



COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 14

RIN 3038-AE21

Proceedings before the Commodity Futures Trading Commission; Rules Relating to Suspension or Disbarment from Appearance and Practice

AGENCY: Commodity Futures Trading Commission.

ACTION: Proposed rule.

SUMMARY: The Commodity Futures Trading Commission (“Commission”) is proposing to amend part 14 of its regulations, under which the Commission may deny, temporarily or permanently, the privilege of certain persons to appear or practice before it. The amendment clarifies the Commission’s standard for determining when an accountant has engaged in “unethical or improper professional conduct” which has been established as a basis for denying the accountant the privilege of appearing or practicing before the Commission.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by RIN number 3038-AE21, by any of the following methods:

- Agency website, via the Comments Online process: <http://comments.cftc.gov>.

Follow the instructions for submitting comments through the website.

- Mail: Christopher Kirkpatrick, Secretary of the Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581.

- Hand delivery/courier: Same as Mail, above.

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow instructions for submitting comments.

Please submit your comments using only one method.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to www.cftc.gov. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act, a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations, 17 CFR 145.9.

The Commission reserves the right, but shall have no obligation, to review, pre-screen, filter, redact, refuse or remove any or all of your submission from www.cftc.gov that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act and other applicable laws, and may be accessible under the Freedom of Information Act.

FOR FURTHER INFORMATION CONTACT: Jason Gizzarelli, Director, Office of Proceedings, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, DC 20581. Telephone: (202)418-5395.

SUPPLEMENTARY INFORMATION:

I. Background

The Commission proposes to amend § 14.8 of its regulations to provide additional guidance with respect to the circumstances in which the Commission, after notice and opportunity for hearing, may deny, temporarily or permanently, the privilege of appearing or practicing before it to any accountant who is found by a preponderance of the evidence to have violated § 14.8 of the regulations. Specifically, the Commission can impose a sanction upon any persons, most notably attorneys and accountants, after notice and opportunity for a hearing, who it finds do not possess the requisite qualifications to represent others; to be lacking in character or integrity; or to have engaged in unethical or improper professional conduct either in the course of an adjudicatory, investigative, rulemaking, or other proceeding before the Commission or otherwise.¹

The Commission has filed six administrative actions alleging violations of Rule 14.8 since 1996 against accountants appearing and practicing before the Commission.² In each of those six cases, the Commission accepted a settlement in which the defendants were banned from practicing before the Commission for a variety of time periods. The amendments to § 14.8 relate to the practice of accountants before the Commission and

¹ 17 CFR 14.8.

² In re Deloitte & Touche and Thomas Lux, CFTC Docket No. 96-10, 1996 WL 547883 (CFTC September 25, 1996); In re Sherald Griffin, CPA & Donna Laubscher, CPA, CFTC Docket No. 98-12, 1998 WL 161709 (CFTC April 8, 1998); In re Anatoly Osadchy, CPA, CFTC Docket No. 99-2, 1998 WL 754637 (CFTC October 29, 1998); In re G. Victor Johnson and Altschuler, Melvoin & Glasser, LLP, CFTC Docket No. 04-29, 2005 WL 1398672 (CFTC June 13, 2005); In re G. Victor Johnson II, McGladrey & Pullen, LLP and Altschuler, Melvoin & Glasser, LLP, CFTC Docket No. 11-01, 2010 WL 3903905 (CFTC October 4 2010); In re Jeannie Veraja-Snelling, CFTC Docket No. 13-29 (CFTC filed Aug. 26, 2013).

are intended to expand upon the language of current § 14.8(c) to articulate the standard more specifically and in a manner consistent with the standard the Commission has applied in past administrative adjudications considering accountant behavior.

The proposed amendment of § 14.8 generally tracks Securities and Exchange Commission (“SEC”) Rule 102(e), in which the SEC has elaborated its standard for determining when an accountant engages in “improper professional conduct” by specifying three types of violative conduct. The SEC rule states that, with respect to persons licensed to practice as accountants, “improper professional conduct” under SEC Rule 201.102(e)(1)(ii) means intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional standards or either of the following two types of negligent conduct: a single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted; or repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the SEC.³

In subparagraph (A) of its amended rule, the SEC defines “improper professional conduct” to include the most egregious violations of applicable professional standards – those done intentionally or knowingly. In subparagraph (B) of Rule 102(e), the SEC specifies what types of negligent conduct rise to the level of “improper professional conduct.” These standards are being added to the proposed § 14.8 of the Commission’s regulations to provide further definition to the fitness criteria established in § 14.8.

³ 17 CFR 201.102(e)(1)(iv).

II. Role of, and Standards Applied to, Accountants

Accountants auditing Commission registrants perform a critical gatekeeper role in protecting the financial integrity of the futures markets and the investing public.

Accountants appearing before the Commission in this capacity must understand the business operations of their clients and conduct financial audits both in accordance with applicable professional principles and standards and in satisfaction of all the requirements of the Commission's regulations.⁴

Rule 14.8 can be an effective remedial tool to ensure that the accountants appearing before the Commission are competent to do so and do not pose a threat to the Commission's registration and examination functions. Accountants who engage in intentional or knowing misconduct, which includes reckless conduct, clearly pose such a threat, as do accountants who engage in certain specified types of negligent conduct.

The Commission believes that a single, highly unreasonable error in judgment or other act made in circumstances warranting heightened scrutiny conclusively demonstrates a lack of competence to practice before the Commission. Repeated unreasonable conduct may also indicate a lack of competence. Therefore, if the Commission finds that an accountant acted egregiously in a single instance or unreasonably in more than one instance, in each case resulting in a violation of applicable professional standards, and that this conduct indicates a lack of competence, then that accountant engaged in improper professional conduct under the standard elaborated today.

⁴ The current professional principles and standards applicable to accountants appearing before the Commission include Generally Accepted Accounting Principles, Generally Accepted Auditing Standards, International Accounting Standards, the Code of Conduct of the American Institute of Certified Public Accountants, and the rules and standards of the Public Company Accounting Oversight Board.

The proposed amendment to § 14.8 is not meant, however, to encompass every professional misstep. A single judgment error, for example, even if unreasonable when made, may not indicate a lack of competence to practice before the Commission sufficient to require Commission action. The proposed amendment is crafted to provide greater clarity with respect to the Commission’s standard, as developed to-date through administrative adjudications, for assessing accountant conduct. At the same time, however, like the SEC regulations after which the amendment is modeled, the amendment elaborates standards that are to be applied in adjudications on a case-by-case basis, a method that promotes equitable application of the standards as warranted upon full consideration of the facts of each case.

Just as the SEC noted when it amended its rule in 1998, the Commission does not seek to use § 14.8 to establish new standards for the accounting profession.⁵ The rule itself imposes no new professional standards on accountants. Accountants who appear or practice before the Commission are already subject to professional standards, and § 14.8(c) is intended to apply consistent with those existing standards.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (“RFA”) requires agencies to consider whether the rules they may adopt will have a significant economic effect on a substantial number of small entities.⁶ The proposed amendment simply clarifies the standard by which the Commission determines whether accountants have engaged in “improper professional conduct” and does not impose any additional burdens on small businesses. Accordingly,

⁵ See 63 FR 33305, June 18, 1998 and 63 FR 57164, Oct. 26, 1998.

⁶ 5 U.S.C. 601 et seq.

the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the amendments will not have a significant economic impact on a substantial number of small businesses.

B. Paperwork Reduction Act

The proposed amendment to Rule 14.8 does not establish a collection of information for which the Commission would be obligated to comply with the Paperwork Reduction Act.⁷

C. Consideration of Costs and Benefits

Section 15(a) of the Commodity Exchange Act (“CEA”) requires the Commission to “consider the costs and benefits” of its actions before promulgating a regulation under the CEA or issuing certain orders.⁸ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

Reckless accounting practices threaten serious harm to market participants and, potentially, to the financial system as a whole.⁹ Section 14.8, which encompasses “improper professional conduct” of accountants that practice before the Commission, is

⁷ 44 U.S.C. 3501 *et seq.*

⁸ 7 U.S.C. 19(a).

⁹ For example, accounting professionals who prepare or assist in the preparation of misleading auditing reports or financial statements – either deliberately or due to their incompetence – may help cover up fraudulent practices that result in loss of customer funds. In addition, misleading auditing reports or financial statements may result in excessive risks being undertaken, because certain risk measures or decisions regarding risk management are based on accounting data.

one of the Commission's tools to guard against such harm. This proposed amendment is not designed to substantively change the standard that the Commission now employs under § 14.8(c) in assessing accountant conduct. Rather, as discussed above, the proposed amendment—which closely tracks language in the SEC's analogous rule¹⁰—would simply expand upon the language of current § 14.8(c) to articulate the standard more specifically and in a manner consistent with the standard the Commission has applied in past administrative adjudications considering accountant behavior.¹¹

Accordingly, the proposed amendment's chief benefit derives from clarifying the specific contours of the Commission's existing § 14.8(c) standard as applied to accountant behavior, and by codifying this refined approach in the Commission's regulations. Through this codification the more well-defined standard will be more transparent and accessible to professional practitioners, market participants, and the public generally. As a result, accountants appearing before the Commission will have the benefit of prominent notice of the specific standards of conduct to which they are held, and the consequences of failing to meet them. To the extent an accountant inclined to test the bounds of professional conduct perceives loopholes or ambiguity for exploitation in the more general standard now stated in § 14.8(c), the proposed clarifying amendment provides a deterrent against such potentially damaging conduct, a benefit for market participants and the public. Further, such clear, specific notice forecloses to a great degree potential for an offending accounting practitioner, in defense of improper conduct, to argue confusion or uncertainty about what specifically the Commission's standard requires, thus supporting Commission enforcement efficiency.

¹⁰ 17 CFR 201.102(e)(1)(iv).

¹¹ See footnote 2 of section I of this Preamble.

The Commission anticipates no material cost burden attributable to the proposed amendment for market participants or accounting professionals to whom the amendment is addressed. Again, this proposed rule amendment merely articulates with more precision the contours of the existing, but now more generally-stated, standard in current § 14.8(c), which incorporates the standards to which accountants must already conform under the rules governing that profession. Accountants practicing before the Commission are currently expected to be in compliance with this standard, so there should be no cost to them to change behavior to meet it.

In the following, the Commission considers the proposed amendment relative to the CEA section 15(a) factors.

(1) Protection of Market Participants and the Public

As noted, improper accounting practices may help to cover up financial frauds or foster improper managerial decisions, and may pose a threat to the safety of customer funds. By articulating the Commission's standards in more specific, codified, and readily accessible form, the amendment safeguards against accountants professing lack of knowledge of the applicable standards—or exploiting perceived ambiguities in them—to the detriment of market participants and the public.

(2) Efficiency, Competitiveness, and Financial Integrity of Futures Markets

Threats to the safety of customer funds generate public distrust in financial market integrity. To the extent this rule amendment better informs accountants and fosters their understanding of the Commission's standards and the consequences of improper actions—actions that potentially could threaten the safety of customer funds—the proposed amendment promotes the integrity of financial markets.

(3) Price Discovery

The Commission does not foresee that the proposed amendment will directly impact price discovery.

(4) Sound Risk Management Practices

As noted, improper accounting practices may lead to unnecessary risks being undertaken, as certain risk measures or managerial decisions are based on accounting data. To the extent the proposed amendment improves accountants' understanding of the Commission's standards, thereby deterring improper conduct that potentially could result in unnecessary risks being undertaken, the proposed amendment promotes sound risk management practices.

(5) Other Public Interest Considerations

By harmonizing the CFTC Rule 14.8(c) standard for accountants with that of SEC Rule 102(e), the proposed amendment helps to ensure consistency and reduces potential for confusion.

The Commission requests comment on all aspects of this consideration of costs and benefits, including whether any alternative is perceived as more beneficial, less costly, or otherwise better suited to serve the public interests articulated in CEA section 15(a) than the amendment herein proposed.

List of Subjects in 17 CFR Part 14

Administrative practice and procedure, Professional conduct and competency standards, Ethical conduct, Penalties.

For the reasons discussed in the preamble, the Commodity Futures Trading Commission proposes to amend 17 CFR part 14 as set forth below:

**PART 14 – RULES RELATING TO SUSPENSION OR DISBARMENT FROM
APPEARANCE AND PRACTICE**

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

Authority: Pub. L. 93-463, sec. 101(a)(11), 88 Stat. 1391, 7 U.S.C. 4a(j), unless otherwise noted.

2. Amend § 14.8 by revising paragraph (c) to read as follows:

§ 14.8 Lack of requisite qualifications, character and integrity.

* * * * *

(c) To have engaged in unethical or improper professional conduct either in the course of any adjudicatory, investigative, or rulemaking or other proceeding before the Commission or otherwise. With respect to the professional conduct of persons licensed to practice as accountants, “unethical or improper professional conduct” means:

(1) Intentional or knowing conduct, including reckless conduct, that results in a violation of applicable professional principles or standards; or

(2) Either of the following two types of negligent conduct:

(i) A single instance of highly unreasonable conduct that results in a violation of applicable professional principles or standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted.

(ii) Repeated instances of unreasonable conduct, each resulting in a violation of applicable professional principles or standards, which indicate a lack of competence to practice before the Commission.

Issued in Washington, DC, on October 17, 2014, by the Commission.

Christopher J. Kirkpatrick,

Secretary of the Commission.

Note: The following appendix will not appear in the Code of Federal Regulations.

**Appendix to Proceedings before the Commodity Futures Trading Commission;
Rules Relating to Suspension or Disbarment from Appearance and Practice –
Commission Voting Summary**

On this matter, Chairman Massad and Commissioners Wetjen, Bowen, and Giancarlo voted in the affirmative. No Commissioner voted in the negative.

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