicitation and such other documents as the CTA or CPO seeks consent to deliver by electronic media; (2) their right to elect to receive the Disclosure Document (and other

⁹¹ The requirement of a manual signature on such statements pursuant to Rule 4.22(h) may be satisfied if the CPO keeps a manually signed copy at its place of business in accordance with Rule 4.23. See Division of Trading and Markets Interpretative Letter No. 93-61, [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 25,780 (June 24, 1993) (CPO may use facsimile signature pursuant to Rule 4.22(h) provided CPO retains the Account Statement from which facsimile is made in accordance with Rule 4.23); cf. Advisory No. 28-96 [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,711 (May 28, 1996) (use of personal identification number may be deemed equivalent of manual signature for purposes of attestation under Commission Rule 1.10(d)(4)), *supra* note 25. Commission regulations do not currently permit CPOs to deliver Annual Reports by electronic means. However, the Commission invites comment from CPOs, accounting professionals, and other interested persons regarding the advisability of amending Rule 1.16 to allow for certification of Annual Reports by independent public accountants by means of electronic media.

⁹⁰ Some of these criteria have been noted by the SEC in its releases on electronic media. See 61 FR 24644; 60 FR 53458.

specified documents to the extent consent is sought for electronic delivery of other communications) in hardcopy form or by electronic means; (3) the specific medium and method by which electronic delivery will be made (for example, whether delivery will be limited to users of a particular proprietary on-line system, will be made available on the World Wide Web, or will be made as an attachment to electronic mail); (4) the potential costs associated with receiving or accessing electronically delivered documents, such as costs relating to on-line access charges, the requirement to maintain an electronic mail account, or the need to possess certain proprietary software packages (such as a particular word processing program or operating system); (5) the types of documents that will be delivered electronically, *i.e.*, documents in addition to the Disclosure Document, such as supplements to Disclosure Documents and pool account statements, and the form in which they will be delivered; and (6) the prospective customers' right to revoke their consent to electronic delivery at any time and the period of time during which the consent to electronic delivery will be effective, absent revocation. Notification concerning at least each of these factors is necessary to the receipt of informed consent from the intended recipient. As informed consent must be revocable at any time, if a person initially agrees to receive certain required disclosures electronically, he must be permitted to revoke such consent at any time, and the CTA or CPO must then provide him with disclosures in hardcopy form. Potential recipients of electronic communication may provide their informed consent either in writing or by electronic means.

Delivery and Access. As noted previously, Commission rules require that at or before the time at which a CTA or CPO solicits a prospective client or pool participant, respectively, he must deliver, or cause to be delivered, the applicable Disclosure Document.⁹²

⁹² As noted by example above, a CPO may not satisfy the requirements of Rule 4.21(a) by electronically posting a "term sheet." Rule 4.21(a) provides that "where the prospective participant is an accredited investor, as defined in 17 CFR 230.501(a), a notice of intended offering and statement of the terms of the intended offering may be provided prior to delivery of a Disclosure Document * * *." In posting a term sheet on a public electronic forum, a CPO is soliciting all persons who are able to access such term sheet, many of whom may not be "accredited investors." Consequently, unless a CPO restricts access to its term sheet to "accredited investors" only, a CPO must also provide a copy of its Disclosure Document in accordance with the criteria set forth herein in order to comply with the requirements of Rule 4.21(a). In any event, to the extent that the

When a person delivers a document by means of postal mail or provides the document personally, the recipient simultaneously has notice of the delivery of the document and receives the actual document. By contrast, when a person distributes a document by means of electronic media, the document (a) will be available only to persons who possess the necessary computer equipment and software to receive it, (b) must be brought to the intended recipient's attention and (c) will be accessible only to recipients who take certain actions in order to access and review the document.

The prospective client or pool participant must be provided the relevant Disclosure Document prior to or at the time of solicitation. In general, the breadth of the term "solicitation," combined with the requirement to deliver a Disclosure Document at the time of or prior to solicitation, significantly restricts the information that CTAs or CPOs may present about their services prior to delivering a Disclosure Document. As discussed above, even preliminary contacts or communication of basic information may constitute a solicitation. Indeed, a website operated by a CTA who simply identifies himself as such may operate as a solicitation, even without other content. Consequently, if for example, a CTA's Disclosure Document is presented at the end of the CTA's website, or made available only at the option of the reader, delivery of the Disclosure Document may occur only after the solicitation has occurred, if at all. In such instances, the CTA operating the website would be in violation of Commission rules with respect to delivery of Disclosure Documents prior to or at the time of solicitation. To facilitate the operation of websites by CTAs and CPOs in a manner consistent with Commission rules and without unduly burdening the use of this medium, the Commission provides the following guidance.

First, a website must provide access to the Disclosure Document prior to any content other than *de minimis* introductory material. For example, a visitor may be given a general description of the contents of a website before reviewing the Disclosure Document. This may be accomplished

CPO intends the offering to be an exempt private offering under SEC Regulation D, such CPO must comply with the solicitation and advertising restrictions in SEC Rule 502(c). See 60 FR at 53463-64 (in which example (20) of SEC's release indicates that placing offering materials on Internet would not be consistent with prohibition against general solicitation or advertising in Rule 502(c) of Regulation D).

through presentation of an outline or table of contents for the website, with the Disclosure Document listed as the first item in the outline or table of contents. The outline or table of contents may include topic headings that are neutrally stated, such as "Disclosure Document", "Background of CTAs" and "How to Contact Us." Icons or images also may accompany such topic headings, but both the topic headings and any icons or images must be presented neutrally.

The website must be constructed so that the reader may not proceed to subsequent sections of the site until he has first accessed and proceeded through the Disclosure Document. Thus, if an outline or table of contents is used, the only active hyperlink should be to the Disclosure Document. For example, if a visitor attempts to view another portion of the website, the website should inform the visitor that he must first access the Disclosure Document before he will be allowed elsewhere in the website. Only after a visitor has been delivered a Disclosure Document and affirmed that he has reviewed it may hyperlinks to other sections of the website be activated.

Delivery of a Disclosure Document for purposes of solicitation, *i.e.*, Commission Rules 4.21(a) and 4.31(a), will be complete when the recipient scrolls down to the end of the Disclosure Document and confirms that he has received the Document. Many website operators currently employ similar designs, for example, in requiring persons to agree to a set of terms and conditions before proceeding in a website or to acknowledge that they are of a certain age. This confirmation of delivery is for the purpose of complying with the requirement that the Disclosure Document be provided at or before the time of solicitation. This confirmation, which is required in the context of electronic presentations of solicitation material, is distinct from the receipt of acknowledgment that is required before a prospective pool participant or client may open an account pursuant to Rules 4.21(b) and 4.31(b). The requirements for obtaining a receipt of acknowledgment under Rules 4.21(b) and 4.31(b) are discussed below in the acknowledgment section.

Websites that contain multiple trading programs or commodity pools may contain a separate Disclosure Document for each such program or pool. CTAs or CPOs, however, are not required to deliver a Disclosure Document for every trading program or commodity pool before allowing a potential client or pool participant access to all portions of a website. Rather, a CTA or CPO may

allow a prospective investor to select a particular trading program or commodity pool, and following delivery of the Disclosure Document for such program or pool, the prospective investor may access general information or material specific to such program or pool. CTAs or CPOs who operate several trading programs or commodity pools must ensure that there is no solicitation on behalf of programs or pools for which a Disclosure Document has not been delivered and reviewed. For example, a CPO who delivers a prospective pool participant a Disclosure Document for "Pool A" must not allow such prospective pool participant to access materials on his website pertaining to "Pool B."

Commission rules require that a CPO or CTA deliver a particular Disclosure Document only once; consequently, with respect to "repeat visitors," separate delivery is not required for subsequent solicitations for the same pool or trading program so long as the Disclosure Document has not changed or expired. Thus, CTAs and CPOs may design websites systems that allow "repeat visitors" who have already reviewed a Disclosure Document to bypass the requirement to receive that Disclosure Document again. For example, a prospective investor, after receiving the required Disclosure Document(s), may be given a password or PIN to enter at the beginning of a CTA's or CPO's homepage to allow him to bypass the consent and Disclosure Document delivery portions of the website for the trading program(s) or pool(s) for which he has already received a Disclosure Document. However, in order to comply with Commission Rules 4.26 and 4.36, the password or PIN must expire once the CPO or CTA amends his Disclosure Document(s) or the effective period of the Disclosure Documents expires.

Documents can be delivered electronically in a variety of ways; some of these methods require very little effort on the part of the recipient, whereas others demand substantial computer expertise or lengthy download times.⁹³ The Commission believes that

delivery should be made in a manner that is not unduly burdensome to the recipient of the document. In cases where information is unduly burdensome to access, the Commission will deem such delivery to be ineffective unless the party making delivery can demonstrate that the recipient actually accessed the document. In the case of a Disclosure Document, an acknowledgment of receipt, provided that it is fully informed and voluntary, should suffice for this purpose.

However, electronic media present special concerns with respect to access because an acknowledgment of receipt in this context does not evidence the ability to access the document over time. The Commission believes that the recipient of electronically delivered documents should be able to have repeated access to the document following delivery. Such accessibility should be comparable to that of a paper document that can be read and re-read over time.⁹⁴ The ability to re-read a document, such as a Disclosure Document, is often necessary to a careful evaluation of the risks and benefits of a particular investment or a meaningful comparison of Disclosure Documents of different pools or trading programs. Accordingly, in order for the electronic delivery of Disclosure Documents to satisfy the Commission's requirements, the recipient must be able to access the document upon receipt and continually thereafter. If the method of electronic delivery of a Disclosure Document requires the reader to download a file to a permanent storage device (such as a hard drive) and to confirm that he has done so, the accessibility concern may be addressed. However, in other circumstances, such as where a Disclosure Document is not downloaded, the Commission believes that accessibility of the Disclosure Document to the prospective (or actual) CTA client or commodity pool participant for a period of nine months after the solicitation occurs would be sufficient but requests comment on this issue.

Acknowledgments. The requirement to deliver a Disclosure Document is only part of a CTA's or CPO's obligation.

does not necessarily intend to preclude any particular types of electronic transfer but, instead, is seeking to ensure that the recipient is able to access the information communicated without substantial burden.

⁹⁴ For example, a "one-time" or "live" broadcast over the Internet generally does not allow a recipient repeated access to the information. In the absence of adequate evidence that the intended recipient actually recorded or stored the information, this method of presentation would not satisfy the access concerns identified above.

Before a CTA may enter into an agreement with a prospective client to direct or guide his account, or before a CPO may accept or receive funds, securities or property from a prospective pool participant, such CTA or CPO must receive a signed and dated acknowledgment from the prospective client or pool participant confirming receipt of the Disclosure Document for the trading program or pool, respectively.⁹⁵ A CPO or CTA may not rely solely on the fact that a prospective investor may have visited the Disclosure Document while reviewing a CPO's or CTA's homepage or consented to receive a Disclosure Document by electronic media.⁹⁶ The signed and dated acknowledgment is a certification by the prospective investor that he has received the required Disclosure Document and is among the items required to be kept by CPOs and CTAs under the Part 4 recordkeeping requirements.⁹⁷

The Commission supports the use of electronic media to obtain customer acknowledgments but believes that measures must be taken to assure an adequate level of verification of the authenticity of such acknowledgments. Requiring the reader to send an electronic mail message or click on an "acknowledgment button" on a website would not, without more, be sufficient for this purpose. As discussed above, the Division of Trading and Markets has permitted the use of a personal identification number ("PIN") to represent a manual signature for the transmission of certain financial reports in which a manual signature normally is required.⁹⁸ The use of a PIN serves two important objectives. First, it enables the recipient, to the extent practicable, to verify the identity of the person sending the electronic communication. If an electronic transmission is

⁹⁵ See Rule 4.31(b) and Rule 4.21(b) for CTAs and CPOs, respectively.

⁹⁶ As noted previously, the requirement of a signed acknowledgment of receipt is distinct from that of delivery, *i.e.*, an adequate delivery mechanism may be implemented without receipt of a signed acknowledgment of receipt. In the recent revisions to Part 4, 60 FR 38146 (July 25, 1995), the Commission confirmed the importance of the requirement that the prospective investor separately acknowledge receipt of the required Disclosure Document but commented that "an acknowledgment may be included in the subscription documents for a pool, provided that the text of the acknowledgment is prominently captioned and distinguished from the subscription agreement and that there is a separate line for the acknowledgment signature and date thereof." 60 FR at 38181.

⁹⁷ See Commission Rules 4.23(a)(3) and 4.33(a)(2), respectively.

⁹⁸ Advisory No. 28-96, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,711 (May 28, 1996), discussed *supra* note 25.

⁹³ Certain methods of delivery require relatively little sophistication on the part of the user. For instance, the content of a site on the World Wide Web can be accessed simply by entering that address into a "web browser" program. Similarly, the contents of an electronic mail message are viewed simply by reading the electronic mail screen or by viewing an attachment to electronic mail that is formatted for a widely available word processing program. On the other hand, where a party must download a file and also a program to decode that file (*e.g.*, "unzip" programs), it is less certain that such party will ultimately be able to access the document. In raising this concern, the Commission

accompanied by a unique and valid PIN, and the recipient knows the identity of the person who requested and received such PIN, it then may confirm the identity of the sender of such message. Second, use of PINs helps to protect innocent persons from false claims that they have sent a particular electronic communication. If a message is sent by one person claiming to be another, the failure to include the valid PIN assigned to such person would render the message invalid. Although the Commission invites comments from interested parties generally on methods to assure the validity of electronic acknowledgments, it believes that a PIN system similar to that used by FCMs for the filing of financial reports with certain self-regulatory organizations would provide an acceptable form of obtaining acknowledgments of receipt of Disclosure Documents. Under Rules 4.21(b) and 4.31(b), CPOs and CTAs bear the burden of obtaining a valid acknowledgment of receipt from prospective pool participants and clients; they are thus responsible for establishing procedures adequate to establish the authenticity of electronic acknowledgments and to preserve records thereof. Currently, in light of this concern, if a CTA or CPO wishes to establish a system for the electronic acknowledgement of receipt of a Disclosure Document, it must create a procedure by which the prospective client or pool participant requests and receives by means of electronic or postal mail an individualized PIN from the CPO or CTA. Once a person receives a PIN, he may then use that PIN in lieu of a manual signature to authenticate the acknowledgment of receipt.⁹⁹ The mechanics of using a PIN signature are illustrated by example below. The Commission welcomes comment concerning other procedures for electronic acknowledgment that are consistent with the objectives stated above.

Of course, CTAs or CPOs, even those providing a Disclosure Document by electronic media, are not required to obtain acknowledgments of receipt electronically. A CTA or CPO may require that the prospective client or pool participant provide a signed and dated paper acknowledgment by mail or facsimile, although the acknowledgment

form may be sent to prospective investors by mail, facsimile, or through the Internet.

Format. The Commission's rules contain a number of specific format requirements relevant to Disclosure Documents, reflecting the Commission's determination that certain information should be accorded special prominence in the Disclosure Document. Parameters for the order of presentation ensure that certain key information is presented first, that important disclosures are not minimized or relegated to the end of the document, and that information of lesser relevance is placed after matters of greater importance. The prescribed order also facilitates the comparison of documents by maintaining the same sequence of topics across documents of different registrants. For example, Rules 4.24, 4.25, 4.34 and 4.35 include specifications as to the placement in Disclosure Documents of required risk disclosure and cautionary statements, tables of contents, and supplemental information, as well as the sequence of various past performance records.¹⁰⁰ In addition, certain items are required to be set forth in capital letters and bold-face type, certain information is required to be accompanied by cautionary legends or disclaimers, and in some contexts, page number cross-references are required.¹⁰¹

Where Commission rules specify the prominence, location, or other attributes of the information required to be delivered, any acceptable electronic presentation of such information used to satisfy Commission rules must present the information in the same format and order as specified in Commission rules and must reflect (if it does not actually replicate) the differences in emphasis and prominence that would exist in the paper document.¹⁰² Further, the addition of any audio, video or graphic material, whether included as separate sections or as enhancements or overlays to written text, must be consistent with

the requirements of Commission rules regarding the order of presentation and the relative prominence of information.¹⁰³ Such material would constitute "supplemental information"¹⁰⁴ and thus must be presented in the Disclosure Document in accordance with Rules 4.24(v) and 4.34(n).¹⁰⁵ Such material may not be presented in a manner that obscures or diminishes the prominence of any required disclosures. If one version of a document contains audio, video, graphic or other material that cannot be included in another version, e.g., if the electronic version of a Disclosure Document has an audio narration, such material must be reproduced in the medium of the version that does not actually contain the material.¹⁰⁶

Modifications. Commission Rules 4.26 and 4.36 require that Disclosure Documents be used for no more than nine months and that performance information included therein be current as of a date not more than three months prior to the date of the Disclosure Document. Additionally, if at any time the Disclosure Document becomes materially inaccurate or incomplete, the registrant must correct the defect and distribute the correction to, in the case

¹⁰³ For example, Rule 4.25(a)(3)(ii) requires that performance results for pools of a different class from the offered pool be presented "less prominently" than the performance of pools of the same class. Audio, video or graphic devices may not be used in a manner that is inconsistent with this requirement. Similarly, an audio voice-over that asks a prospective client to turn directly to the CTA's performance tables, bypassing the cautionary and risk disclosure statements and the forepart information required by Rule 4.34 (a), (b) and (d), is not permitted.

¹⁰⁴ "Supplemental information" refers to "information not specifically called for by Commission rules or federal or state securities laws or regulations." 60 FR at 38150.

¹⁰⁵ Rules 4.24(v) and 4.34(n) specify that supplemental performance information (not including proprietary, hypothetical, extracted, pro forma or simulated trading results) must be placed after all required performance information in the Disclosure Document and that supplemental non-performance information relating to a required disclosure may be included with the related required disclosure. Other supplemental information may be included only after all required disclosures. 17 CFR 4.24(v) and 4.34(n). Rules 4.24(v) and 4.34(n) also provide that supplemental information may not be misleading in content or presentation or inconsistent with the required disclosures and is subject to the antifraud provisions of the Act and Commission and NFA rules.

¹⁰⁶ Commission Rules 4.26(d) and 4.36(d) require that a CPO or CTA, respectively, file a Disclosure Document with the Commission prior to its use. To the extent that a Disclosure Document contains any audio, video, or graphic material, the CPO or CTA must file that version as well as any paper version. CPOs and CTAs who are required to file a Disclosure Document that contains audio, video, or graphic portions should contact the Division of Trading and Markets to establish a method whereby the Commission may receive such documents.

⁹⁹ The Commission notes that various states have established or are developing requirements for "digital signatures." See, e.g., "Utah Digital Signature Act," Utah Code Ann. 46-3-101 *et seq.* (1995). To the extent that a particular state recognizes as valid only certain digital signatures, it is the responsibility of the registrant to ensure compliance with such rules in order to comply with state law requirements.

¹⁰⁰ See Rules 4.24(a) through (d), 4.24(v), 4.25(a)(2) and (3), 4.34(a) through (d), 4.34(n) and 4.35(a)(2).

¹⁰¹ See Rules 4.24 (a) and (b), 4.25 (a)(9) and (c), 4.34 (a) and (b), 4.35 (a)(8) and (b) and 4.41(b)(1).

¹⁰² For example, where text is required to be presented in bold-face type, acceptable on-screen presentation could be accomplished by changing the color or shading of the text and/or the background in a prominent manner. In addition, information such as the break-even point per unit of initial investment must be presented in the forepart of the Disclosure Document and the Risk Disclosure Statement, which must appear immediately following disclosures required to be on the cover of the Disclosure Document, must highlight the page (or highlight the link) where the break-even point is presented. If the document is not paginated, a registrant may use hyperlinks in lieu of page numbers.

of a CPO, all existing pool participants and previously solicited pool participants prior to accepting or receiving funds from such prospective participants,¹⁰⁷ and in the case of a CTA, all existing clients in the trading program and each previously solicited client for the trading program prior to entering into an agreement to manage such prospective client's account.¹⁰⁸ For persons who have consented to receive such information electronically, registrants may provide amendments and updates in the same manner, provided that such recipients' consent to the use of electronic media extends to amendments and updates.

One of the salient features of electronic media is the ability to modify or update information more simply and more frequently than in a paper environment. On the Internet, many financial service providers update their performance on a daily basis, a practical impossibility using conventional postal mail.¹⁰⁹ The Commission believes that the greater timeliness of information that electronic media is capable of providing is an important benefit. Certainly, therefore, information contained in electronic form can be expected to be at least as current as that in paper form. Consequently, where a registrant employs electronic and paper media, the electronic version of any publicly disseminated document must be at least as current as any paper-based version. If registrants elect to update their performance more frequently than is required, any such performance history must be calculated and presented in accordance with Commission rules.

Record Retention. Another important area of regulatory concern in the context of electronic media is that of recordkeeping, as provided by Commission Rules 4.23 and 4.33.¹¹⁰ These rules require that CPOs and CTAs keep, among other records, "the original

or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be delivered * * * showing the first date of distribution or receipt if not otherwise shown on the document."¹¹¹ The Commission's Part 4 recordkeeping requirements thus extend to the contents of CTA and CPO websites and related electronic mail messages. The Commission's rules concerning the use of electronic media for recordkeeping, e.g., optical disk or CD-ROM storage, permit storage of computer generated records in ASCII or EBCDIC format only.¹¹² These formats generally do not allow storage of paper records or electronic images, such as webpages, since such records or images are normally not written in ASCII or EBCDIC format. Therefore, these records would be required to be retained in hardcopy form. The Commission invites interested parties to comment concerning whether these rules, and in particular, Rule 1.31, are sufficient to address record retention in the current electronic environment.

The following examples are illustrative of the requirements discussed above.

(22) (*Hyperlink to Disclosure Document From Homepage Satisfies Delivery Obligation*) RST is a CTA who operates a site on the World Wide Web. RST provides copies of its Disclosure Documents, in an acceptable format, which visitors to its website can access from a menu of options at the beginning of its website. Before the visitor may access data on the website other than the menu or table of contents, such as a description of RST's principals and summaries of its trading programs, performance data, or other matters, visitors must select and view a Disclosure Document for the trading program(s) in which they are interested. By providing access to each of these Disclosure Documents and assuring that the visitor has reviewed the Disclosure Document prior to proceeding, RST has complied with Rule 4.31(a), which requires that at or before the time a CTA solicits a prospective client, the CTA deliver to the prospective client a Disclosure Document for the trading program pursuant to which the CTA will direct or guide the account.

(23) (*Obtaining Informed Consent*) GHJ is a CTA with a site on the World Wide Web. On the first page of GHJ's website, and before any solicitation materials are presented, is a page requesting informed consent from visitors to receive GHJ's Disclosure Document by electronic means. This page informs visitors that: (a) prospective managed

account clients must receive a Disclosure Document; (b) they can receive the Disclosure Document in hardcopy if they prefer; (c) the electronic version of the Disclosure Document will be contained in a portion of GHJ's website; (d) persons accessing the electronic version of the Disclosure Document may incur charges relating to on-line access fees; (e) the original Disclosure Document as well as any amendments thereto will be provided on the website; and (f) visitors have the right to revoke their consent to receive electronic delivery at any time. At the bottom of the webpage is a button for visitors to "click" if they consent to receive electronic delivery of GHJ's Disclosure Document and any amendments thereto. If a visitor "clicks" on the acknowledgment button, he is hyperlinked to a copy of GHJ's Disclosure Document. If a visitor "clicks" on a button signifying that he does not provide his consent to receive a Disclosure Document by electronic means, he is then hyperlinked to a form asking for his name and postal address, which will be used to send a hardcopy Disclosure Document through postal mail and is not allowed to view any other portions of the website. GHJ's website properly obtains informed consent from visitors. Before engaging in any solicitation activity, GHJ obtains informed consent to deliver the Disclosure Document electronically. Then, immediately upon receipt of such consent, visitors are delivered the Disclosure Document. Once a visitor scrolls down to the end of the Disclosure Document and acknowledges that he has received the Disclosure Document, he may view other data on the site. However, before the visitor may open a managed account with GHJ, an acknowledgment of receipt of the Disclosure Document in accordance with Rule 4.31(b) must be obtained, either electronically (see example 25 below) or in hardcopy.

(24) (*Registrant May Require Acknowledgment to be Returned by Postal Mail*) X, a registered CTA, has established a site on the World Wide Web. After users review X's Disclosure Document, they may access other portions of X's website. In the section dealing with opening an account, users are informed that before a trading account may be opened with X, a prospective client must download X's Disclosure Document and return a signed acknowledgment of receipt thereof. On X's website is a form receipt of acknowledgment, with a statement informing the user that the acknowledgment must be printed, and signed, dated and returned to X by postal mail before X will open an account for the user. Receipt of such an acknowledgment would comply with Rule 4.31(b). Registrants are permitted to distribute Disclosure Documents to prospective clients electronically and may obtain acknowledgments of receipt electronically. However, they are not required to do so. A CTA operating a site on the World Wide Web may require that acknowledgments be signed, dated and returned by postal mail.

(25) (*Acknowledgments May Be Signed Electronically With a Personal Identification Number*) LMN, a registered CTA, operates a

¹⁰⁷ 17 CFR 4.26(c)(1).

¹⁰⁸ 17 CFR 4.36(c)(1).

¹⁰⁹ Indeed, by the time the recipient received such updated information, it would already be out of date.

¹¹⁰ For instance, Rule 4.23(a)(9) provides that a CPO must keep:

The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity pool operator to any existing or prospective pool participant or received by the pool operator from any commodity trading advisor of the pool, showing the first date of distribution or receipt if not otherwise shown on the document.

Analogous requirements for CTAs are found in Rule 4.33(a)(7).

¹¹¹ Commission Rules 4.23(a)(9) and 4.33(a)(7).

¹¹² 17 CFR 1.31(d). See 58 FR 27458, 27462-63 (May 10, 1993).

site on the World Wide Web. LMN's website permits prospective clients to acknowledge receipt of its Disclosure Document by electronic media. Jill Doe visits LMN's website and wishes to open a managed futures account. LMN's website instructs Jill Doe that in order for her to acknowledge receipt of its Disclosure Document, she must receive a PIN. LMN's website asks Jill Doe to provide her electronic mail address, to which a PIN may be sent. Upon receipt of Jill Doe's electronic mail address, LMN then sends her a PIN. Jill Doe may then use that PIN in lieu of a manual signature required under Commission Rule 4.31(b).

(26) *(Consent To Receive Monthly Statements Electronically Can Be Withdrawn)* JKL is the registered CPO of the Fund. John Smith and Jane Doe are both participants in the Fund. In September, JKL sends a notice to participants indicating that it will be sending monthly account statements to participants via electronic mail through the Internet, as Microsoft Word documents. JKL informs all pool participants that persons wishing to receive monthly account statements by means of electronic mail may incur costs relating to on-line access time, maintaining an electronic mail account, and owning a licensed copy of Microsoft Word. Further, JKL informs pool participants that electronic delivery of the monthly account statements will begin in January 1997. At the bottom of the notice is a form for participants to complete if they are interested in receiving monthly account statements electronically. The form asks for the participant's electronic mail address and for the participant's signature agreeing to the conditions of the electronic delivery.

John Smith and Jane Doe complete the form and mail it back to JKL in November. In December, John Smith decides that he prefers to receive monthly account statements by means of postal mail and notifies JKL that he no longer agrees to electronic delivery. In January, JKL can send monthly account statements to Jane Doe by means of electronic mail but must send such statements to John Smith by means of postal mail. The requirements for manual signatures under 4.22(h) for these reports will be satisfied if JKL keeps such signed reports in paper form at its place of business.

(27) *(Registrant Must Abide by Parameters of Consent)* In the same example as above, JKL now decides to post its monthly account statements on its World Wide Web homepage. JKL sends electronic mail to Jane Doe informing her that the monthly account statement can be accessed on JKL's homepage on the World Wide Web. This form of delivery would not satisfy the requirements of Rule 4.22. Jane Doe has only consented to receive monthly account statements as Microsoft Word attachments to Internet electronic mail. If JKL changes its method of electronic delivery, it must again obtain informed consent from pool participants. Jane Doe's consent to receive monthly account statements was limited to the means specified in the September notice. JKL cannot assume that Jane Doe has access to the World Wide Web or that she will agree to receive her monthly account statements by viewing them on JKL's homepage.

(28) *(Use of Hyperlinks in Table of Contents Acceptable)* WXY, a CPO, posts her Disclosure Document on the World Wide Web. As it appears on the World Wide Web, the Disclosure Document is without any "pages;" instead it is a continuous stream of HTML text, which contains all of the required disclosures. In lieu of page numbers as contemplated by Rule 4.24, WXY has placed in the table of contents a series of hyperlinks, i.e., subject headings which trigger access to the various sections of the Disclosure Document. In addition, in the Risk Disclosure statement, where page numbers are required for the discussion of expenses, break-even point and principal risk factors, WXY has provided hyperlinks to those sections. This would comply with the format requirements of Rule 4.24. Where a Disclosure Document is posted on the World Wide Web without pages, the CPO may use readily comprehensible hyperlinks instead of page numbers to denote specific sections. Both page numbers and hyperlinks allow the reader to locate a particular section.

(29) *(Electronic Version Identical to Paper Version)* ABC is a CTA who operates a homepage on the World Wide Web, with a hyperlink to enable visitors to download her Disclosure Document. The Disclosure Document can be downloaded in a form compatible with Microsoft Word for Windows or WordPerfect for DOS. Once downloaded, the Disclosure Document is in all respects identical to the paper version, including page numbers, bold-faced text and capsule performance information. In this case, ABC has met the format requirements of Rules 4.34.

(30) *(Electronic Version of Disclosure Document May Include More Recent Performance Data)* ABC is a CTA who operates a website. ABC's hardcopy Disclosure Document is dated August 1 and reflects the ABC's performance through July 31. It is now October 1, and ABC wants to amend the performance section of its Disclosure Document that appears on the website to include performance through September 30. ABC may amend the performance section of the website Disclosure Document to include more recent performance data. However, the calculation and presentation of such recent performance data must be in accordance with Commission rules. ABC is not required to amend its hardcopy Disclosure Document, which still may reflect ABC's performance through July 31. Under Rule 4.26, ABC may solicit prospective clients with the October 1 Disclosure Document and the version on its website with more recent performance data. However, on May 1 of the next year (i.e., nine months after date of the hardcopy Disclosure Document), ABC may no longer use the hardcopy Disclosure Document. Beginning May 1, ABC must use a new Disclosure Document. In addition, the Disclosure Document used on the website, which contains updated performance data, must also be amended to conform to any other changes reflected in the new hardcopy Disclosure Document.

(31) *(Disclosure Documents Delivered Electronically Must Be Current and Updated)* DEF is a CTA who distributes a hardcopy of

its Disclosure Document and also operates a website with an electronic version of its Disclosure Document. DEF solicits through its website but also sends each prospective client a hardcopy of its Disclosure Document via postal mail. The Disclosure Document DEF sends its prospective clients has been updated to reflect some material changes, but the electronic version on the Internet has not. DEF is in violation of Rule 4.36. Even though DEF provides its prospective customers with a current version of its Disclosure Document, it may not solicit customers using a superseded or out-of-date Disclosure Document.

(32) *(Outdated Disclosure Documents May Not Be Used on Electronic Media)* ABC is a CTA who operates a site on the World Wide Web. ABC's website contains a Disclosure Document that is more than nine months old. The website also contains a form that allows persons to request a current version of ABC's Disclosure Document. ABC is in violation of Rule 4.36. Even though ABC allows prospective clients to obtain a current version of its Disclosure Document, ABC may not continue to provide its out-of-date Disclosure Document on the World Wide Web.

(33) *(Outdated Disclosure Document Contained on CD-ROM Cannot Be Used To Solicit Clients)* RST is a CTA who has created a CD-ROM containing promotional materials and a Disclosure Document. The date of the Disclosure Document on the CD-ROM is January 15, 1995. On December 15, 1995, RST provides a prospective client with a copy of his CD-ROM but at the same time provides the client with a revised Disclosure Document dated October 1, 1995, which reflects certain material changes. Even though RST has provided the prospective client with a revised Disclosure Document, RST is in violation of Rule 4.36(b) because the CD-ROM contains a Disclosure Document dated more than nine months prior to its use. After October 15, 1995, RST may no longer distribute the CD-ROM with the Disclosure Document dated January 15, 1995.

IV. Electronic Filing With the Commission

A. Pilot Program Commencing October 15, 1996

In response to numerous inquiries from managed futures professionals, the Commission is evaluating the potential benefits and costs of electronic document filing, both to registrants and to the Commission's regulatory program. The Commission is also considering the relative merits of several alternatives for implementing an electronic filing system. In furtherance of this objective, the Commission is announcing a pilot program for optional electronic filing of Disclosure Documents and is requesting comments concerning the standards and specifications that should be utilized if the Commission elects to establish a permanent program for electronic filing.

The Commission has determined to initiate a six-month pilot program for

electronic filing of CPO and CTA Disclosure Documents, commencing October 15, 1996. Participation in the pilot program will be voluntary and will be open to all registered CPOs and CTAs who are members of NFA. The pilot program will be conducted by the Commission's Division of Trading and Markets and will be restricted (at least initially) to electronic submission of Disclosure Documents (and amendments thereto) which CTAs and CPOs are required to file with the Commission pursuant to Rules 4.36 and 4.26, respectively. Electronic filing of other documents, such as annual reports for commodity pools required to be filed pursuant to Rule 4.22, and documents filed to obtain relief available under certain Commission rules, such as notices of eligibility under Rule 4.5, notices of claims of exemption under Rule 4.7, claims of exemption under Rule 4.12(b) and notices of exemption under Rule 4.14(a)(8), may be implemented in the future.¹¹³ Participation in the pilot program will not obligate a registrant to provide its Disclosure Documents to prospective clients or pool participants by electronic means.

Under the pilot program as currently envisioned, a participating registrant will transmit its Disclosure Document, as an attachment to electronic mail, to an address specified by the Commission for purposes of this program. Receipt of the filed document will be acknowledged by electronic mail, followed by the customary review process conducted by Commission staff. Electronic mail also may be used by Commission staff for providing comments on the filed Disclosure Document and by the registrant to submit document revisions in response to staff comments.

The Commission's pilot program will accommodate use of two widely utilized commercial word processing systems without the need for extensive formatting specifications, and it will not require specialized coding and

formatting of numerical tables. At the outset, Documents filed under the Commission's pilot program will not be made publicly available in an electronic equivalent of a public reference room, as is currently the case with the document dissemination function of the EDGAR system; however, this enhancement may be considered in the future.¹¹⁴

B. Filing Procedure Under the Pilot Program

The Commission is establishing the following procedures for CTAs and CPOs seeking to employ electronic filing under the pilot program. The Commission welcomes comments concerning the adequacy and appropriateness of these requirements, and suggestions concerning any additional criteria that the Commission should consider in the pilot program.

Beginning October 15, 1996, a CPO or CTA may file a Disclosure Document (or amendment) by taking the following steps:

1. Save the Disclosure Document as a WordPerfect for DOS (version 5.1 or earlier) or a Microsoft Word for Windows (version 6.0 or earlier) file. Retain both a hardcopy and a diskette or tape backup.

2. Use the participating registrant's NFA identification number as the file name for the saved Disclosure Document, and add a file extension (DD1, DD2, DD3, . . . D10, D11, etc.) indicating whether the submission is sequentially the first, second, etc. submission by the registrant.¹¹⁵

3. Add the file as an attachment to an electronic mail message addressed to tm-pilot-program@cftc.gov.¹¹⁶ Persons who participate in the pilot program must agree to receive comments from Commission staff by electronic mail. Accordingly, the message text should include the electronic mail address where comments, if any, may be sent. Confirmation of receipt of the filed Disclosure Document will be provided

by Commission staff to the electronic mail address supplied by the participating registrant, and the Disclosure Document will undergo the customary review process. Following review of the filed document, staff comments also will be transmitted to the participating registrant's electronic mail address as an electronic mail attachment in Microsoft Word for Windows or WordPerfect 5.1 for DOS format.

4. Submit the registrant's response to staff comments by electronic mail message to the Commission's electronic mail filing address. The message should indicate the date of the staff comment message, and any revised text or pages should be attached in the same manner as the original filing (using the registrant's NFA identification number and the appropriate sequential file extension as described in No. 2, above).

For purposes of the pilot program, a document of up to one megabyte (approximately 230 pages) can be received as an electronic mail attachment. If a participating registrant's Disclosure Document exceeds one megabyte, the registrant should contact the Division of Trading and Markets, Managed Funds Branch, for guidance.

C. Expansion of Pilot Program; Request for Comments

The Commission intends to use its experience with the pilot program to develop and implement a permanent system for electronic filing of Disclosure Documents. As stated previously, the Commission will also consider permitting electronic filing of other types of required documents (e.g., annual reports to commodity pool participants, and notices of claims of exemption filed pursuant to Commission rules), as well as permanent implementation of electronic filing of CPO and CTA Disclosure Documents, either as an alternative to paper filing or as the sole filing method.

Interested persons are invited to comment on the proposed structure of the pilot program, as well as the contemplated adoption of a permanent electronic filing system. Specifically, the Commission seeks comment on: (1) whether it is preferable to retain the option for registrants to submit documents in paper form or to eliminate that alternative in favor of a universal requirement to file electronically; (2) whether security concerns make it advisable to require that filings be encrypted or otherwise protected from unauthorized interception and use, and if so, what measures would be appropriate (e.g., commercially available encryption software); (3)

¹¹³ The Commission is considering electronic filing of the entire range of documents and reports covered by the Act and Commission rules, including without limitation, Forms 1-FR for FCMs and IBs, Form 103 (Large Trader Reporting Form), and Form 40 (Statement of Reporting Trader). As noted in Section I, the Commission has approved self-regulatory organization ("SRO") programs (notably those of the CBT and the CME) permitting FCMs and IBs to file electronically with such SROs the periodic financial reports on Form 1-FR required by Commission Rule 1.10. In Advisory 28-96, [Current Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,711 (May 28, 1996), the Commission noted its intention to implement procedures to permit FCMs and IBs that file electronically with SROs also to file their financial reports electronically with the Commission.

¹¹⁴ Persons may, of course, obtain hardcopies of Disclosure Documents filed under the pilot program through a request made under the Freedom of Information Act, 5 U.S.C. 552 (1994), as implemented in Part 145 of the Commission rules.

¹¹⁵ For example, XYZ, whose NFA identification number is 99999999, is a CTA with separate Disclosure Documents for two trading programs. XYZ names one Disclosure Document "99999999.DD1" and the other "99999999.DD2." The first amendment to either Disclosure Document will be named "99999999.DD3," and each subsequent submission will follow the same pattern. In the event that a registrant has more than one version of the Disclosure Document for a particular trading program or pool offering, each version would similarly be given a separate file extension.

¹¹⁶ Persons participating in the pilot program are not required to make duplicate filings under Rules 4.26(d) or 4.36(d).

whether there is a need for a graphics capability (beyond that currently offered by the WordPerfect 5.1 for DOS and Microsoft Word for Windows programs) to permit transmission of pictorial or graphic material included in Disclosure Documents or in other documents required to be filed with the Commission; (4) whether the Commission should specify uniform formatting requirements for electronically-filed documents (e.g., margin dimensions, type font and point size, pagination, etc.) and if so, what the appropriate requirements would be; and (5) whether the selection of word processing formats currently being considered by the Commission for use in the pilot program (WordPerfect 5.1 for DOS or Microsoft Word for Windows) is adequate, and if not, which additional word processing programs or text formats registrants should be permitted to use.

D. Unsolicited Proposal Recently Presented to the Commission

The Commission has been approached by a prospective vendor ("Vendor") with a proposal to implement a system to permit electronic filing of Disclosure Documents utilizing a computer system developed by Vendor. The Vendor's prototype system assumes use of a WordPerfect or Microsoft Word word processing system in a Microsoft Windows operating system environment. Registrants would download from the Commission's Internet website a document "packaging" program, which would prompt the registrant to provide identifying information and facilitate secure uploading of the registrant's Disclosure Document to Vendor's system.¹¹⁷ Vendor has offered to develop a separate program for Commission staff handling and tracking of filed Disclosure Documents during the review process. Vendor's system, if implemented, may be designed to accommodate other required Commission filings, including CPO annual reports to pool participants. Under one variation of Vendor's system, filed Disclosure Documents would "reside" electronically on a server located at Vendor's offices, rather than at the Commission's headquarters.

The Commission plans to publish in *Commerce Business Daily* a notice seeking information and indications of interest on the part of proprietary vendors and developers of data

processing and telecommunication systems with respect to developing and implementing a system to accept, track and control electronically-filed documents, as well as incoming and outgoing correspondence in connection with such documents.

Comment is sought regarding the advisability of the Commission's selecting and entering into a contractual relationship with one or more independent vendors to facilitate electronic filing of documents on behalf of the Commission, and/or to serve as a repository or dissemination point to provide public access to electronically-filed documents. Finally, to the extent that a filing fee would be necessary to cover the operating and development costs of Vendor's system, the Commission seeks comment on the willingness of registrants to bear such costs and suggestions concerning how such fees should be calculated.

E. Future Releases

The Commission invites comment not only on the specific issues discussed in this release, but also on any other approaches or issues that should be considered in connection with facilitating the use of electronic media. In the future, the Commission may issue further releases, as may be suitable to expand or provide additional guidance regarding the pilot program; to propose and adopt rules and amendments to existing rules to implement electronic filing procedures; or to give guidance generally with respect to the use of electronic media in the context of the Commission's regulatory program.

Issued in Washington, DC, on May 8, 1996, by the Commission.

Catherine D. Dixon,

Assistant to the Secretary of the Commission.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 8682]

RIN 1545-AU23

Treatment of Section 355 Distributions by U.S. Corporations to Foreign Persons

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: These temporary regulations amend the Income Tax Regulations

relating to the distribution of stock and securities under section 355 of the Internal Revenue Code of 1986 by a domestic corporation to a person that is not a United States person. These regulations are necessary to implement section 367(e)(1) as added by the Tax Reform Act of 1986. The text of these regulations also serves as the text of the proposed regulations set forth in the notice of proposed rulemaking on this subject in the Proposed Rules section of this issue of the Federal Register.

EFFECTIVE DATE: These regulations are effective September 13, 1996.

FOR FURTHER INFORMATION CONTACT: Philip L. Tretiak at (202) 622-3860 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

These regulations are being issued without prior notice and public procedure pursuant to the Administrative Procedure Act (5 U.S.C. 553). For this reason, the collection of information contained in these regulations has been reviewed and, pending receipt and evaluation of public comments, approved by the Office of Management and Budget under control number 1545-1487. Responses to this collection of information are required in order for a U.S. corporation that distributes domestic stock or securities to a foreign person to qualify for an exception to the general rule of taxation provided by the regulations under section 367(e)(1).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

For further information concerning this collection of information, and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the cross-referencing notice of proposed rulemaking published in the Proposed Rules section of this issue of the Federal Register.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

On January 16, 1990, temporary regulations under section 367(e)(1) and 367(e)(2) were published in the Federal

¹¹⁷ The document packaging software includes a scrambling or encryption function enabling transmission of the document over phone lines without permitting unauthorized persons to read or alter the text.