

## Rulemaking Requirements

1. This rule has been determined to be not significant for purposes of E.O. 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid Office of Management and Budget Control Number. This rule involves collections of information subject to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*). These collections have been approved by Office of Management and Budget under control number 0694-0088, "Multi-Purpose Application," which carries a burden hour estimate of 58 minutes for a manual or electronic submission. BIS believes that this rule will not materially affect the burden imposed by this collections.

3. This rule does not contain policies with Federalism implications as that term is defined under E.O. 13132.

4. The Department finds that there is good cause under 5 U.S.C. 553(b)(B) to waive the provisions of the Administrative Procedure Act requiring prior notice and the opportunity for public comment because it is unnecessary. The changes made by this rule merely provide greater clarity by including cross-references to interrelated provisions of existing regulations. In particular, the Syria General Order, published in May of 2004, modified the regulatory treatment of exports and reexports to Syria. This rule inserts references to the General Order into existing Syria specific provisions of the EAR to ensure that the public is aware of the existence of the Syria General Order. Therefore because the changes made by this rule are not substantive, it is unnecessary to provide notice and opportunity for public comment. In addition, the 30-day delay in effectiveness required by 5 U.S.C. 553(d) is not applicable because this rule is not a substantive rule.

Because notice of proposed rulemaking and opportunity for public comment are not required to be given for this rule under the Administrative Procedure Act or by any other law, the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) are not applicable.

## List of Subjects

### 15 CFR Part 742

Exports, Terrorism.

### 15 CFR Part 746

Exports, Foreign trade.

■ Accordingly, parts 742 and 746 of the Export Administration Regulations (15 CFR parts 730—799) are amended as follows:

### PART 742—[AMENDED]

■ 1. The authority citation for part 742 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 18 U.S.C. 2510 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 2, 2005, 70 FR 45273 (August 5, 2005); Notice of October 25, 2005, 70 FR 62027 (October 27, 2005).

■ 2. Section 742.9 is amended to add a new paragraph (e) as follows:

#### § 742.9 Anti-terrorism: Syria.

\* \* \* \* \*

(e) General Order No. 2, Supplement No. 1 to part 736 of the EAR, sets forth special controls for exports and reexports to Syria. General Order No. 2 supersedes the provisions of paragraphs (a) through (d) of this section.

### PART 746—[AMENDED]

■ 3. The authority citation for part 746 continues to read as follows:

**Authority:** 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 287c; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; 22 U.S.C. 6004; Sec. 901–911, Pub. L. 106–387; Sec. 221, Pub. L. 107–56; E.O. 12854, 58 FR 36587, 3 CFR 1993 Comp., p. 614; E.O. 12918, 59 FR 28205, 3 CFR, 1994 Comp., p. 899; E.O. 13222, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 2, 2005, 70 FR 45273 (August 5, 2005).

■ 4. New section 746.9 is added to read as follows:

#### § 746.9 Syria.

General Order No. 2, Supplement No. 1 to part 736 of the EAR, sets forth special controls for exports and reexports to Syria.

Dated: February 14, 2006.

**Matthew S. Borman,**

*Deputy Assistant Secretary for Export Administration.*

[FR Doc.06–1709 Filed 2–23–06; 8:45 am]

**BILLING CODE 3510–33–P**

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 1

### RIN 3038–AC20

### Definition of “Client” of a Commodity Trading Advisor

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Final regulations.

**SUMMARY:** The Commodity Futures Trading Commission (Commission) is amending Regulation 1.3(bb) by adding to that regulation a definition of the term “client,” as it relates to commodity trading advisors (CTAs). This amendment clarifies inconsistencies in the Commission’s regulations concerning the advisees of CTAs, and it reflects the Commission’s longstanding view that its antifraud authority extends to all CTAs, irrespective of whether they provide advice on a personalized or nonpersonalized basis. The Commission is also amending Regulation 1.3(bb) by adding the term “derivatives transaction execution facility” to the CTA definition set forth in that regulation.

**DATES:** Effective Date: March 27, 2006.

#### FOR FURTHER INFORMATION CONTACT:

Barbara S. Gold, Associate Director, or R. Stephen Painter Jr., 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) 418–5416, respectively; facsimile number: (202) 418–5528; and electronic mail: [bgold@cftc.gov](mailto:bgold@cftc.gov) or [spainter@cftc.gov](mailto:spainter@cftc.gov), respectively.

#### SUPPLEMENTARY INFORMATION:

#### I. The Proposal

##### A. Background

On September 28, 2005, the Commission published for public comment a proposed amendment to Regulation 1.3(bb) (Proposal).<sup>1</sup> That amendment, which the Commission is

<sup>1</sup> 70 FR 56608. This **Federal Register** release announcing the Proposal (Proposing Release) may be accessed through the Commission’s Web site: <http://www.cftc.gov/files/foia/fedreg05/foi050928a.pdf>. In the Proposing Release, the Commission provided a detailed explanation of the proposed amendment to Regulation 1.3(bb). Accordingly, the Commission encourages interested persons to read the Proposing Release for a fuller discussion of the purpose of the amendment to Regulation 1.3(bb).

The Commission’s regulations are found at 17 CFR Ch. I (2005) and may be accessed at <http://www.gpoaccess.gov/ecfr>.

adopting as proposed, defines the term “client” of a CTA.

Section 1a(6)(A) of the Commodity Exchange Act (Act or CEA)<sup>2</sup> defines the term “commodity trading advisor” to mean 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—

(I) 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 or derivatives transaction execution facility;

(II) any commodity option authorized under section 4c; or

(III) any leverage transaction authorized under section 19; 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).

Under the language of Section 1a(6)(A) of the Act, the term “commodity trading advisor” includes advisors who provide nonpersonalized advice, such as publishers of advisory newsletters or Web sites, as well as advisors who provide advice tailored to the needs of particular persons and advisors who direct other persons’ trading pursuant to a power of attorney or other written authorization.<sup>3</sup>

Regulation 1.3(bb) contains essentially the same definition of the term “commodity trading advisor” as that contained in Section 1a(6) of the Act. However, neither the Act nor the Commission’s regulations issued thereunder define who the “others” are that CTAs advise. Moreover, neither the Act nor the regulations are consistent when referring to these advisees. As explained in more detail in the Proposing Release,<sup>4</sup> although most of the relevant provisions refer solely to “clients,” a few provisions of the Act and regulations refer to “clients and subscribers.”

The definition of the term “client” of a CTA being adopted today clarifies these inconsistencies. Specifically, the amendment to Regulation 1.3(bb) clarifies that, as used in the provisions of the Act and the regulations relating to CTAs, the term “client” refers to all advisees of a CTA, including persons who receive advice by subscribing to a

newsletter or other information service. A “subscriber,” as used in these statutory provisions and regulations, is one type of “client.”<sup>5</sup> In this regard, the Commission notes that, as it stated in the Proposing Release,<sup>6</sup> the amendment to Regulation 1.3(bb) clarifies that the antifraud provisions of Section 4o of the Act apply to all CTAs, and not just to those who provide advice on a personalized basis.

#### B. New Regulation 1.3(bb)(2)

As proposed and as adopted, new Regulation 1.3(bb)(2) defines the term “client,” as it relates to a CTA, as including:

any person (i) to whom a commodity trading advisor provides advice, for compensation or profit, 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 or derivatives transaction execution facility, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act; or (ii) to whom, for compensation or profit, and as part of a regular business, the commodity trading advisor issues or promulgates analyses or reports concerning any of the activities referred to [above]. The term “client” includes, without limitation, any subscriber of a commodity trading advisor.

This new definition of “client” includes clients to whom a CTA provides personalized trading advice as well as clients to whom a CTA provides nonpersonalized trading advice. Such nonpersonalized advice includes, among other things, standardized advice provided by newsletters, seminars, tutorials, periodicals, computer software, Internet websites, voicemail recordings, emails, and facsimiles. The definition also covers advice provided over a period of time pursuant to a subscription arrangement or on a one-time basis.

As the Commission noted in the Proposing Release,<sup>7</sup> because the definition of the term “client” of a CTA includes within its scope persons to whom the CTA provides advice on either a personalized or nonpersonalized basis, new Regulation 1.3(bb)(2) makes clear that the antifraud provisions of Section 4o of the Act

apply to *all* persons who come within the statutory definition of the term “commodity trading advisor,” and not, for example, just to those who provide personalized trading advice or who direct their clients’ trading—*i.e.*, CTAs who must register as such with the Commission pursuant to Section 4m(1) of the Act.<sup>8</sup>

#### C. Comments on the Proposal

The Commission received five comment letters on the Proposal:<sup>9</sup> One from the Association of the Bar of the City of New York (Bar Association), one from an attorney who represents certain CTAs that provide commodity trading advice on a nonpersonalized basis, and three from CTAs. The Bar Association wrote in support of the Proposal, agreeing that the Commission should eliminate inconsistencies in the regulations concerning the advisees of CTAs. It further agreed that the term “client” as used in the Act was not intended to abridge the Commission’s jurisdiction to proceed against fraud by CTAs that provide advice on a nonpersonalized basis.

The other commenters wrote in opposition to the Proposal, with each suggesting that the proposed definition of “client” of a CTA might raise issues under the First Amendment of the United States Constitution.<sup>10</sup> The Commission disagrees, because the definition of “client” does no more than clarify that the manner in which advice is provided, whether on a personalized or nonpersonalized basis, does not affect whether a person comes within the CTA definition of Section 1a(6)(A) of the Act. As proposed and as adopted, new Regulation 1.3(bb)(2) does not impose any registration obligation on those CTAs that are currently eligible to claim the registration exemption of Regulation 4.14(a)(9).<sup>11</sup> Consequently, because this

<sup>2</sup> 7 U.S.C. 6m(1).

<sup>3</sup> The comment letters may be accessed through the Commission’s Web site: [http://www.cftc.gov/foia/comment05/foi05-005\\_1.htm](http://www.cftc.gov/foia/comment05/foi05-005_1.htm).

<sup>4</sup> The First Amendment prohibits Congress from, among other things, making any law abridging the freedom of speech. U.S. Const. amend. I.

<sup>5</sup> Regulation 4.14(a)(9) provides a registration exemption for CTAs that do not engage in either of the following activities: (1) Directing client accounts; or (2) providing commodity trading advice based on, or tailored to, the commodity interest or cash market positions or other circumstances or characteristics of particular clients. The Commission adopted Regulation 4.14(a)(9) in response to several Federal district court cases holding that the CTA registration requirement, as applied to certain “publisher” CTAs, constitutes an unconstitutional prior restraint on speech. Specifically, the Commission adopted Regulation 4.14(a)(9) because of its belief that “minimizing impact on speech, other than false, deceptive or misleading speech, is a relevant

<sup>2</sup> 7 U.S.C. 1a(6) (2000). The Act may be accessed at [http://www.access.gpo.gov/uscode/title7/chapter1\\_.html](http://www.access.gpo.gov/uscode/title7/chapter1_.html).

<sup>3</sup> As noted in more detail in the Proposing Release, Section 1a(6)(B) of the Act excludes certain persons from the CTA definition where, as provided for in Section 1a(6)(C) of the Act, their furnishing of advice with respect to trading in commodity futures and options is *solely incidental* to the conduct of their business or profession. 70 FR 56608, 56609.

<sup>4</sup> 70 FR 56608, 56609 nn.5–6.

<sup>5</sup> As noted in the Proposing Release, 70 FR 56608, 56609 n.8, and as discussed in more detail below, the usual presumption that different terms in a statute have separate meanings is rebutted as to the terms “client” and “subscriber” in Section 4(1) of the Act. Consequently, the phrase “clients and subscribers,” as used in the Act and in the regulations, does not imply that “clients” and “subscribers” are two separate classes of advisees.

<sup>6</sup> *Id.* at 56609.

<sup>7</sup> *Id.* at 56609.

new regulation does not require CTAs that provide advice on a nonpersonalized basis to register if they are otherwise eligible to claim the registration exemption of Regulation 4.14(a)(9), the Commission believes that the regulation does not implicate the First Amendment. By defining the term “client” of a CTA, the Commission is merely clarifying its longstanding view that *all* CTAs, regardless of whether they provide personalized or nonpersonalized advice, are subject to the Commission’s antifraud authority. The Commission does not believe that the regulation of false, deceptive, or misleading speech of CTAs—even of those CTAs that provide advice on a nonpersonalized basis—runs afoul of the protections of the First Amendment.<sup>12</sup>

In addition to raising First Amendment concerns, one commenter also suggested that the Commission lacks authority to adopt the Proposal because the amendment to Regulation 1.3(bb) would eliminate a substantive distinction between the terms “client” and “subscriber” that the United States Supreme Court recognized in *Lowe v. SEC*.<sup>13</sup> This commenter further suggested that, because the Act and the Commission’s regulations refer to “clients” and “subscribers,” Congress must have intended those words to have different meanings. Consequently, according to the commenter, the

policy consideration in determining the Commission’s regulatory approach toward CTAs whose relationship with their clients is limited to standardized advice through media such as newsletters, prerecorded telephone newlines, Internet Web sites, and non-customized computer software.” 65 FR 12938, 12939 (March 10, 2000).

<sup>12</sup> 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).

One commenter suggested that the proposed definition of “client” would violate the First Amendment because it would clarify that Section 4o of the Act covers fraud in connection with nonpersonalized advice. According to this commenter, Section 4o of the Act imposes fiduciary standards and such standards cannot constitutionally be imposed on providers of impersonal advice. The premise of this argument was rejected by the Court of Appeals in *Commodity Trend Serv., Inc. v. CFTC (CTS)*, 233 F.3d 981 (7th Cir. 2000). The court held that Section 4o of the Act “effectuates the extant fiduciary duties of personalized advisors \* \* \* but does not impose fiduciary obligations on impersonal advisors.” *Id.* at 990, *see also* 233 F.3d at 993–95 (discussing the scope of Section 4o of the Act as applied to impersonal CTAs and holding the provision constitutional if properly applied). The Commission agrees with the analysis of this issue in *CTS* and finds it to be an adequate response to the commenter’s concern.

<sup>13</sup> 472 U.S. 181 (1985). That case involved a securities investment adviser and the application of the Investment Advisers Act (IAA), 15 U.S.C. § 80b–1 *et seq.*, to his conduct.

Commission does not have the authority to amend Regulation 1.3(bb) to clarify that a “subscriber” is one type of “client.”

Both of these arguments were considered and rejected by the United States Court of Appeals for the Seventh Circuit in *Commodity Trend Service, Inc. (CTS)*.<sup>14</sup> As explained in the Proposing Release,<sup>15</sup> *CTS* deferred to the Commission’s interpretation of Section 4o of the Act, finding that the Commission’s position was a reasonable interpretation of the statutory language and that it appeared to effectuate Congressional intent. In *CTS*, the court held that the use of the term “client” in Section 4o does not connote only a personalized relationship. Instead, the term “client” “can refer to \* \* \* those who receive tailored advice from professionals or those who receive any kind of service regardless of whether it is personalized.”<sup>16</sup>

According to *CTS*, the distinction drawn by *Lowe* between the term “client” and the term “subscriber” is not necessarily applicable to the CEA. Looking at the broad exclusion from the IAA for publishers, the Court in *Lowe* held that, under the IAA, Congress intended the term “client” to refer only to a personalized relationship; investment advisers providing advice on a nonpersonalized basis are excluded entirely from the scope of the IAA because they generally fall within the IAA’s broad exclusion for publishers.<sup>17</sup> The CEA, on the other hand, does not exclude all publishers from its scope. Rather, the CEA expressly brings within its scope certain advisors that provide advice on a nonpersonalized basis—for example, publishers of nonpersonalized advice may come within the CTA definition, provided that their advice is not “solely incidental” to their publishing business.<sup>18</sup> According to the court in *CTS*, if the use of the term “client” in Section 4o were construed as removing from the scope of that section’s antifraud provisions CTAs who provide advice on a nonpersonalized basis, certain of those CTAs would come within the CTA definition, but virtually none of the Act’s provisions would apply to them.<sup>19</sup> According to the *CTS* court, Congress likely did not intend such an anomalous result.<sup>20</sup>

<sup>14</sup> *CTS*, 233 F.3d 981.

<sup>15</sup> 70 FR 56608, 56609.

<sup>16</sup> *CTS*, 233 F.3d at 991.

<sup>17</sup> *Id.* at 988.

<sup>18</sup> *See supra* note 3.

<sup>19</sup> *CTS*, 233 F.3d at 988–89.

<sup>20</sup> *Id.* at 989.

Nor does the Commission believe that by using the terms “client” and “subscriber,” Congress intended “client” to refer only to CTAs that provide advice on a personalized basis. As noted by *CTS*,<sup>21</sup> and as explained in the Proposing Release,<sup>22</sup> the usual presumption that different terms in a statute have separate meanings is rebutted as to the terms “client” and “subscriber” by the language of Section 4l(1) of the Act, which lists “subscriptions” as one of the “arrangements with clients” entered into by CTAs. This language implies that, in connection with CTAs, a person who arranges for a subscription, in other words a “subscriber,” is a type of “client.”

In light of the foregoing, the Commission is adopting as proposed Regulation 1.3(bb)(2).

#### D. Amended Regulation 1.3(bb)(1)

The Commodity Futures Modernization Act of 2000 (CFMA) amended the statutory definition of “commodity trading advisor” to take account of the new type of trading facility known as a “derivatives transaction execution facility.”<sup>23</sup> As noted in the Proposing Release,<sup>24</sup> the Commission is adopting a conforming change to the CTA definition contained in Regulation 1.3(bb)(1).

## II. Related Matters

### A. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)<sup>25</sup> 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 regulations on such entities in accordance with the RFA.<sup>26</sup>

With respect to CTAs, the Commission has previously stated that it would evaluate within the context of a particular 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.<sup>27</sup> As explained in the Proposing Release, the Commission does not believe that Regulation

<sup>21</sup> *Id.* at 989–90.

<sup>22</sup> 70 FR 56608, 56609 n.8.

<sup>23</sup> *See* Commodity Futures Modernization Act of 2000, Pub. L. 106–554, Appendix E, 114 Stat. 2763, Section 123(a)(1)(A). The CFMA may be accessed through the Commission’s Web site: <http://www.cftc.gov/files/ogc/ogchr5660.pdf>.

<sup>24</sup> 70 FR 56608, 56609 n.4.

<sup>25</sup> 5 U.S.C. 601 *et seq.*

<sup>26</sup> 47 FR 18618 (April 30, 1982).

<sup>27</sup> *Id.* at 18620.

1.3(bb)(2) will have a significant impact on affected CTAs. This is because the only burden imposed by the amendment is the obligation to comply with the antifraud provisions of Section 4o of the Act. Assuming *arguendo*, however, that compliance with Section 4o does constitute a significant burden, the burden is neither new nor additional, because new Regulation 1.3(bb)(2) is consistent with the Commission's longstanding interpretation of Section 4o as applicable to all CTAs.

The Commission did not receive any public comments on its analysis of the application of the RFA to proposed Regulation 1.3(bb)(2).

#### B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)<sup>28</sup> imposes certain requirements on Federal agencies (including the Commission) in connection with their conducting or sponsoring any collection of information as defined by the PRA. This rulemaking does not require a new collection of information on the part of any entities subject to it. Accordingly, for purposes of the PRA, the Commission certified that the proposed amendment did not impose any new reporting or recordkeeping requirements.

#### C. Cost-Benefit Analysis

Section 15(a) of the Act<sup>29</sup> 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 shall 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 regulation 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 has evaluated the

costs and benefits of new Regulation 1.3(bb)(2) in light of the specific considerations identified in Section 15(a) of the Act as follows:

#### 1. Protection of Market Participants and the Public

Because Regulation 1.3(bb)(2) expressly brings all CTAs within the purview of the antifraud provisions of Section 4o of the Act, the regulation will enhance the Commission's ability to protect market participants and the public.

#### 2. Efficiency and Competition

Regulation 1.3(bb)(2) will 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

Regulation 1.3(bb)(2) will 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

Regulation 1.3(bb)(2) will 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

Regulation 1.3(bb)(2) will have no effect, from the standpoint of imposing costs or creating benefits, on any other public interest considerations.

Accordingly, after considering these factors, the Commission has determined to adopt the amendments to Regulation 1.3(bb) set forth below.

#### List of Subjects in 17 CFR Part 1

17 CFR Part Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

■ For the reasons presented above, the Commission is amending 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, 6l, 6m, 6n, 6o, 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 1.3 is amended by revising paragraph (bb)(1) and adding new paragraph (bb)(2) as follows:

#### § 1.3 Definitions.

\* \* \* \* \*

(bb)(1) *Commodity trading advisor.* This term means 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 or derivatives transaction execution facility, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act, or who, for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the foregoing; but such term does not include (i) Any bank or trust company or any person acting as an employee thereof, (ii) any news reporter, news columnist, or news editor of the print or electronic media, or any lawyer, accountant, or teacher, (iii) any floor broker or futures commission merchant, (iv) the publisher or producer of any print or electronic data of general and regular dissemination, including its employees, (v) the named fiduciary, or trustee, of any defined benefit plan which is subject to the provisions of the Employee Retirement Income Security Act of 1974, or any fiduciary whose sole business is to advise that plan, (vi) any contract market or derivatives transaction execution facility, and (vii) such other persons not within the intent of this definition as the Commission may specify by rule, regulation or order: Provided, That the furnishing of such services by the foregoing persons is solely incidental to the conduct of their business or profession: *Provided further,* That the Commission, by rule or regulation, may include within this definition, any person advising as to the value of commodities or issuing reports or analyses concerning commodities, if the Commission determines that such rule or regulation will effectuate the purposes of this provision.

(2) *Client.* This term, as it relates to a commodity trading advisor, means any person (i) to whom a commodity trading advisor provides advice, for compensation or profit, 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

<sup>28</sup> 44 U.S.C. 3501 *et seq.*

<sup>29</sup> 7 U.S.C. 19(a).

market or derivatives transaction execution facility, any commodity option authorized under section 4c of the Act, or any leverage transaction authorized under section 19 of the Act; or (ii) to whom, for compensation or profit, and as part of a regular business, the commodity trading advisor issues or promulgates analyses or reports concerning any of the activities referred to in paragraph (bb)(2)(i) of this section. The term "client" includes, without limitation, any subscriber of a commodity trading advisor.

\* \* \* \* \*

Issued in Washington, DC, on February 21, 2006 by the Commission.

**Jean A. Webb,**

*Secretary of the Commission.*

[FR Doc. 06-1745 Filed 2-23-06; 8:45 am]

BILLING CODE 6351-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 358

[Docket No. RM01-10-005]

#### Interpretive Order Relating to the Standards of Conduct

Issued February 16, 2006.

**AGENCY:** Federal Energy Regulatory Commission, DOE.

**ACTION:** Interpretive order.

**SUMMARY:** The Federal Energy Regulatory Commission (Commission) is issuing this Order to clarify that Transmission Providers may communicate with affiliated nuclear power plants regarding certain matters related to the safety and reliability of the transmission system on the nuclear power plants, in order to comply with requirements of the Nuclear Regulatory Commission.

**DATES:** The interpretive order will become effective February 24, 2006. Comments are due March 20, 2006. Reply comments are due April 19, 2006.

**FOR FURTHER INFORMATION CONTACT:** Demetra Anas, Office of the Market Oversight and Investigations, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, (202) 502-8178, [Demetra.Anas@ferc.gov](mailto:Demetra.Anas@ferc.gov).

**SUPPLEMENTARY INFORMATION:** Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

Standards of Conduct for Transmission Providers.

1. The Federal Energy Regulatory Commission (Commission) clarifies that sections 358.5(a) and (b) of the Commission's regulations, 18 CFR 358.5(a) and (b) (2005), do not prohibit a Transmission Provider and its affiliated nuclear power plant from engaging in necessary communications related to the safety and reliability of the transmission system or the nuclear power plant, including information relating to the loss of or potential loss of transmission lines that provide off-site power to the nuclear power plant regardless of ownership of those lines. The Commission is issuing this Interpretive Order to clarify that Transmission Providers may communicate with affiliated and non-affiliated nuclear power plants to enable the nuclear power plants to comply with the requirements of the Nuclear Regulatory Commission (NRC) as described in the NRC's February 1, 2006 Generic Letter 2006-002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power (Generic Letter).<sup>1</sup>

#### I. Background

2. On November 25, 2003, the Commission issued a Final Rule adopting Standards of Conduct for Transmission Providers (Order No. 2004).<sup>2</sup> Under Order No. 2004, the Standards of Conduct govern the relationships between Transmission Providers<sup>3</sup> and all of their Marketing Affiliates<sup>4</sup> and Energy Affiliates.<sup>5</sup> The

<sup>1</sup> Nuclear Regulatory Commission's Generic Letter 2006-002, Grid Reliability and the Impact on Plant Risk and the Operability of Offsite Power. February 1, 2006. OMB Control No.: 3150-0011.

<sup>2</sup> *Standards of Conduct for Transmission Providers*, Order No. 2004, FERC Stats. & Regs., Regulations Preambles ¶ 31,155 (2003), *order on reh'g*, Order No. 2004-A, III FERC Stats. & Regs. ¶ 31,161 (2004), 107 FERC ¶ 61,032 (2004), *order on reh'g*, Order No. 2004-B, III FERC Stats. & Regs. ¶ 31,166 (2004), 108 FERC ¶ 61,118 (2004), *order on reh'g*, Order No. 2004-C, 109 FERC ¶ 61,325 (2004), *order on reh'g*, Order No. 2004-D, 110 FERC ¶ 61,320 (2005), *appeal docketed sub nom.*, *National Gas Fuel Supply Corporation v. FERC*, No. 04-1183 (D.C. Cir. June 9, 2004).

<sup>3</sup> A Transmission Provider means: (1) Any public utility that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce; or (2) Any interstate natural gas pipeline that transports gas for others pursuant to subpart A of part 157 or subparts B or G of part 284 of this chapter. A Transmission Provider does not include a natural gas storage provider authorized to charge market-based rates that is not interconnected with the jurisdictional facilities of any affiliated interstate natural gas pipeline, has no exclusive franchise area, no captive ratepayers and no market power. 18 CFR 358.3(a) (2005).

<sup>4</sup> A Marketing Affiliate means an affiliate as that term is defined in section 358.3(b) or a unit that engages in marketing, sales or brokering activities as those terms are defined at section 358.3(e). 18 CFR 358.3(k) (2005).

<sup>5</sup> An Energy Affiliate means an affiliate of a Transmission Provider that:

Standards of Conduct also contain various information sharing prohibitions to help ensure that Transmission Providers do not use their access to information about transmission to unfairly benefit their own or their affiliates' sales to the detriment of competitive markets. Absent one of the exceptions articulated in section 358.5, if a Transmission Provider discloses transmission information to its Marketing or Energy Affiliate, the Transmission Provider is required to immediately post that information on its OASIS or Internet Web site.<sup>6</sup>

3. On January 9, 2006, at the request of the NRC, FERC Staff participated in a public meeting/workshop of the NRC regarding its then-proposed Generic Letter concerning Grid Reliability and the Operability of Offsite Power. During that discussion, participants expressed concern that the Commission's Standards of Conduct appear to restrict communications between Transmission Providers and their affiliated nuclear power plants, which are Energy Affiliates, thereby limiting the ability of the nuclear power plants to comply with all the requirements of the NRC. The participants also expressed concern that the information sharing prohibitions of the Standards of Conduct would prevent the nuclear power plants from answering all the questions posed in the NRC's draft Generic Letter.

4. The NRC's Generic Letter information request focuses on four areas: (1) Use of protocols, communications and coordination procedures between the nuclear power plant and the transmission system operators (TSO), independent system operator (ISO) or reliability coordinator/authority (RC), including the use of real-time contingency analysis or other programs to monitor the operability of

(1) Engages in or is involved in transmission transactions in U.S. energy or transmission markets; or

(2) Manages or controls transmission capacity of a Transmission Provider in U.S. energy or transmission markets; or

(3) Buys, sells, trades or administers natural gas or electric energy in U.S. energy or transmission markets; or

(4) Engages in financial transactions relating to the sale or transmission of natural gas or electric energy in U.S. energy or transmission markets.

(5) An LDC division of an electric public utility Transmission Provider shall be considered the functional equivalent of an Energy Affiliate, unless it qualifies for the exemption in § 358.3(d)(6)(v). 18 CFR 358.3(d) (2005). Affiliates that are not Energy Affiliates are described at 18 CFR 358.3(d)(6)(i)-(vi) (2005).

<sup>6</sup> The information sharing prohibitions of the Standards of Conduct are found at 18 CFR 358.5(a) and (b).