PART 39—AIRWORTHINESS DIRECTIVES

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40113, 44701.

§ 39.13 [Amended]

2. The Federal Aviation Administration (FAA) amends § 39.13 by adding the following new airworthiness directive (AD):

Airbus: Docket No. FAA–2006–25670; Directorate Identifier 2006–NM–027–AD.

Comments Due Date

(a) The FAA must receive comments on this AD action by September 22, 2006.

Affected ADs

(b) None.

Applicability

(c) This AD applies to all Airbus Model A300 airplanes; certificated in any category; except the following airplanes:

(1) Model A300 B4–220, A300 B4–203, and A300 B2–203 airplanes in a forward facing crew cockpit certified configuration;

(2) Model A300 B4–601, B4–603, B4–620, and B4–622 airplanes;

(3) Model A300 B4–605R and B4–622R airplanes;

(4) Model A300 F4–605R and F4–622R airplanes; and

(5) Airbus Model A300 C4–605R Variant F airplanes.

Unsafe Condition

(d) This AD results from a report of a sudden nose-up movement after disengagement of the autopilot in cruise. We are issuing this AD to ensure that the flightcrew is aware of the procedures for resetting the trim and pitch trim levers after each landing and to prevent failure of the servomotors of the pitch trim systems during flight. Failure of the servomotors of the pitch trim systems could result in uncommanded nose up movement of the control surface of the pitch trim systems after disengagement of the autopilot in cruise.

Compliance

(e) You are responsible for having the actions required by this AD performed within the compliance times specified, unless the actions have already been done.

Revision of Airplane Flight Manual (AFM)

(f) Within 14 days after the effective date of this AD, revise the Normal Procedures section of the Airbus A300 AFM to include the information in Airbus A300 Temporary Revision (TR) 4.03.00/04, Issue 02, dated November 18, 2003, as specified in the TR.

Note 1: This may be done by inserting a copy of TR 4.03.00/04, Issue 02, in the AFM. When the TR has been included in the general revisions of the AFM, the general revisions may be inserted in the AFM, provided the relevant information in the general revision is identical to that in the TR.

Determination if Pitch Trim Control Wheel Moves

(g) Following accomplishment of the AFM revision required by paragraph (f) of this AD: After each landing and before shutting down the engines, do the AFM procedures specified in Airbus A300 TR 4.03.00/04, Issue 02, dated November 18, 2003.

Determination if Servomotor Moves

(h) Before further flight after any movement reported in accordance with paragraph (g) of this AD, determine which servomotor moves the pitch trim control wheel, and do applicable other specified actions in accordance with Airbus TR No. 22–001, dated April 11, 2003, of Chapter 22–23–00 of Airbus A300 Fault Isolation Manual.

Note 2: Airbus TR No. 22–001 contains a typographical error. The TR incorrectly refers to ''MM 22–23–39'' as the appropriate source of service information for replacing the pitch trim actuator; the correct reference is ''MM 22–23–29.''

Optional Replacement of the Pitch Trim Servomotors

(i) Replace the pitch trim servomotors in the attachment area of the horizontal and vertical stabilizers with new servomotors, in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–22–0119, dated May 13, 2005.

Note 3: Airbus Service Bulletin A300–22–0119, dated May 13, 2005, refers to Thales Service Bulletin V1AM–22–005, Revision 01, dated July 27, 2005, as an additional source of service information for doing the replacement.

Repetitive Preventative Maintenance Tasks

(j) Within 12,000 flight hours after replacing one or both servomotors in accordance with paragraph (h) or (i) of this AD, or within 6 months after the effective date of this AD, whichever occurs later, do the preventative maintenance task of the pitch trim servomotor(s), in accordance with the Accomplishment Instructions of Airbus Service Bulletin A300–22–0120, dated May 13, 2005. Repeat the preventative maintenance task thereafter at intervals not to exceed 12,000 flight hours.

Note 4: Airbus Service Bulletin A300–22–0120, dated May 13, 2005, refers to Thales Service Bulletin V1AM–22–006, Revision 01, dated July 26, 2005, as an additional source of service information for doing the preventative maintenance task.

Removal of AFM Revision

(k) After accomplishing the actions specified in paragraph (i) and the initial task in paragraph (j) of this AD, the AFM revision required by paragraph (f) of this AD may be removed, and the requirements of paragraphs (g) and (h) of this AD are no longer required.

No Reporting

(l) Although Airbus Service Bulletin A300–22–0120 specifies to submit certain information to the manufacturer, this AD does not include that a requirement.

Alternative Methods of Compliance (AMOCs)

(m)(1) The Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA, has the authority to approve AMOCs for this AD, if requested in accordance with the procedures found in 14 CFR 39.19.

(2) Before using any AMOC approved in accordance with § 39.19 on any airplane to which the AMOC applies, notify the appropriate principal inspector in the FAA Flight Standards Certificate Holding District Office.

Related Information

(n) French airworthiness directives F–2003–291 R1, issued July 6, 2005, and F–2005–109, issued July 6, 2005, also addresses the subject of this AD.

Issued in Renton, Washington, on August 15, 2006.

Kalene C. Yanamura,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. E6–13964 Filed 8–22–06; 8:45 am]

BILLING CODE 4910–13–P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038–AC35

Advertising by Commodity Pool Operators, Commodity Trading Advisors, and the Principals Thereof

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rules.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend Regulation 4.41, which governs advertising by commodity pool operators (CPOs), commodity trading advisors (CTAs) and the principals thereof, (1) To restrict the use of testimonials, (2) to clarify the required placement of the prescribed simulated or hypothetical performance disclaimer, and (3) to include within the regulation's coverage advertisement through electronic media (Proposal). This action is in furtherance of the Commission's longstanding position that CPOs, CTAs, and their principals may not advertise in a false, deceptive or misleading manner.

DATES: Comments must be received on or before September 22, 2006.

ADDRESSES: Comments on the Proposal should be sent to Eileen Donovan, Acting Secretary, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581. Comments may be sent by facsimile transmission to (202) 418–5528, or by e-mail to

secretary@cftc.gov. Reference should be made to ''Advertising by Commodity Pool Operators, Commodity Trading Advisors, and the Principals Thereof.'' Comments may also be submitted by connecting to the Federal eRulemaking Portal at *http://www.regulations.gov* and following the comment submission instructions.

FOR FURTHER INFORMATION CONTACT: Barbara S. Gold, Associate Director, or Peter B. Sanchez, Staff Attorney, Division of Clearing and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581, telephone number: (202) 418–5450 or (202) 418–5237, respectively; facsimile number: (202) 418–5528; and electronic mail: *bgold@cftc.gov* or *psanchez@cftc.gov,* respectively.

SUPPLEMENTARY INFORMATION:

I. Background

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.[1] In particular, Regulation 4.41 pertains to advertising by CPOs, CTAs, and the principals[2] thereof, an issue first addressed by the Commission over 25 years ago. The Commission originally proposed that CPOs, CTAs, and their principals could not advertise their actual past performance results in a format other than that which the CPO or CTA was required to use in its Disclosure Document,[3] and that the presentation of simulated or hypothetical performance of a CPO, CTA, or the principals thereof would be prohibited.[4] In response to the comments received and its further deliberations on these proposals, the Commission adopted less restrictive advertising regulations.[5]

With respect to the presentation of actual past performance, the Commission explained that it had adopted in Regulation 4.41(a) ''a rule that leaves to the discretion of the [CPO, CTA, or principal] advertising performance results—whether actual, simulated or hypothetical—the format of that presentation, so long as that format is not false, misleading or deceptive.'' [6] As for the presentation of simulated or hypothetical performance results, the Commission explained that it had adopted in Regulation 4.41(b) ''a rule that allows the presentation of those results, provided that the presentation *is accompanied by* the statement prescribed in the rule (emphasis supplied),'' whose purpose was ''to alert prospective customers to the limitations inherent in simulated and hypothetical past performance results.'' [7] The Commission also noted the scope of new Regulation 4.41—that it applied to both oral and written communications and regardless of whether a CPO or a CTA was exempt from registration under the Act.[8]

Based on its experience with the operation of Regulation 4.41 over the course of the past 25 years, the Commission today is proposing certain amendments as described below.

II. The Proposal

A. Presentation of Actual Past Performance: Proposed Addition of Regulation 4.41(a)(3)

The Commission is proposing to add a new paragraph (a)(3) to Regulation 4.41, which would address the use of testimonials by a CPO, CTA, or a principal thereof. Proposed Regulation 4.41(a)(3) would require advertisements that refer to a testimonial to prominently disclose that the testimonial may not be representative of the experience of other clients; that the testimonial is no guarantee of future performance or success; and, if more than a nominal sum is paid, the fact that it is a paid testimonial.[9] The

[1] 17 CFR Part 4 (2006). The Commodity Exchange Act (Act) and the Commission's regulations issued thereunder may be accessed through the Commission's Web site, at *http://www.cftc.gov/cftc.cftclawreg.htm.*

[2] The definition of the term ''principal'' is set forth in Regulation 4.10(e)(1), which cross-references the definition of the term in Regulation 3.1(a). An example of a principal of a CPO organized as a corporation would be the corporation's chief executive officer.

[3] Regulations 4.21–4.26 and 4.31–4.26 respectively concern the Disclosure Document that registered CPOs and CTAs must prepare, deliver, and file.

[4] 45 FR 51600 (Aug. 4, 1980).

[5] 46 FR 26004 (May 8, 1981).

[6] While acknowledging that it was not possible to identify every advertisement that was prohibited by new Regulation 4.41, the Commission nonetheless gave notice in the **Federal Register** release announcing the adoption of the rule that it would consider the following, non-exclusive list of advertisements, to be prohibited:

(1) References only to successful trades, if during the same time period, trades which were unsuccessful were also recommended or executed; (2) references to the results during a specific time period, if the results claimed were not fairly representative of results achieved for comparable periods; (3) suggestions, assurances or claims of profit potential that do not also fairly present the possibility of loss; (4) statements of opinions or predictions which are not clearly labeled as such or which have no reasonable basis in fact; and (5) failure to disclose whether, and to what extent, fees, commissions and other expenses are reflected in the past performance results. *Id.* at 26012.

[7] *Id.*

[8] Section 4m(1) of the Act, 7 U.S.C. 6m(1) (2000), generally requires the registration of CPOs and CTAs. Regulation 4.13 provides an exemption from CPO registration for certain persons, and Sections 4m(1) and 4m(3) and Regulation 4.14 provide an exemption from CTA registration for certain other persons.

[9] The Commission has modeled this proposal upon NASD Rule 2210(d)(2), which sets similar limits on the use of testimonials in advertisements and other marketing materials applicable to NASD members, as follows:

(2) Standards Applicable to Advertisements and Sales Literature

(A) Advertisements or sales literature providing any testimonial concerning the investment advice or investment performance of a member or its products must prominently disclose the following:

(i) The fact that the testimonial may not be representative of the experience of other clients.

(ii) The fact that the testimonial is no guarantee of future performance or success.

(iii) If more than a nominal sum is paid, the fact that it is a paid testimonial.

The potential of testimonials to mislead customers has been recognized by other Federal regulatory agencies. The Securities and Exchange Commission (SEC) has promulgated a rule that declares any use of testimonials in advertising by investment advisers to be ''a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of the [Investment Advisers] Act [of 1940] (15 U.S.C. 80b–6(4))''. 17 CFR 275.206(4)–1(a)(1). In its release promulgating the rule, the SEC found that ''such advertisements are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable.'' 26 FR 10548, 10549 (November 9, 1961).

Testimonials also are subject to the Federal Trade Commission's (FTC) *Guides Concerning Use of Endorsements and Testimonials in Advertising,* which are not limited to a specific industry. 16 CFR 255, *http://www.ftc.gov/bcp/guides.endorse.htm.* The FTC Guides provide, for example, that:

An advertisement employing an endorsement reflecting the experience of an individual or a group of consumers on a central or key attribute of the product or service will be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product in actual, albeit variable, conditions of use. Therefore, unless the advertiser possesses and relies upon adequate substantiation for this representation, the advertisement should either clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances or clearly and conspicuously disclose the limited applicability of the endorser's experience to what consumers may generally expect to achieve. *See* 16 CFR 255.2(a).

The FTC *Guides* are an administrative interpretation of section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a), which prohibits ''unfair or deceptive acts or practices in or affecting commerce.'' *See Porter & Dietsch, Inc.* v. *Federal Trade Comm'n,* 605 F.2d 294, 303 (7th Cir. 1979) (sustaining FTC's finding that advertisements were deceptive where the typical experiences of consumers did not parallel the experiences reported in testimonials); *Federal Trade Comm'n* v. *Ken Roberts Company,* 276 F.3d 583 (DC Cir. 2001)(FTC's authority to investigate deceptive advertising extended to, among other things, testimonials used by seller of courses in commodities and securities investing and was not clearly preempted by overlapping authority of CFTC or SEC). Standards for establishing unlawful deception under the Federal Trade Commission Act are broadly similar to those for establishing unlawful deception by commodity trading advisors and commodity pool operators under the Commodity Exchange Act. Compare *Federal Trade Comm'n* v. *Tashman,* 318 F.3d 1273, 1275–77 (11th Cir. 2003) (unsupported earnings claims by business opportunity firm were material misleading representations that violated Federal Trade Commission Act) with *CFTC* v. *Heffernan,* 245 F.

Commission believes that advertisements that do not contain this information may provide potential CPO and CTA customers with a misleading assessment about the quality of services being offered or the motivation of the person providing the testimonial—and, thus, violate the Commission's intent that these advertisements not be ''false, misleading or deceptive.''

B. Simulated or Hypothetical Performance Presentation: Proposed Amendments to Regulation 4.41(b)

Regulation 4.41(b)(1) requires that simulated or hypothetical performance results ''be accompanied by'' a prescribed statement,[10] and Regulation 4.41(b)(2) requires that this statement be ''prominently disclosed'' if that performance is presented other than orally. Nonetheless, the Commission has encountered numerous instances where persons were not adequately identifying their trading results as simulated or hypothetical,[11] or were not appropriately locating the disclaimer,[12] and thus were not providing those results as the Commission had contemplated—*i.e.*, in a manner intended ''to alert prospective customers to the limitations inherent in simulated and hypothetical past performance results.'' The Commission therefore is proposing to amend Regulation 4.41(b)(1) to clarify the meaning of the term ''accompanied by,'' especially in light of the popularity of electronic means of communication that were not in existence 25 years ago when the Commission adopted Regulation 4.41.

Specifically, the Commission is proposing to amend Regulation 4.41(b)(1)(i) by including in the prescribed disclaimer references to ''*these* results'' when discussing the simulated or hypothetical performance results being presented.[13] Additionally, the Commission is proposing to amend Regulation 4.41(b)(2) by adding to the existing requirement that the prescribed disclaimer must be prominently disclosed, the requirement that the prescribed disclaimer also must be ''*in immediate proximity* to the simulated or hypothetical performance being presented.'' [14]

C. The Scope of Regulation 4.41: Proposed Amendment to Regulation 4.41(c)(1)

As originally adopted by Congress in 1974, the term ''commodity trading advisor'' included any person who provided commodity interest trading advice ''either directly or through publications or writings.'' [15] With the subsequent advent of electronic media and the increasing use of such media by CTAs, in 1982 Congress amended the CTA definition to include any person providing commodity interest trading advice ''either directly or through publications, writings *or electronic media*'' (emphasis supplied).[16] In turn, the Commission amended the definition of the term ''commodity trading advisor'' in Regulation 1.3(bb) to conform to the statutory amendment.[17] CPOs, like CTAs, typically solicit customers based on their performance results. The Commission accordingly is proposing to amend Regulation 4.41(c)(1) in order to clarify that advertisements by ''electronic media, or otherwise, including information provided via internet or e-mail'' are within the scope of Regulation 4.41.

In this regard, the Commission emphasizes that it interprets Regulation 4.41 in its current form as applying to the presentation of past performance results by CPOs, CTAs, and their principals made through electronic media. The Proposal is intended to make this interpretation explicit.

The Commission believes that the Proposal is fully consistent with the First Amendment. False, deceptive or misleading commercial speech—even of, for example, those CTAs that provide advice on a non-personalized basis—is not protected by the First Amendment.[18] Moreover, even where commercial speech is only potentially misleading, the government can use disclosure requirements to make sure that the public is not, in fact, misled.[19]

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [20] requires that agencies, in proposing rules, consider the impact of those rules on small businesses. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its rules on such entities in accordance with the RFA.[21]

With respect to CTAs, the Commission has previously stated that it would evaluate within the context of a particular rule proposal whether all or some affected CTAs would be considered to be small entities and, if so, the economic impact on them of the proposal.[22] Moreover, the Commission stated that CPOs would be considered small entities if they are exempt from registration by virtue of Regulation 4.13(a).[23] The Commission does not believe that the proposed amendments to Regulation 4.41 would have a significant impact on affected CTAs, CPOs, and their principals. This is because the only burden that would be imposed by the Proposal would be the obligation to comply with the antifraud provisions of Section 4*o* of the Act

Supp. 2d 1276, 1290–91, 1294–96 (S.D.Ga. 2003)(unsupported earnings claims by commodity trading advisor were material misleading representations that violated Commodity Exchange Act if they were made with scienter or had an impact on prospective customers).

[10] This statement may be the text contained in Regulation 4.41(b)(1)(i) or it may be a statement prescribed by a registered futures association pursuant to Section 17(j) of the Act, 7 U.S.C. 21(j). In this regard, the National Futures Association (NFA) has adopted a Risk Disclosure Statement, the text of which is contained in NFA Compliance Rule 2–29(c) and may be accessed at *http://www.nfa.futures.org/nfaManual/manualCompliance.asp#2-29*.

[11] See, *e.g.*, *CFTC* v. *R&W Technical Servs. Ltd.*, 205 F.3d 165 (5th Cir. 2000) (hypothetical trading results presented as real trading results); *CFTC* v. *Skorupskas*, 605 F. Supp. 923, 933 (E.D. Mich. 1985) (performance tables not based on real or actual trading).

[12] See, *e.g.*, *CFTC* v. *Vartuli*, 228 F.3d 94 (2d Cir. 2000) (disclaimer appears on a separate page from the hypothetical trading results); *Heffernan* at 1286, 1296–1297, 1299 (disclaimer on a webpage, but not included in the original advertisement containing the hypothetical performance); *In re Martin*, [1999—2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,239 (CFTC Sept. 6, 2000) (hypothetical performance results on a Web page, but disclaimer on a separate page accessible by hyperlink).

[13] The Commission also is proposing a few non-substantive changes to the prescribed disclaimer. The text of Regulation 4.41(b)(1)(i) would thus read as follows:

''These results are based on hypothetical or simulated performance results that have certain inherent limitations. Unlike the results shown in an actual performance record, these results do not represent actual trading. Also, because these trades have not actually been executed, these results may have under- or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Hypothetical or simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to these being shown.''

[14] *See, e.g. supra* note 12 for situations in which the required disclaimer was not in immediate proximity to the hypothetical performance.

[15] Pub. L. 93–463, 88 Stat. 1389, Sec. 202 (Oct. 23, 1974).

[16] Pub. L. 947–444, 96 Stat. 2294, Sec. 201 (Jan. 11, 1983).

[17] 48 FR 35248 (Aug. 3, 1983).

[18] Indeed, the Commission may constitutionally prohibit the dissemination of commercial speech that is ''false, deceptive, or misleading.'' *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 638 (1985).

[19] *See, e.g. Pearson* v. *Shalala*, 164 F.3d 650 (D.C. Cir. 1999) (disclosure can be required to cure possibility of misleading public that would not just justify prohibition).

[20] 5 U.S.C. 601 *et seq.*

[21] 47 FR 18618 (April 30, 1982).

[22] *Id.* at 18620.

[23] *Id.*

when presenting the past performance of CTAs, CPOs, and their principal—whether by way of actual or hypothetical performance or through the use of testimonials. Assuming *arguendo,* however, that compliance with Section 4*o* would constitute a significant burden, the burden is neither new nor additional, because the proposed revisions to Regulation 4.41 are consistent with the Commission's longstanding interpretation of Section 4*o* as applicable to all advertisements by CTAs, CPOs, and their principals, including advertisements that are viewed electronically, and that such advertisements must not be false or misleading.

Accordingly, the Chairman, on behalf of the Commission, certifies pursuant to Section 605(b) of the RFA [24] that the Proposal will not have a significant economic impact on a substantial number of small entities. However, the Commission invites the public to comment on this finding.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. The Proposal does not require a new collection of information on the part of any entities. Accordingly, for purposes of the PRA, the Commission certifies that the proposed rule amendments, if promulgated in final form, would not impose any new reporting or recordkeeping requirements.

C. Cost-Benefit Analysis

Section 15(a) of the Act [25] requires the Commission to consider the costs and benefits of its action before issuing a new regulation under the Act. By its terms, Section 15(a) does not require the Commission to quantify the costs and benefits of a new regulation or to determine whether the benefits of the proposed regulation outweigh its costs. Rather, Section 15(a) simply requires the Commission to ''consider the costs and benefits'' of its action.

Section 15(a) further specifies that costs and benefits must be evaluated in light of five broad areas of market and public concern: protection of market participants and the public; efficiency, competitiveness, and financial integrity of futures markets; price discovery; sound risk management practices; and other public interest considerations. Accordingly, the Commission could in its discretion give greater weight to any one of the five enumerated areas and could in its discretion determine that, notwithstanding its costs, a particular rule was necessary or appropriate to protect the public interest or to effectuate any of the provisions or to accomplish any of the purposes of the Act.

The Commission is considering the costs and benefits of this rule in light of the specific provisions of Section 15(a) of the Act as follows:

1. Protection of Market Participants and the Public

Because the Proposal discusses the use of testimonials and the placement of the prescribed hypothetical disclaimer, and specifically includes advertisement via electronic media by CPOs, CTAs, and their principals, the Proposal should enhance the Commission's ability to protect market participants and the public.

2. Efficiency and Competition

The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on efficiency or competition.

3. Financial Integrity of Futures Markets and Price Discovery

The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on the financial integrity or price discovery function of the commodity futures and option markets.

4. Sound Risk Management Practices

The Proposal should have no effect, from the standpoint of imposing costs or creating benefits, on the available range of sound risk management alternatives.

5. Other Public Interest Considerations

The Proposal should have no effect, from the standpoint of imposing costs on, and may create public interest benefits to, consumers as a result of their having more honest information.

After considering these factors, the Commission has determined to propose the amendments to Regulation 4.41 discussed above. The Commission invites public comment on its application of the cost-benefit provision. Commenters also are invited to submit any data that they may have quantifying the costs and benefits of the Proposal with their comment letters.

List of Subjects in 17 CFR Part 1

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

For the reasons presented above, the Commission proposes to amend 17 CFR part 1 as follows:

PART 1—GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6j, 6k, 6*l*, 6m, 6n, 6*o*, 6p, 7, 7a, 7b, 8, 9, 12, 12a, 12c, 13a, 13a–1, 16, 16a, 19, 21, 23 and 24, as amended by the Commodity Futures Modernization Act of 2000, Appendix E of Pub. L. 106–554, 114 Stat. 2763 (2000).

2. Section 4.41 is amended by removing ''or'' at the end of paragraph (a)(1), removing the period and adding a semi-colon and ''or'' at the end of paragraph (a)(2), adding new paragraph (a)(3), and revising paragraphs (b)(1)(i), (b)(2) and (c)(1) to read as follows:

§ 4.41 Advertising by commodity pool operators, commodity trading advisors, and the principals thereof.

(a) * * *

(3) Refers to any testimonial, unless the advertisement or sales literature providing the testimonial prominently discloses:

(i) That the testimonial may not be representative of the experience of other clients;

(ii) That the testimonial is no guarantee of future performance or success; and

(iii) If, more than a nominal sum is paid, the fact that it is a paid testimonial.

(b) * * *

(1) * * *

(i) The following statement: ''These results are based on hypothetical or simulated performance results that have certain inherent limitations. Unlike the results shown in an actual performance record, these results do not represent actual trading. Also, because these trades have not actually been executed, these results may have under-or over-compensated for the impact, if any, of certain market factors, such as lack of liquidity. Hypothetical or simulated trading programs in general are also subject to the fact that they are designed with the benefit of hindsight. No representation is being made that any account will or is likely to achieve profits or losses similar to these being shown''; or

* * * * *

(2) If the presentation of such simulated or hypothetical performance is other than oral, the prescribed statement must be prominently disclosed and in immediate proximity

[24] 5 U.S.C. 605(b).

[25] 7 U.S.C. 19(a).

to the simulated or hypothetical performance being presented.

(c) * * *

(1) To any publication, distribution or broadcast of any report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice, whether by electronic media or otherwise, including information provided via internet or e-mail, the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations, and

* * * * *

Issued in Washington, DC, on August 17, 2006, by the Commission.

Eileen Donovan.

Acting Secretary of the Commission.

[FR Doc. E6–13946 Filed 8–22–06; 8:45 am]

BILLING CODE 6351–01–P

DEPARTMENT OF HOMELAND SECURITY

DEPARTMENT OF THE TREASURY

Bureau of Customs and Border Protection

19 CFR Parts 103, 178, and 181

[USCBP–2006–0090]

RIN 1505–AB58

NAFTA: Merchandise Processing Fee Exemption and Technical Corrections

AGENCY: Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: The current regulations in title 19 of the Code of Federal Regulations allow CBP to collect a merchandise processing fee (MPF) on imported shipments to recoup administrative expenses. However, ''originating merchandise'' that qualifies to be marked as goods of Canada or of Mexico under the NAFTA are exempted from this fee. CBP is proposing to amend the regulations to clarify that an importer is subject to the same declaration requirement that is established for claiming NAFTA duty preference in order to claim the exemption of the MPF for goods that meet a NAFTA rule of origin even when the goods are unconditionally free.

In addition, CBP is proposing to make several technical corrections. CBP is proposing to amend the regulations to clarify that a Certificate of Origin is not required for a commercial importation for which the total value of originating goods does not exceed $2,500. CBP is also proposing to remedy two incorrect addresses and an incorrect Code of Federal Regulations citation.

DATES: Comments must be received on or before October 23, 2006.

ADDRESSES: You may submit comments, identified by docket number, by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments via docket number USCBP–2006–0090.
- *Mail:* Trade and Commercial Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW., (Mint Annex), Washington, DC 20229.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *http://www.regulations.gov*, including any personal information provided. For detailed instructions on submitting comments and additional information on the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov.* Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Seth Mazze, Trade Agreements Branch, Office of Field Operations, (202) 344–2634.

SUPPLEMENTARY INFORMATION:

Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. Comments that will provide the most assistance to CBP in developing these procedures will reference a specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

Background

On December 17, 1992, the United States, Canada, and Mexico entered into the North American Free Trade Agreement (NAFTA). Among the stated objectives of the NAFTA is the elimination of barriers to trade in, and the facilitation of the cross-border movement of, goods and services between the territories of the countries. The provisions of the NAFTA were adopted by the United States with the enactment of the North American Free Trade Agreement Implementation Act (''the Act,'' 19 U.S.C. 3301–3473). On September 6, 1995, Customs published Treasury Decision (T.D.) 95–68 (North American Free Trade Agreement) in the **Federal Register** (60 FR 46334), adopting amendments to the regulations in title 19 of the Code of Federal Regulations (CFR) to implement Customs-related aspects of the NAFTA. The final rule went into effect on October 1, 1995. Sections 403(1) and 411 of the Homeland Security Act of 2002 (Pub. L. 107–296) transferred the United States Customs Service and certain of its functions from the Department of the Treasury to the Department of Homeland Security; pursuant to section 1502 of the Act, the President renamed the ''Customs Service'' as the ''Bureau of Customs and Border Protection,'' also referred to as the ''CBP.''

Merchandise Processing Fee (MPF) Exemption

As a means of recouping administrative expenses for the processing of imported shipments, CBP charges a merchandise processing fee (MPF), as provided for in 19 U.S.C. 58c. However, under 19 U.S.C. 58c(b)(10)(B), for goods qualifying under the rules of origin set out in 19 U.S.C. 3332, the fee may not be charged with respect to goods that qualify to be marked as goods of Canada or of Mexico (pursuant to Annex 311 of the NAFTA). In order to claim a NAFTA duty preference, an importer must make a declaration. The same declaration is used to claim the MPF exemption. That is, the importer must place the appropriate special program indicator (e.g., ''CA'' for goods of Canada and ''MX'' for goods of Mexico) opposite the good on the entry form. The proposal in this document addresses the situation in which an importer of an originating good has no duty preference incentive to make the required NAFTA declarations on the entry because the Normal Trade Relations rate of duty on the good is free (i.e., the good is unconditionally duty free). Accordingly, CBP is proposing to