amend the energy conservation standards for small-duct high-velocity air conditioners and heat pumps. In a notice of final rulemaking published on May 23, 2002 (67 FR 36368), DOE established amended energy conservation standards for all classes of residential central air conditioners and heat pumps except small-duct high-velocity systems. In that final rule, DOE created a separate product class for SDHV systems, but it deferred establishing amended standards pending completion of a new test procedure and the analysis needed to support new standards. The May 23, 2002, final rule defines ''small duct high-velocity system'' to mean a heating and cooling product that contains a blower and indoor coil combination that: (1) Is designed for, and produces, at least 1.2 inches of external static pressure when operated at the certified air volume rate of 220–350 CFM per rated ton of cooling; and (2) when applied in the field, uses high velocity room outlets generally greater than 1000 fpm which have less than 6.0 square inches of free area. (*See* revision to § 430.2 at 67 FR 36406). The workshop announced in today's notice is also being held to consider the additional revisions to DOE's test procedure for central air conditioners and heat pumps mentioned in the preceding paragraph of this notice.

A detailed agenda for this workshop is currently under development and as noted above, will be posted on the Department's Web site on or about November 15, 2002. The agenda items will include issues related to the engineering and life-cycle cost methodology used in the small-duct high-velocity standards rulemaking, and the methodology and data used to derive new default values for the cooling mode cyclic degradation coefficients. For each agenda item, the Department will make a presentation summarizing the current status and will initiate a discussion regarding the accuracy and completeness of data and analysis tools. During these discussions, the Department is particularly interested in receiving comments and views of interested parties and possible approaches to enhance the accuracy of the analysis tools and data. The Department encourages those who wish to participate in the workshop to make presentations that address these issues. If you would like to make a presentation during the workshop, please inform Ms. Branson at least two weeks before the date of the workshop and provide her with a copy of your written presentation material at least one week before the date of the workshop.

The meeting will be conducted in an informal, conference style. A court reporter will be present to record the minutes of the meeting. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by antitrust law. After the meeting and a period for written statements, the Department will begin collecting data and conducting the analyses discussed at the workshop.

If you would like to participate in the workshop, to receive workshop materials, or to be added to the DOE mailing list to receive future notices and information regarding distribution transformers, please contact Ms. Crystal Branson at (202) 586–6448.

Issued in Washington, DC, on October 22, 2002.

**David K. Garman,**

*Assistant Secretary, Energy Efficiency and Renewable Energy.*

[FR Doc. 02–27332 Filed 10–25–02; 8:45 am]

**BILLING CODE 6450–01–P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 4

**RIN 3038–AB34**

## Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term ''Commodity Pool Operator''

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Commodity Futures Trading Commission (Commission or CFTC) is proposing to amend Rule 4.5 by adding an alternative limitation on the non-hedge activities of eligible persons claiming relief under the rule (Proposal). The Commission also is taking a ''no-action'' position to permit the use of this alternative criterion pending final action on an amendment to the rule. The Proposal and the ''no-action'' position would not affect the ability of qualifying entities under Rule 4.5 to engage in unlimited trading for *bona fide* hedging purposes.

**DATES:** Comments on the proposed rule change must be received by December 12, 2002.

**ADDRESSES:** Comments on the proposed rule should be sent to Jean A. Webb, 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 ''Proposed Amendment to Rule 4.5 for Non-Hedge Activity.''

**FOR FURTHER INFORMATION CONTACT:** Barbara S. Gold, Associate Director, Division of Clearing and Intermediary Oversight, or Ronald Hobson, Industry Economist, Office of the Chief Economist, Commodity Futures Trading Commission, 1155 21st Street, NW., Washington, DC 20581, telephone number: (202) 418–5441 or (202) 418–5285, respectively; facsimile number: (202) 418–5536, or (202) 418–5660, respectively; and electronic mail: *bgold@cftc.gov* or *rhobson@cftc.gov,* respectively.

**SUPPLEMENTARY INFORMATION:**

### I. Background

The term ''commodity pool operator'' (CPO) is defined in section 1a(5) of the Commodity Exchange Act (Act),[1] to mean:

> [A]ny 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 or derivatives transaction execution facility, *except that the term does not include such persons not within the intent of the definition of the term as the Commission may specify by rule, regulation, or order.* [Emphasis added.][2]

In connection with the adoption of the Futures Trading Act of 1982,[3] the Senate Committee on Agriculture, Nutrition, and Forestry (Committee) considered an amendment to the Act that would have exempted certain persons from the CPO definition. In lieu of adopting such an amendment to the CPO definition, the Committee directed the Commission to issue regulations that would have the effect of providing relief from regulation as a CPO for certain otherwise regulated persons with respect to their operation of certain collective investment vehicles that met certain criteria. These criteria specified, among other things, that ''the entity uses commodity futures or options thereon

[1] 7 U.S.C. 1a(5) (2002).

[2] Both the Act and the Commission's rules issued thereunder can be accessed through the Commission's Web site: *www.cftc.gov/cftc/cftclawreg.htm#cea.* Commission rules cited to herein are found at 17 CFR chapter I (2002).

[3] Pub. L. No. 97–444, 96 Stat. 2294 *et seq.* (1983).

solely for hedging purposes'' and that ''initial margin requirements or premiums for * * * futures or options contracts will never be in excess of 5 percent of the entity's assets. * * *'' [4] Pursuant to this directive, in 1985 the Commission adopted Rule 4.5.[5]

The purpose of Rule 4.5 is to make available to certain persons (eligible persons) an exclusion from the definition of CPO with respect to their operation of certain entities (qualifying entities) that would otherwise be treated as commodity pools under the Act, but that are already subject to extensive operating requirements of another federal or state regulator. These eligible persons and their qualifying entities include: (1) Investment companies registered as such under the Investment Company Act of 1940; (2) state-regulated insurance companies with respect to their operation of insurance company separate accounts; (3) state- or federally-regulated financial depository institutions with respect to their operation of separate units of investment; and (4) trustees, named fiduciaries, certain designated fiduciaries, and employers of pension plans subject to Title I of the Employee Retirement Income Security Act of 1974 with respect to the operation of such plans.[6] In order to claim exclusion from the CPO definition under Rule 4.5, an eligible person must file a Notice of Eligibility with the National Futures Association (NFA) and the Commission.[7] The Notice must contain specified representations on how the person will operate the qualifying entity. These operating criteria include requirements to: restrict the amount of the entity's commodity interest trading with respect to its non-hedging activity; not market the entity as a pool or otherwise as a vehicle to trade commodity interests; disclose the purpose of and restrictions on the entity's commodity interest trading; and submit to special calls to demonstrate compliance with the foregoing provisions. A supplemental Notice must be filed, as necessary, to render the original Notice ''accurate and complete.'' [8]

Based upon its staff's experience in administering Rule 4.5, the Commission has made various revisions to the rule subsequent to its initial adoption. These revisions have expanded the range of persons eligible to claim relief under the rule [9] and the trading strategies that may be engaged in under the rule—*i.e.*, that unlimited hedging but limited non-hedging activities may be engaged in under the rule.[10] Based upon staff's most recent experience with Rule 4.5, the Commission again is proposing revisions to the rule and, in particular, to the operating criteria concerning the amount of a qualifying entity's non-hedging commodity interest trading.

## II. The Proposal

### *A. The Text of the Proposal*

Currently, Rule 4.5(c)(2)(i) provides that the Notice of Eligibility must contain a representation that the eligible person must operate the qualifying entity such that the entity:

> Will use commodity futures or commodity option contracts solely for bona fide hedging purposes within the meaning and intent of [Rule] 1.3(z)(1); *Provided, however,* That in addition, with respect to positions in commodity futures or commodity option contracts which do not come within the meaning and intent of [Rule] 1.3(z)(1), a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; And, *Provided further*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in [Rule] 190.01(x) may be excluded in computing such 5 percent.

This limitation on non-hedge activity contained in Rule 4.5 has come to be known as ''the 5 percent test.''

Because futures margins have generally been set at levels near or below 5 percent of contract value, the 5 percent test has permitted the notional value of non-hedging commodity futures and option positions to approximate the liquidation value of an entity's portfolio. Recently, however, eligible persons and qualifying entities have expressed concern to Commission staff over the 5 percent test, because margin levels for certain stock index futures have come to significantly exceed 5 percent of contract value, thereby limiting the use of such contracts in non-hedging strategies to a much greater extent than other types of contracts with lower margins.[11] They also have expressed concern that a similar constraint could arise with respect to security futures products (SFPs), because the required margin for SFPs will be 20 percent of contract value.[12]

In response to these concerns, the Commission is proposing to amend Rule 4.5 by adding as an alternative to the 5 percent test a limitation based on the notional value of non-hedge positions. This amendment would reorganize paragraph (c)(2)(i) of the rule, to: (1) Redesignate the 5 percent test as new paragraph (c)(2)(i)(A); and (2) provide an alternative non-hedge operating criterion in new paragraph (c)(2)(i)(B).

As proposed, this alternative would provide that, with respect to non-hedge commodity interest positions, a qualifying entity may represent that the aggregate notional value of such positions does not exceed the liquidation value of the qualifying entity's portfolio (notional test). This alternative is based upon a proposal recently made to the Commission's Division of Clearing and Intermediary Oversight in connection with a request for ''no-action'' relief from the 5 percent test of Rule 4.5(c)(2).[13] For the purpose of the notional test, ''notional value'' would be calculated for futures by multiplying for each such position the size of the contract, in contract units, by the current market price per unit and for

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[4] S. Rep. No. 384, 97th Cong., 2d Sess. 79–80 (1982).

[5] 50 FR 15868 (Apr. 23, 1985), which contains a full discussion of the history of the directive and the subsequent adoption of Rule 4.5.

[6] Rules 4.5(a) and (b).

[7] Rule 4.5(c).

[8] Rule 4.5(d).

Over the past ten years, eligible persons have filed approximately 15,500 initial and supplemental Notices with the NFA and the Commission, as follows: registered investment companies (filing on a series-by-series basis)—12,000; state-regulated insurance companies—600; state- or federally-regulated financial depository institutions—2,700; and pension plan trustees, fiduciaries and employers—200. However, not all of the qualifying entities named in these Notices may still be in operation as of this date.

Additionally, Rule 4.5 provides that certain pension plans are not commodity pools. Because this exclusion is self-executing, no notice must be filed to claim it. Accordingly, the amendment to Rule 4.5(c) that the Commission is today proposing does not apply to these plans or their operation. *See* Rule 4.5(a)(4)(i)–(iv).

[9] See 58 FR 43791 (Aug. 18, 1993). The Commission also has expanded the class of persons who are ''non-pools'' under Rule 4.5. *See* 65 FR 24127 (Apr. 25, 2000).

[10] *See* 58 FR 6371 (Jan. 28, 1993).

[11] *See, e.g.*, comments received in connection with the Commission's Roundtable on CPO and CTA Issues, held on September 19, 2002. These comments may be accessed at *http://www.cftc.gov/opa/press02/opa4700–02.htm*.

The Commission held the Roundtable as a result of its ''Report on the Study of the Commodity Exchange Act and the Commission's Rules and Orders Governing the Conduct of Registrants Under the Act.'' The Report was mandated by section 125 of the Commodity Futures Modernization Act of 2000 (CFMA), which directed the Commission to conduct a study of those sections of the Act and the Commission's rules applicable to intermediaries. The Report can be accessed through: *www.cftc.gov/files/opa/opaintermediarystudy.pdf*, and section 125 of the CFMA can be accessed through: *www.cftc.gov/files/ogc/ogchr5660.pdf*.

[12] *See* CFTC Rule 41.45(b)(1) and Securities and Exchange Commission Rule 403(b)(1), 67 FR 53146, 53174 and 53179, respectively (Aug. 14, 2002).

[13] *See* Letter of Barclays Global Investors, N.A. dated July 18, 2002, to Jane K. Thorpe, Director of the Division.

options by multiplying for each such position the size of the contract, in contract units, by the strike price per unit.

The following two examples show the different effects of the existing and proposed non-hedging tests using futures contracts based on equity, in one instance, and on debt, in the other instance. In each example, the eligible person desires to establish the maximum number of contracts permissible for the qualifying entity. In both examples, it is assumed that the entity's liquidation value is $10 million, the settlement level of the contract is as of September 25, 2002, and the margin requirement is as of September 26, 2002.

With respect to the S&P 500 Stock Price Index futures contract traded on the Chicago Mercantile Exchange, the number of contracts the person could establish would be:

5% of liquidation value = $500,000 (.05 × $10,000,000)

Initial non-hedge margin for a single S&P contract = $17,813, or almost 9% of contract value

S&P settlement level = 819.29 points

S&P contract value = $204,822.50 (819.29 × $250 per point)

5% Test = 28 contracts ($500,000/$17,813=28.07)

Notional Test = 48 contracts ($10,000,000/$204,822.50=48.8)

Thus, for establishing positions in the S&P 500 Stock Price Index future contract, the notional test would be less restrictive.

With respect to the 10-Year Treasury Note contract traded on the Chicago Board of Trade, the number of contracts that the eligible person could establish would be:

5% of liquidation value = $500,000 (.05 × $10,000,000)

Initial non-hedge margin for a single T-Note contract = $1,755, or less than 2% of contract value

T-Note settlement level = 114,160 points

T-Note contract value = $114,160 (114,160 × 100%)

5% Test = 284 contracts ($500,000/$1,755=284.9)

Notional Test = 87 contracts ($10,000,000/$114,160=87.6)

Thus, for establishing positions in the 10-Year Treasury Note contract, the 5 percent test would be less restrictive.

The following table summarizes this information:

| Contract | Liquidation value | 5% | Initial margin (as of 9/26/02) | Settlement level (as of 9/25/02) | Multiplier | Contract value | No. Contracts 5% test | Contracts notional test |
|---|---|---|---|---|---|---|---|---|
| S&P | $10m | $500,000 | $17,813 | 819.29 | $250 | $204,822.50 | 28 | 48 |
| T-Note | 10m | 500,000 | 1,755 | 114,160.00 | 100% | 114,160.00 | 284 | 87 |

The Proposal (and the ''no-action'' position taken below) would not affect the ability of eligible persons claiming relief under Rule 4.5 to use commodity interests for *bona fide* hedging purposes on an unlimited basis. Rather, it would establish a second, alternative test under which they could use commodity interests for other than *bona fide* hedging purposes. Also, the Proposal (and the ''no-action'' position) would not affect any other provision of Rule 4.5, including the proviso following paragraph (c)(2) of the rule that:

> the making of such representations [as are required in the Notice of Eligibility] shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which [an eligible] person or qualifying entity is subject.

*B. Request for Comment*

The Commission requests comment on the Proposal and on the following issues:

(1) Do the proposed changes adequately address perceived problems with the existing requirements under Rule 4.5?

(2) Is there some other limitation for non-hedge positions that the Commission should adopt in lieu of, or in addition to, the existing and proposed limitations?

(3) Should the Commission impose *any* limitation for non-hedge activity by persons claiming relief under Rule 4.5?

*C. ''No-Action'' Position*

The Proposal would facilitate the use of the commodity interest markets by persons and entities who, in accordance with Rule 4.5, are ''otherwise regulated'' and it would potentially benefit other market participants through increased liquidity. Accordingly, the Commission has determined that, pending action on the Proposal, it will not commence any enforcement action against an eligible person for failing to register as a CPO in accordance with section 4m(1) of the Act,[14] where the eligible person operates a qualifying entity in accordance with the proposed revisions to Rule 4.5(c)(2).

Neither eligible persons who have claimed relief under Rule 4.5 nor eligible persons who claim such relief in the future need to take any additional action to operate their qualifying entities in accordance with the notional test. Rather, making the representations currently required by the rule in a Notice filed with the NFA and the Commission—including the representation concerning the 5 percent test—is all that is required.

This position will remain in effect until such time as the Commission takes final action on the Proposal. It is, however, subject to the condition that upon adoption of any amendment to Rule 4.5, the eligible person must comply in full with the terms of any amendment as the Commission may adopt or with the existing 5 percent test of Rule 4.5. In the event the Commission adopts an alternative non-hedge operating criterion that varies from the criterion proposed herein, it will provide affected eligible persons and qualifying entities with sufficient time within which to comply with the criterion as adopted.

**III. Related Matters**

*A. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (PRA),[15] which 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, does not apply to the Proposal. The Commission believes the proposed amendment of Rule 4.5 does not contain information requirements which necessitate the approval of the Office of Management and Budget, because the purpose of the amendment is to provide an alternative representation that may be made to claim the relief available under the rule.

*B. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA)[16] requires that agencies, in promulgating rules, consider the impact

[14] 7 U.S.C. 6m(1).

[15] 44 U.S.C. 3501 *et seq.*

[16] 5 U.S.C. 601 *et seq.*

of these rules on small entities. The definitions of small entities that the Commission has established for this purpose do not address the eligible persons and qualifying entities set forth in Rule 4.5 because, by the very nature of the rule, the operations and activities of such persons and entities generally are regulated by federal and state authorities other than the Commission. Assuming, arguendo, that such persons and entities would be small entities for purposes of the RFA, the Commission believes that the Proposal would not have a significant economic impact on them because it would relieve a greater number of those persons (and entities) from the requirement to register as a CPO and from the disclosure, reporting and recordkeeping requirements applicable to registered CPOs.

Accordingly, the Chairman, on behalf of the Commission, certifies pursuant to section 3(a) of the RFA,[17] that the Proposal will not have a significant economic impact on a substantial number of small entities. Nonetheless, the Commission invites comment from any person who believes that these rules, as proposed, would have a significant economic impact on its operation.

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

Commodity pool operators, Commodity trading advisors, Commodity futures, Commodity options.

Accordingly, 17 CFR chapter I is proposed to be amended as follows:

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

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

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

### Subpart A—General Provisions, Definitions and Exemptions

2. Section 4.5 is proposed to be amended by revising paragraph (c)(2)(i) to read as follows:

**§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term ''commodity pool operator.''**

* * * * *

(c) * * *

(2) * * *

(i) Will use commodity futures or commodity options contracts solely for bona fide hedging purposes within the meaning and intent of § 1.3(z)(1) of this chapter; *Provided, however,* That in addition, with respect to positions in commodity futures or commodity option contracts which do not come within the meaning and intent of § 1.3(z)(1), a qualifying entity may represent that:

(A) The aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; *Provided further,* That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in § 190.01(x) of this chapter may be excluded in computing such five percent; or

(B) The aggregate notional value of such positions does not exceed the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into. For the purpose of this paragraph (c)(2)(i)(B), the term ''notional value'' shall be calculated for each such futures position by multiplying the size of the contract, in contract units, by the current market price per unit and for each such option position by multiplying the size of the contract, in contract units, by the strike price per unit;

* * * * *

Issued in Washington, DC, on October 22, 2002, by the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 02–27309 Filed 10–25–02; 8:45 am]

**BILLING CODE 6351–01–P**

[17] 5 U.S.C. 605(b).

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

### 33 CFR Part 165

**[COTP Los Angeles–Long Beach 02–004]**

**RIN 2115–AA97**

### Security Zones; San Pedro Bay, CA

**AGENCY:** Coast Guard, DOT.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Coast Guard proposes to establish moving and fixed security zones around and under all cruise ships located on San Pedro Bay, California, in and near the ports of Los Angeles and Long Beach. These proposed security zones are needed for national security reasons to protect the public and ports from potential terrorist acts. Entry into these zones will be prohibited unless specifically authorized by the Captain of the Port Los Angeles-Long Beach.

**DATES:** Comments and related material must reach the Coast Guard on or before November 22, 2002.

**ADDRESSES:** You may mail comments and related material to U.S. Coast Guard Marine Safety Office/Group Los Angeles-Long Beach, Waterways Management Division, 1001 S. Seaside Avenue, Building 20, San Pedro, California 90731. The Waterways Management Division maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at the Waterways Management Division between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Junior Grade Rob Griffiths, Assistant Chief, Waterways Management Division, (310) 732–2020.

**SUPPLEMENTARY INFORMATION:**

**Request for Comments**

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking (COTP Los Angeles-Long Beach 02–004), indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

In our final rule, we will include a concise general statement of the comments received and identify any changes from the proposed rule based on the comments. If as we anticipate, we make the final rule effective less than 30 days after publication in the **Federal Register**, we will explain our good cause for doing so, as required by 5 U.S.C. 553(d)(3).

**Public Meeting**

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to the Waterways Management Division at the