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COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AE76

Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting certain amendments to its regulations applicable to commodity pool operators (CPOs) and commodity trading advisors (CTAs). The amendments (Final Rules) are consistent with no-action and exemptive letters issued by the Commission's Division of Swap Dealer and Intermediary Oversight (DSIO). The amendments provide an exemption from registration for CPOs and CTAs of family offices; adopt exemptive relief consistent with the Jumpstart Our Business Startups Act of 2012 by permitting general solicitation under applicable Commission regulations; and clarify that non-U.S. persons, regardless of financial sophistication, are permitted participants in pools exempt under the applicable Commission regulation.

DATES: This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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I. Background

a. Statutory and Regulatory Background

i. Existing Statutory and Regulatory Authorities

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)[1] established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the swaps market. As amended by the Dodd-Frank Act, section 1a(11) of the Commodity Exchange Act (CEA or the Act) defines the term "commodity pool operator," as any person[2] engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, 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 commodity interests.[3] CEA section 1a(12) defines a "commodity trading advisor," as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or

[1] Pub. L. 111-203, 124 Stat. 1376 (2010), *available at*: *https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf* (last retrieved Jul. 17, 2019).

[2] Regulation 1.3 defines "person" as including individuals, associations, partnerships, corporations, and trusts. 17 CFR 1.3. The Commission's regulations are found at 17 CFR Chapter I (2019).

[3] 7 U.S.C. 1a(11). The CEA is found at 7 U.S.C. 1, et seq. (2019). Both the Act and the Commission's regulations are accessible through the Commission's website, *https://www.cftc.gov*.

electronic media, as to the value of or the advisability of trading in commodity interests.[4] CEA section 4m(1) generally requires each person who satisfies the CPO or CTA definitions to register as such with the Commission.[5] With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within or exclude from the term "commodity pool operator," any person engaged in the business of operating a commodity pool, if the Commission determines that the rule or regulation will effectuate the purposes of the Act.[6] CEA section 1a(12)(B) provides multiple exclusions from the CTA definition, and similarly affords the Commission the authority to exclude such other persons not within the intent of that provision, as the Commission may specify by rule, regulation, or order.[7]

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.[8] Those regulations implement the statutory authority provided to the Commission by the CEA and establish multiple registration exemptions and exclusions for CPOs and CTAs.[9] Part 4 also contains regulations that establish the ongoing compliance obligations applicable to CPOs and CTAs registered or required to be

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[4] 7 U.S.C. 1a(12)(A)(i). The CTA definition also includes any person who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning the value of or advisability of trading in commodity interests, and any person that is registered with the Commission as a CTA. 7 U.S.C. 1a(12)(A)(ii)-(iii).

[5] 7 U.S.C. 6m(1).

[6] 7 U.S.C. 1a(11)(B).

[7] 7 U.S.C. 1a(12)(B)(vii). The Commission most recently relied on the authority in this provision in issuing an Order excluding Farm Credit System institutions from that definition, due to their similarities to banks, a type of entity that is already excluded by CEA section 1a(12)(B)(i). *See* Order Excluding Farm Credit System Institutions From the Commodity Exchange Act's Definition of "Commodity Trading Advisor," 81 FR 89447 (Dec. 12, 2016). CEA section 1a(12)(C) requires that the exclusions in CEA section 1a(12)(B) only apply if the furnishing of such excluded CTA services by such persons is solely incidental to the conduct of their business or profession. 7 U.S.C. 1a(12)(C).

[8] *See generally* 17 CFR part 4.

[9] *See, e.g.,* 17 CFR 4.13 and 4.14 (providing multiple registration exemptions to qualifying persons meeting the CPO and CTA definitions, respectively).

registered. These requirements relate to the commodity pools and separate accounts that the CPOs and CTAs operate and advise, and among other things, provide customer protection, disclosure and reporting of certain information to a registrant's commodity pool participants or advisory clients.

ii. The October 2018 Proposal

In response to information received from members of the public, as well as CFTC staff's own internal review of the Commission's regulatory regime, the Commission published for public comment in the *Federal Register* on October 18, 2018, a Notice of Proposed Rulemaking (NPRM, or the Proposal), proposing several amendments to the regulations applicable to CPOs and CTAs.[10] Specifically, the Commission proposed regulatory amendments that would add to 17 CFR part 4:

(1) An exemption from registration in Regulation 4.13(a)(4) that is generally consistent with the terms of Staff Advisory 18-96;[11]

(2) A requirement in Regulation 4.13 that any person claiming or affirming an exemption from CPO registration pursuant to Regulations 4.13(a)(1)-(a)(5) certify that neither the claimant nor its principals are statutorily disqualified pursuant to CEA sections 8a(2) or 8a(3);

(3) An exemption from the recordkeeping requirements in Regulation 4.23 for U.S.-based CPOs of offshore commodity pools that permits the CPO to maintain the pool's original books and records in the pool's offshore location;

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[10] *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018) (Proposal).

[11] Offshore Commodity Pools Relief for Certain Registered CPOs from Rules 4.21, 4.22, and 4.23(a)(10) and (a)(11) and From the Books and Records Requirement of Rule 4.23, Commodity Futures Trading Commission, Division of Trading & Markets (Apr. 11, 1996), *available at*: *https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm* (last retrieved Oct. 10, 2019) (Staff Advisory 18-96).

(4) An exemption from registration in Regulations 4.13 and 4.14 for persons acting as CPOs or CTAs for family offices and/or their family clients, as those terms are defined in regulations adopted by the Securities and Exchange Commission (SEC);

(5) A clarification that the exclusion from the CPO definition currently provided by Regulation 4.5(a)(1) for a registered investment company (RIC) should be claimed by the entity most commonly understood to solicit for or "operate" the RIC, i.e., the RIC's investment adviser;

(6) An exclusion in Regulation 4.5 from the CPO definition for the investment advisers of business development companies (BDCs);

(7) Relief permitting general solicitation in commodity pools offered by CPOs pursuant to exemptions in Regulations 4.7 and 4.13(a)(3), consistent with the Jumpstart Our Business Start-ups Act of 2012 (JOBS Act); and

(8) Amendments to the "Reporting Person" definition in Regulation 4.27 that would eliminate the filing requirements for Forms CPO-PQR and CTA-PR for certain classes of CPOs and CTAs.[12]

Several of the proposed amendments are consistent with, or expansions of relief that is currently available through a staff advisory or through no-action and exemptive letters issued over the years by staff of the Commission's DSIO and its predecessors. The Commission proposed these amendments intending to simplify the regulatory landscape for CPOs and CTAs without reducing the protections or benefits provided by those regulations, to increase public awareness about available relief by incorporating commonly relied upon no-action or exemptive relief in Commission regulations, and to

[12] Proposal, 83 FR 52903 – 52904.

generally reduce the regulatory burden without sacrificing the Commission's customer protection and other regulatory interests.

b. Public Comments and Ex Parte Meetings

The Commission requested comment generally on all aspects of the Proposal, and also solicited comment through targeted questions about each of the proposed amendments. Overall, the Commission received 28 individual comment letters responsive to the NPRM: six from legal and market professional groups; 13 from law firms; seven from individual family offices; one from a government-sponsored enterprise (GSE) actively involved in the domestic housing market; and one from the National Futures Association (NFA), a registered futures association,[13] who through delegation by the Commission, assists the Commission staff in administering the CPO and CTA regulatory program.[14] Additionally, Commission staff participated in multiple ex parte meetings concerning the Proposal.[15]

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[13] *See* CEA section 17, 7 U.S.C. 21.

[14] Comments were submitted by the following entities: Alscott, Inc.* (Dec. 7, 2018); Alternative Investment Management Association (AIMA) (Letter 1: Dec. 17, 2018, and Letter 2: Oct. 7, 2019); Buchanan, Ingersoll, and Rooney, PC* (Dec. 12, 2018); Commodore Management Company* (Dec. 12, 2018); Dechert, LLP (Dechert) (Dec. 17, 2018); Freddie Mac (Dec. 17, 2018); Fried, Frank, Harris, Shriver, & Jacobson, LLP (Fried Frank) (Dec. 17, 2018); Investment Adviser Association (IAA) (Dec. 17, 2018); Kramer, Levin, Naftalis, & Frankel, LLP* (Dec. 17, 2018); LBCW Investments* (Dec. 5, 2018); Managed Funds Association (MFA) (Dec. 14, 2018); Marshall Street Capital* (Dec. 13, 2018); McDermott, Will, & Emery, LLP* (Dec. 17, 2018); McLaughlin & Stern, LLP* (Dec. 5, 2018); Moreland Management Company* (Dec. 13, 2018); Morgan, Lewis, & Bockius, LLP* (Dec. 18, 2018); NFA (Dec. 17, 2018); New York City Bar Association, the Committee on Futures and Derivatives (NYC Bar Derivatives Committee) (Jan. 4, 2019); Norton, Rose, Fulbright US, LLP* (Dec. 17, 2018); Perkins Coie, LLP* (Dec. 17, 2018); the Private Investor Coalition, Inc. (PIC) (Nov. 28, 2018); Ridama Capital* (Dec. 13, 2018); Schiff Hardin, LLP (two offices)* (Dec. 13 and 17, 2018); the Securities Industry and Financial Management Association Asset Management Group (SIFMA AMG) (Letter 1: Dec. 17, 2018, and Letter 2: Sept. 13, 2019); Vorpal, LLC* (Dec. 17, 2018); Willkie, Farr, and Gallagher, LLP (Willkie) (Dec. 11, 2018); and Wilmer Hale, LLP (Wilmer Hale) (Dec. 7, 2018). Those entities marked with an "*" submitted substantively identical, brief comments, specifically supporting the detailed comments and suggested edits submitted to the Commission by PIC.

[15] Comments for Proposed Rule 83 FR 52902, *available at*: *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2925* (last retrieved Oct. 15, 2019).

c. Scope of the Final Rules

As noted above, the Commission proposed to add to Regulation 4.13 an exemption for qualifying CPOs operating commodity pools outside of the U.S. consistent with Commission Staff Advisory 18-96, known in the Proposal as the "18-96 Exemption." In conjunction with that amendment, the Commission also proposed to add a prohibition against statutory disqualifications listed in CEA sections 8a(2) and 8a(3) that would apply generally to CPOs claiming a registration exemption under Regulation 4.13, as well as a number of technical and substantive changes to Regulation 4.23 intended to preserve recordkeeping relief also provided by that advisory, and enhance the regulation's readability. The Commission received many comments regarding the proposed relief based on Staff Advisory 18-96 and the proposed prohibition on statutory disqualifications for certain exempt CPOs.

Based on the comments received and the recommendations of Commission staff, the Commission is not finalizing or adopting these amendments at this time. Commenters noted the 18-96 Exemption, if adopted as proposed, could have a significant impact on the compliance burdens of CPOs operating outside of the United States. In consideration of the comments, the Commission is withdrawing that aspect of the Proposal, but may undertake a more comprehensive review of the extraterritorial application of Commission regulations in the CPO-CTA space in the future. Commenters also addressed the statutory disqualification prohibition in great detail,[16] and the Commission believes those comments likewise require further consideration.

[16] The Commission received several comments raising logistical and scoping issues with respect to this particular proposed amendment. *See, e.g.*, Dechert Letter, at 8; AIMA Letter, at 10; MFA Letter, at 4; SIFMA AMG Letter, at 19.

Therefore, the Commission intends to reconsider these amendments in a future rulemaking.

II. Final Rules

a. Family Offices

i. The Proposed Exemptions

The Commission proposed amendments to Regulations 4.13 and 4.14 that would establish CPO and CTA registration exemptions for persons meeting the definition of "family office," (the Family Offices) consistent with the regulatory exclusion from the definition of "investment adviser," for Family Offices adopted by the SEC in 2012.[17] The proposed exemptions, which the Commission intends to adopt with certain modifications, are substantively similar to no-action relief from CPO and CTA registration currently provided through CFTC Letter Nos. 12-37 and 14-143.[18] Through the Proposal, the Commission intended that the exemptions would provide Family Offices regulatory certainty and make unnecessary the no-action relief program for Family Office CPOs and CTAs, administered by Commission staff since 2012 and 2014, respectively.[19] Thus, the Commission proposed to incorporate by reference the

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[17] *See* Proposal, 83 FR 52927 (proposing new CPO and CTA exemptions for qualifying Family Offices at Regulations 4.13(a)(8) and 4.14(a)(11), respectively).

[18] CFTC Letter No. 12-37 (Nov. 29, 2012), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/12-37.pdf* (last retrieved Oct. 10, 2019) (CPO Family Office No-Action Letter); CFTC Letter No. 14-143 (Nov. 5, 2014), *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-143.pdf* (last retrieved Oct. 10, 2019) (CTA Family Office No-Action Letter).

[19] Proposal, 83 FR 52909 (citing Commission staff's experience "gained through the continued availability of the CPO Family Office No-Action Letter and the subsequent issuance and utilization by industry of the CTA Family Office No-Action Letter").

definitions of "family office" and "family client" from § 275.202(a)(11)(G)-1, as adopted by the SEC, into each of the proposed exemptions.[20]

Proposed Regulation 4.13(a)(8) would provide an exemption from CPO registration to a person with respect to a qualifying commodity pool, if: (a) interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are sold only to "family clients;" (b) the commodity pool qualifies as a "family office;" and (c) the person reasonably believes, at the time of investment, or at the time of conversion for an existing pool, that each person who participates in the pool is a "family client" of the "family office."[21] The Commission proposed to require that Family Offices claiming the CPO exemption submit an initial notice filing, to be affirmed on an annual basis, pursuant to Regulation 4.13(b).[22] The Commission proposed this requirement to "ensure at least an annual assessment of whether the CPO of the Family Office remains eligible to rely upon the proposed exemption."[23]

Proposed Regulation 4.14(a)(11) would provide an exemption from CTA registration to a person who directs commodity trading advice solely to, and for the sole use of, "family clients."[24] Like most of the other exemptions contained in Regulation 4.14, the Commission proposed to make this exemption self-executing, requiring no filing with the Commission or NFA prior to its efficacy. The Commission further explained in the Proposal that it thought certain CTA services provided to the exempt

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[20] Id. at 52907-09, citing CPO Family Office No-Action Letter and CTA Family Office No-Action Letter (defining "family offices" and explaining the SEC exclusion for Family Offices and the available no-action relief).

[21] *Id.* at 52927.

[22] *Id.* (proposing to amend Regulation 4.13(b)(1)(ii) to add Proposed Regulation 4.13(a)(8), the CPO exemption for Family Offices); and 17 CFR 4.13(b)(1) and (b)(4).

[23] Proposal, 83 FR at 52915.

[24] *Id.* at 52927.

commodity pools of Family Offices would be covered by Regulation 4.14(a)(5), which currently provides an exemption from CTA registration to a person who: (a) is also exempt from CPO registration; and (b) only advises pool(s) for which that person is so exempt.[25] Therefore, the Commission limited the proposed CTA exemption for Family Offices to the commodity trading advice provided to "individual Family Clients."[26]

In addition to the general solicitation of comments, the Commission also posed several specific questions in the Proposal regarding the Family Office exemptions. The Commission solicited comment on the following issues:

(1) Whether persons claiming the CPO exemption in Proposed Regulation 4.13(a)(8) should be required to annually recertify their ongoing eligibility for that exemption and what the costs of such a requirement would be;

(2) Whether the identifying information submitted by Family Offices in order to claim the proposed CPO exemption should be included in NFA's Background Affiliation Status Information Center ("BASIC") database, consistent with the treatment of other registered and exempt persons, or whether the limitation of their prospective and actual clients to non-public, "family clients," warranted different treatment;

(3) Whether the proposed bifurcation of relief for CTAs of Family Offices between existing Regulation 4.14(a)(5) for pools for which the CTA is also the exempt CPO and Proposed Regulation 4.14(a)(11) for other non-pool, individual "family clients" made sense, or whether a more efficient or effective approach was available; and

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[25] *Id.* at 52915 (citing 17 CFR 4.14(a)(5)).

[26] *Id.* (explaining the Commission's preliminary belief that "Family Offices that are also claiming relief under proposed § 4.13(a)(8) would already be eligible for relief from CTA registration by virtue of the existing exemption in § 4.14(a)(5)").

(4) Whether the Commission should require persons claiming the exemption from CTA registration in Proposed Regulation 4.14(a)(11) to file any notice, initial, annual, or otherwise, and what the costs of such a requirement would be.[27]

The Commission received multiple comments in response to the proposed CPO and CTA exemptions for Family Offices. For instance, a detailed comment letter addressing each of the Commission's questions, as well as multiple other issues, was submitted by the Private Investor Coalition (PIC), an individual Family Office professional group, and was specifically supported by 13 other comment letters submitted by a variety of Family Offices and their counsel.[28] Additionally, several other groups and national law firms representing Family Offices commented on this aspect of the Proposal.[29] Overall, the Commission received generally favorable comments regarding its effort to add CPO and CTA registration exemptions for Family Offices to 17 CFR part 4.

For the reasons discussed in the Proposal, the Commission is adding the CPO and CTA exemptions for Family Offices, with procedural modifications in light of comments received, as Regulations 4.13(a)(6) and 4.14(a)(11). The Commission continues to believe that familial relationships inherent in Family Offices provide a reasonable mechanism for protecting the interests of family clients and resolving disputes amongst them, and that the regulatory interest is lower than in typical, arms-length transactions where the CPO and the pool participants, or the CTA and its advisory clients, do not have

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[27] Proposal, 83 FR 52916 – 52917, questions 7-10.

[28] PIC Letter; *see, e.g.*, Marshall Street Capital Letter, Alscott, Inc. Letter, Commodore Management Co. Letter (all supporting "the adoption of the Proposed Rule for the reasons set forth and with the modifications proposed in the comment letter submitted by [PIC] on November 28, 2018").

[29] *See, e.g.*, Wilmer Hale Letter, Fried Frank Letter, Willkie Letter.

close relationships and/or long-standing family history between them. The Commission also understands that Family Offices are not operations of the type and nature that warrant regulatory oversight by the Commission, because, by definition, a Family Office is not a vehicle in which non-family clients would be solicited or permitted to invest.[30] The Commission continues to believe that these unique characteristics reduce the need for and utility of the benefits and protections generally afforded by the Commission's regulatory regime for CPOs and CTAs and further justify providing Family Offices relief from that regime. The Commission further addresses significant comments on this aspect of the Proposal and details the exemptions below.

ii. No Notice Required for the Family Office CPO Exemption

The Commission received multiple comments in response to its question regarding the notice requirement for Family Offices claiming the proposed CPO exemption. The commenters generally opposed requiring Family Offices to file any notice to claim and/or maintain eligibility for the proposed CPO exemption, citing multiple reasons. Those included the resulting lack of regulatory harmonization between the SEC's exclusion and the proposed CTA exemption, the asserted limited utility of such notices to the Commission, and the generally stable nature of Family Offices. Conversely, one commenter supported a one-time, initial notice filing with no ongoing annual requirement,[31] and another stated that any mandatory notice should require information from the Family Office claiming the exemption only, omitting any collection

[30] Proposal, 83 FR 52909-10 (citing prior claims by Family Office representatives that "a Family Office is comprised of participants with close relationships, and there is a direct relationship between the clients and the CPO or advisor, … [and] such relationships greatly reduce the need for the customer protections available pursuant to … 17 CFR part 4"); *Id.* at 52915.

[31] AIMA Letter, at 10.

of information regarding a Family Office's exempt pools (or, as the commenter referred to them, "investment entities").[32]

The commenters emphasized that neither the SEC's exclusion for Family Offices from the definition of "investment adviser," nor the Commission's own proposed CTA exemption would require a notice filing of any kind.[33] Commenters further cited the Commission's historic and consistent recognition that its consumer protection concerns are much lower in the context of Family Offices and their family clients.[34] For uniformity across regulatory regimes, several commenters argued in favor of making the CPO exemption for Family Offices self-executing.[35] Though the Commission inquired, commenters did not offer any estimates as to how much an initial or annual notice filing for the CPO exemption would cost a Family Office.

The Commission understands, both from the comments and from its regulatory experience with Family Offices, that Family Offices typically exist to manage the assets solely of persons within a single family, frequently involving multiple generations of family members, as well as the investment entities, trusts, or accounts formed to benefit those family members. It is also not uncommon for Family Offices to continue their operations for extended periods of time with little to no change in their legal or financial structures or arrangements. With that in mind, the Commission has carefully considered

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[32] Willkie Letter, at 3.

[33] PIC Letter, at 4-6 (stating that uniform treatment across exemptions would "facilitate compliance with and lower the regulatory burdens of each separate regime"); Willkie Letter, at 3; Fried Frank Letter, at 2 (stating that the Commission should not refer to the adoption of this exemption as "harmonization" with the SEC's requirements because requiring a notice for this exemption would make it fundamentally different from the SEC's exclusion for Family Offices).

[34] PIC Letter, at 4-5; Willkie Letter, at 2 (summarizing Commission's staff's historic position regarding Family Offices as, "no substantial public interest is served in regulating investment entities whose primary purpose is investing family assets").

[35] PIC Letter, at 4-6; Fried Frank Letter, at 2-3; Willkie Letter, at 3; Wilmer Hale Letter, at 2-3 and 6.

the comments received on the Proposal and has determined to eliminate the filing requirement in its entirety with respect to the CPO Exemption for Family Offices.

As a result, the Commission has determined not to adopt several of the proposed amendments to Regulation 4.13(b). The Commission is, however, adding language to Regulation 4.13(b)(1) to clarify that an exemption notice is not required to be filed by persons claiming the new CPO exemption for Family Offices. Upon its adoption as Regulation 4.13(a)(6), the Commission intends the CPO registration relief provided by this exemption to be available on a self-executing basis for qualifying Family Offices. Exempt Family Offices will still be subject to the same recordkeeping requirements and special call authority as all other exempt CPOs.[36] Therefore, the Commission is also amending the introductory language to Regulation 4.13(c), such that the provisions in subparagraph (c)(1) will apply to all persons claiming an exemption from CPO registration under that regulation, regardless of whether a notice of exemption is required to claim such relief.

This approach harmonizes the filing requirements for the regulatory exclusions and exemptions available to Family Offices, including the relief previously adopted by the SEC. It also ensures that Family Offices can rely on these exemptions without needing to determine whether an initial filing was completed, and without tracking annual updates or claims to maintain the exemption. Family Office CPOs do not broadly solicit the public for investment in commodity pools, as they are limited, by common understanding and by the regulations adopted herein, to providing services to their

[36] *See* 17 CFR 4.13(c)(1) (generally requiring CPOs exempt under Regulation 4.13 to make and keep books and records related to their CPO activities for five years, and to submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria of the claimed exemption).

"family clients." Therefore, as the Commission has historically stated, these intermediaries do not pose the same regulatory concerns as those of other CPOs that routinely engage in wider solicitation, whether registered or exempt from such registration, and from whom the Commission would generally require either a registration application or a notice filing for such exemption. Because of their unique characteristics, and for the myriad reasons cited by commenters,[37] the Commission has determined not to adopt a notice filing requirement for exempt Family Office CPOs in the Final Rule.

The Commission also solicited comment on whether any information collected through the notices submitted by Family Offices claiming the proposed CPO exemption should be submitted for inclusion in NFA's BASIC database. That issue is mooted by the Commission's decision not to require any notice for the CPO exemption; nonetheless, the Commission notes that commenters overwhelmingly argued against including in the BASIC database any data or information collected from notices filed by Family Offices.[38] By determining *not* to collect this information in the first place, the Commission will also avoid the resolution of potentially complex and novel legal issues involving intermediary privacy, information confidentiality, and data storage and management. In the interest of

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[37] Those reasons discussed above include the benefit of harmonization of regulatory requirements across SEC and CFTC regimes with respect to Family Offices, the CFTC's lowered regulatory interest in Family Offices limited to serving family clients, and the typical historic stability in the operations of Family Offices, generally. *See* PIC Letter, at 4-6; Willkie Letter, at 2-3; Fried Frank Letter, at 2-3; Wilmer Hale Letter, at 2-3 and 6.

[38] PIC Letter, at 7-9 (strongly objecting to any requirement that Family Offices post their claims for exemption or any other identifying information on BASIC or any other public forum or database); Fried Frank Letter, at 2-3; Willkie Letter, at 3; *cf.* AIMA Letter, at 10 (stating that adding exempt Family Offices to the BASIC database would make Bylaw 1101 due diligence easier for other NFA Members). With respect to determining compliance with Bylaw 1101, Wilmer Hale argues that, "there are other equally as effective means of ascertaining that information on family offices." Wilmer Hale Letter, at 4. PIC further urged the Commission to consider that Family Offices and their family clients are individual market participants, rather than commercial market participants, and as a result of their private status, they have very different, additional privacy concerns. PIC Letter, at 9.

harmonizing Family Office relief across multiple financial regulatory areas, while also wishing to protect the privacy of Family Offices and their family clients, the Commission has determined it appropriate not to require a filing to claim the CPO exemption, as discussed above.

iii. The CTA Exemption: No Bifurcation Needed and No Notices Required

Regarding the proposed CTA exemption for qualifying Family Offices, the Commission also received largely favorable comments. Commenters responded directly to the two remaining questions of whether CTA relief should be bifurcated between two exemptions and whether the Commission should require a notice filing for the relief. Regarding the former, PIC commented that it disagreed with the concept of bifurcating relief for Family Office CTAs between exemptions in Regulation 4.14(a)(5) and Proposed Regulation 4.14(a)(11), based on whether they are advising a pooled vehicle or individual family client. Instead, PIC stated that the exemptive relief for CTAs of all types of family client should ideally be housed in one exemption, to the extent possible.[39] One law firm suggested editing the proposed exemption to provide additional coverage for "any collective investment vehicle, the operator of which would be subject to Part 4, absent exemption."[40] PIC disagreed, arguing that the language in Proposed Regulation 4.14(a)(11) would, in fact, already cover CTAs of all family clients, regardless of type or structure.[41]

The Commission agrees with PIC's comments: because the exemption, which is adopted as proposed, is limited to "commodity trading advice … solely directed to family

[39] PIC Letter, at 9-10.

[40] Wilmer Hale Letter, at 7 (stating that this edit would cover situations where, "there is a slim chance where a commodity pool might not be a 'family client'").

[41] PIC Letter, at 10.

clients," the exemption would cover CTA activities on behalf of both individual family clients and pools comprised of family client assets.[42] This approach greatly simplifies the compliance analysis for Family Offices and provides them a single CTA registration exemption to cover their advisory activities on behalf of all persons and entities meeting the SEC's "family client" definition.

Additionally, the Commission agrees with comments received suggesting that no notice be required for the CTA exemption for Family Offices to claim that relief. Almost all of the other exemptions under Regulation 4.14 operate on a self-executing basis and have done so since its inception.[43] Further, the Commission has not found a unique characteristic about Family Offices that would justify their disparate treatment under the Commission's existing part 4 regulations. The Commission believes that harmonizing the requirements across the SEC's "investment adviser" exclusion and the CPO and CTA exemptions adopted herein is a significant benefit to Family Offices navigating the federal regulatory regimes applicable to them without negatively affecting the Commission's interests in regulating CPOs and CTAs more generally. Therefore, for the reasons stated in the Proposal[44] and pursuant to the analysis above, the Commission has determined to adopt the CTA exemption for Family Offices with no notice requirement and with the intent that this exemption be relied upon for CTA services provided to all types of "family client."

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[42] PIC Letter, at 10 (adding that, consequently, a CTA to a Family Office would need to claim only the exemption in Regulation 4.14(a)(11) for complete exemptive relief coverage of its advisory activities, without having to consider its status under the exemption in Regulation 4.14(a)(5)).

[43] *See, e.g.*, 17 CFR 4.14(a)(1) - (a)(7) and (a)(9) - (a)(10). Conversely, Regulation 4.13 generally requires a notice filing to claim the exemptions therein, with the exception of the exemption added by this Final Rule for qualifying Family Offices. The Commission justifies this approach for Family Offices, different from other exempt CPOs required to file a notice, based primarily on their distinctly limited clientele, i.e., "family clients." *See supra* section II.A.ii for further discussion.

[44] *See* Proposal, 83 FR 52909 and 52915.

iv. Responses to Miscellaneous Comments

Several commenters also requested a specific correction to the proposed CPO Family Office exemption. For instance, multiple commenters pointed out that a correction should be made to the proposed CPO exemption's requirement that the *commodity pool* subject to the exemption meet the SEC's "family office" definition. PIC suggested that this proposed requirement be changed to instead require the covered pool meet the SEC's "family client" definition,[45] whereas Willkie suggested that the requirement be changed, such that it would instead require the person claiming the CPO exemption, rather than the pool, to meet the SEC's "family office" definition.[46] In the Proposal, the Commission intended to draft an exemption from CPO registration with substantive conditions applicable to both the exempt CPO and the exempt pool(s) operated on behalf of family clients. Because conditions applicable to the exempt commodity pool are already found in the first paragraph of the exemption,[47] the Commission is adopting the CPO exemption with that provision corrected to require that the CPO, i.e., the person claiming the exemption, meets the SEC's "family office" definition.

Finally, the Commission also received several comments that, although not directly responding to specific questions posed, did nonetheless raise issues relevant to

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[45] PIC Letter, at 2-3. This suggested edit was also specifically supported in comments submitted by Fried Frank, McDermott, Will & Emery, and Perkins Coie. Fried Frank Letter, at 3, n.6; McDermott, Will & Emery Letter, at 1; and Perkins Coie Letter, at 1.

[46] AIMA suggested a similar edit, stating that the proposed requirement should read, "the operator of the pool qualifies," not "the pool qualifies." AIMA Letter, at 10.

[47] Proposed Regulation 4.13(a)(8)(i) would require that interests in the exempt pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold only to "family clients," as defined in § 275.202(a)(11)(G)-1 of CFR title 17. *See* Proposal, 83 FR 52927. The Commission intends to adopt this requirement, though the internal numbering in the final amendments has changed due to other edits made to the Proposal.

continued Family Office operations in the Commission's jurisdiction. For instance, several commenters requested that the Commission confirm the ongoing validity of historic Commission staff letters, which continue to provide interpretative relief to any Family Office choosing to rely upon them, as permitted by Regulation 140.99,[48] notwithstanding the adoption herein of CPO and CTA exemptions in 17 CFR part 4 for Family Offices.[49] In response to those commenters, the Commission confirms that the Final Rules do not supersede prior staff letters providing that a particular entity is "not a pool," provided that a Family Office has determined its own situation to be substantively identical to the outlined facts and circumstances precipitating the letter relief.

v. The Effect of the Final Amendments on CFTC Staff Letters 12-37 and 14-143: The CPO and CTA Family Office No-Action Letters

The Commission does intend the adoption of the CPO and CTA exemptions for Family Offices at Regulations 4.13(a)(6) and 4.14(a)(8), respectively (which are effective 30 days after publication in this *Federal Register* release), however, to supersede the staff no-action relief previously provided by the CPO and CTA Family Office No-Action Letters. Therefore, Family Offices qualifying for those exemptions should instead, as soon as practicable after these amendments go into effect, create and maintain an internal record documenting the relevant exemption they wish to claim, as well as their qualifications for that exemption, similar to the requirements to claim other self-executing exemptions in 17 CFR part 4.

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[48] 17 CFR 140.99(a)(3) (stating that an interpretative letter may be relied upon by persons other than the Beneficiary).

[49] Fried Frank Letter, at 3; Willkie Letter, at 2. In the Proposal, the Commission stated, "Family Offices unable to meet the requirements of the exemptions proposed herein today may still avail themselves of the relief provided in § 4.13(a)(3), if they so qualify, or they may continue to seek relief on an individual firm-by-firm basis through requests submitted to Commission staff." Proposal, 83 FR 52909.

b. JOBS Act Amendments: Expanding Marketing and Advertising for Qualifying Exempt CPOs and Certain Exempt Pools

i. Background of the JOBS Act and the Proposed Amendments

The JOBS Act amended various sections of the Securities Act of 1933 (33 Act) and required, among other things, that the SEC revise its regulations to implement the new JOBS Act provisions, including the loosening of marketing restrictions generally applicable to securities that are privately offered, or resold pursuant to Rule 144A.[50] To that end, the SEC adopted amendments to Regulation D and Rule 144A that were consistent with those congressional directives.[51] Specifically, the SEC amended Regulation D by adding § 230.506(c), which permits issuers to engage in general solicitation or general advertising in the offer and sale of securities under that regulation, subject to certain conditions. These include that the issuer meets the terms and conditions of 17 CFR 230.501 and 230.502(a) and (d), that all purchasers of the offered securities are accredited investors, and that the issuer takes reasonable steps to verify the accredited investor status of each purchaser.[52] The SEC also adopted substantively similar amendments to its Rule 144A, which is a non-exclusive safe harbor exemption from the registration and prospectus delivery requirements under the 33 Act for resales of certain securities to qualified institutional buyers (QIBs), as defined in § 230.144A(a)(1),

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[50] P.L. 112-206, 126 Stat. 306 (Apr. 5, 2012). The 33 Act may be found at 15 U.S.C. 77a, et seq.

[51] *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 FR 54464 (Sept. 5, 2012) and 78 FR 44771 (Jul. 24, 2013) ("JOBS Act Adopting Release") (amending Regulation D, 17 CFR 230.500-230.508, and Rule 144A, 17 CFR 230.144A).

[52] 17 CFR 230.506(c)(1)-(2). In adopting this alternative to traditional Regulation D offerings, the SEC stated that, "because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of the [33 Act], it will be important for issuers and their verification service providers to retain adequate records regarding the steps taken to verify that a purchaser was an accredited investor." JOBS Act Adopting Release, 78 FR 44779.

provided that certain conditions are met.[53] Through the JOBS Act Adopting Release, the SEC also eliminated offering and marketing restrictions in the resale of certain securities to QIBs.[54]

Prior to these amendments, commodity pools offered and sold pursuant to § 506 of Regulation D, or resold pursuant to Rule 144A, were able to be operated pursuant to exemptive relief provided under Regulations 4.7(b) and 4.13(a)(3). After these regulatory amendments prompted by the JOBS Act, persons marketing, selling, or reselling securities pursuant to § 230.506(c) of Regulation D and/or Rule 144A could not necessarily qualify for an exemption from CPO registration provided by Regulation 4.13(a)(3), or for exemptive relief from certain CPO compliance obligations, as provided by Regulation 4.7, each of which has historically been subject to offering and marketing restrictions. Specifically, with respect to Regulation 4.7(b), such pools may not be able to satisfy the requirement that participation units are offered solely to qualified eligible persons (QEPs), if their CPOs and resellers wish to engage in the general solicitation and advertising now permitted under §§ 230.506(c) and 230.144A, respectively.[55] With respect to Regulation 4.13(a)(3), those exempt pools may not be able to meet the exemption's condition that its interests be "offered and sold without marketing to the

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[53] *See* Rule 144A, 17 CFR 230.144A.

[54] The SEC stated, "[a]s amended, Rule 144A(d)(1) will require only that the securities be *sold* to a QIB or to a purchaser the seller and any person acting on behalf of the seller reasonably believes is a QIB." JOBS Act Adopting Release, 78 FR 44786 (emphasis added).

[55] Additionally, certain market participants questioned whether CPOs of commodity pools relying on § 230.506(c) would be able to meet the condition in Regulation 4.7(b) that requires that the offering "qualifies for exemption from the registration requirements of the [33] Act pursuant to section 4[(a)](2) of that Act." Although § 230.506, including § 230.506(c), "continue[s] to be treated as a regulation issued under section 4[(a)](2) of the [33 Act]," 78 FR 44774, there was nonetheless uncertainty expressed by certain market participants about whether § 230.506(c) constituted an "exemption from the registration requirements of the [33] Act pursuant to section 4[(a)](2) of that Act," in accordance with Regulation 4.7(b).

public in the United States."[56] In response to the concerns of market participants, DSIO issued CFTC Letter No. 14-116,[57] which provided relief so that CPOs of commodity pools, the securities of which are either offered and sold pursuant to § 230.506(c) of Regulation D, or resold to QIBs under Rule 144A, were able to operate them pursuant to Regulations 4.7 and 4.13, even if they or their resellers engage in general solicitation and marketing, as contemplated by the JOBS Act.

In the Proposal, the Commission proposed amending Regulations 4.7(b) and 4.13(a)(3) in a manner consistent with the JOBS Act, and informed in large part by the exemptive relief provided by the JOBS Act Relief Letter. The Commission also proposed making several technical amendments to Regulation 4.7(b) to improve the readability and clarity of that provision. With respect to Regulation 4.7(b), the Proposal: (1) allowed the offerings to be exempt from registration under section 4(a)(2) of the 33 Act, and/or offered and sold pursuant to Regulation D, including § 230.506(c); (2) allowed the offerings to be resold pursuant to Rule 144A; (3) deleted the restrictive text, "without marketing to the public;" and (4) removed the reference to the act of "offering" by the registered CPO of a pool exempt under Regulation 4.7. As a result of the Proposal, the operative requirements of "non-bank" CPOs[58] claiming relief under Regulation 4.7(b) would become: (1) the CPO must be registered with respect to the exempt pool; (2) the participation units must be exempt from registration under section

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[56] 17 CFR 4.13(a)(3)(i).

[57] CFTC Letter No. 14-116 (Sept. 9, 2014) ("JOBS Act Relief Letter"), *available at: https://www.cftc.gov/sites/default/files/csl/pdfs/14/14-116.pdf* (last retrieved Oct. 3, 2019).

[58] The Proposal's technical amendments also sought to break out the eligible claimants of the relief in Regulation 4.7(b) into two separate subparagraphs: Regulation 4.7(b)(1)(i) for "non-bank" CPOs whose offerings are subject to Regulation D or Regulation S, and Regulation 4.7(b)(1)(ii) for banks registered as CPOs offering pools in the form of a collective trust fund exempt under section 3(a)(2) of the 33 Act. *See* Proposal, 83 FR 52926.

4(a)(2) of the 33 Act and/or offered and sold pursuant to Regulation D, or resold pursuant to Rule 144A, or offered and sold pursuant to Regulation S;[59] (3) the participation units must be *sold* solely to QEPs, with no marketing or solicitation restriction on the offering; and (4) the registered CPO must file the notice required by Regulation 4.7(b), and otherwise comply with the requirements in Regulation 4.7(d) in operating the exempt pool.

With respect to the exemption in Regulation 4.13(a)(3), the Commission proposed to amend the regulation by deleting the language, "such interests are offered and sold without marketing to the public in the United States," and replacing it with a conditional statement requiring that "the interests [be] marketed and advertised to the public in the United States solely, if at all, in compliance with Regulation D, §§ 230.500 through 230.508 of this title, or with Rule 144A, § 230.144A of this title."[60] Consequently, Regulation 4.13(a)(3) would require, in relevant part, that: (1) such commodity pool interests be exempt from registration under the 33 Act; and (2) if such interests are marketed and advertised in the U.S., they can only be marketed or advertised in compliance with the provisions of Regulation D or of Rule 144A, as amended by the JOBS Act.

ii. Comments Received and Final Amendments

The Commission received two comments specifically addressing the JOBS Act aspect of the Proposal. Fried Frank stated that it supported all of the proposed amendments related to the JOBS Act in Regulations 4.7 and 4.13(a)(3), including the Commission's decision not to require an additional notice beyond that which is already

[59] 17 CFR 230.901 - 230.905.

[60] Proposal, 83 FR 52926.

required to claim relief under Regulations 4.7 or 4.13(a)(3).[61] MFA similarly offered its strong support and commended the Commission's efforts to harmonize its 17 CFR part 4 regulations with securities regulations impacted by the JOBS Act, stating its appreciation for the Commission's desire to "provide legal certainty with respect to transactions engaged in by dually-regulated CFTC and SEC entities."[62]

For the reasons described in the Proposal,[63] the Commission is adopting the amendments to Regulations 4.7(b) and 4.13(a)(3) relating to the JOBS Act. Specifically, the Commission continues to believe that harmonizing the impact of the JOBS Act on dually-regulated entities eliminates incompatibilities between comparable SEC and CFTC regulatory regimes, and generally provides legal certainty regarding these transactions in a manner that allows these entities to benefit from the new offering process under the JOBS Act. The Commission further believes that the amendments achieve the goal of permitting commodity pools operated by CPOs claiming relief under Regulations 4.7(b) or 4.13(a)(3) to avail themselves of the JOBS Act relief adopted by Congress, while still retaining the other requirements currently set forth in those regulations.

However, the Commission is further reorganizing and revising Regulation 4.7(b)(1) and adopting a minor amendment to Regulation 4.13(a)(3)(i) to clarify which exempt CPOs are eligible for relief from the offering restrictions in those regulations pursuant to the JOBS Act amendments, and to further improve readability and clarity. First, Regulation 4.7(b)(1), as amended, will separate the three different types of

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[61] Fried Frank Letter, at 2.

[62] MFA Letter, at 8.

[63] Proposal, 83 FR 52911 and 52915.

commodity pools for which a registered CPO may claim relief under that regulation: (1) a commodity pool that is exempt from registration under section 4(a)(2) of the 33 Act, which includes certain Regulation D offerings; (2) a commodity pool that is offered and sold pursuant to Regulation S; and (3) a commodity pool that is a collective trust fund, the securities of which are exempt under section 3(a)(2) of the 33 Act.[64] Second, consistent with the JOBS Act Relief Letter, Regulation 4.7(b)(1)(i)(A) clarifies that the general solicitation ban currently in Regulation 4.7(b) remains in effect for all offerings of the three types of commodity pools listed in Regulations 4.7(b)(1)(i)(A)-(C), except for those that are offered pursuant to § 230.506(c). Third, also consistent with the JOBS Act Relief Letter, the Commission is creating Regulation 4.7(b)(1)(ii) to clarify that the relief in Regulation 4.7(b) is available with respect to the three types of commodity pools listed in Regulations 4.7(b)(1)(i)(A)-(C), even if participations in such pools are resold pursuant Rule 144A. Finally, with respect to Regulation 4.13(a)(3), the Commission is amending that subparagraph's reference to "Regulation D, §§ 230.500 through 230.508" to say "§ 230.506(c)."

iii. The Effect of the Final Amendments on CFTC Letter 14-116: The JOBS Act Relief Letter

The Commission intends the adoption of the amendments to Regulations 4.7 and 4.13(a)(3) detailed above, which are effective 30 days after publication in this *Federal Register* release, to supersede the staff exemptive relief previously provided by the JOBS Act Relief Letter. Because CPOs currently relying on that exemptive letter are already required to file notices claiming an exemption under Regulation 4.7 or 4.13(a)(3) to fully

[64] *See infra* new Regulations 4.7(b)(1)(i) and (ii).

utilize that relief, the Commission expects that such exempt CPOs wishing to use general solicitation in their existing qualifying exempt pools may do so without further action. CPOs interested in using general solicitation with respect to qualifying exempt pools formed in the future may do so in accordance with the amendments adopted herein, following their effective date, by filing a notice of exemption for such pools, as required by Regulations 4.7(d) and 4.13(b)(1).

c. Permitting Non-U.S. Person Investors in De Minimis Exempt Pools

In the context of proposing other amendments to Regulation 4.13, the Commission also proposed to amend Regulation 4.13(a)(3), which, as noted above, provides a CPO registration exemption to persons who operate pools trading a de minimis amount of commodity interests, subject to the conditions enumerated in that regulation.[65] Specifically, the Commission proposed to amend Regulation 4.13(a)(3)(iii), the condition which governs the permissible investors in those exempt pools, by deleting, at Regulation 4.13(a)(3)(iii)(E), a provision referencing persons eligible to participate in pools relying upon Regulation 4.13(a)(4),[66] and replacing it with "[a] non-U.S. person," as a new category of permissible investors.[67]

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[65] 17 CFR 4.13(a)(3).

[66] The Commission noted in the Proposal its understanding that "relying on CFTC Staff Letter 04-13, for purposes of determining whether a person qualifies for exemption from CPO registration under § 4.13(a)(3), market participants are generally not considering whether non-U.S. person participants meet one of the investor sophistication criteria listed in § 4.13(a)(3)." Proposal, 83 FR 52907 (internal footnotes omitted). In 2012, the Commission rescinded the exemption originally provided in Regulation 4.13(a)(4), the features of which comprised the legal underpinnings for the analysis in CFTC Staff Letter 04-13. *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012); correction notice published at 77 FR 17328 (Mar. 26, 2012).

[67] Proposal, 83 FR 52907, 52914, 52926. The Commission also expressed its view that de minimis pools "do not trigger the same level of regulatory interest… as commodity pools requiring CPO registration and compliance with all or part of the requirements in 17 CFR part 4," and that such an amendment would be consistent with other part 4 regulations: "Additionally, § 4.7 already permits non-U.S. persons, regardless of their [QEP] status, to participate in commodity pools thereunder, which are not subject to de minimis commodity interest trading thresholds." *Id.*

Generally, the Commission received comments in favor of its efforts to amend Regulation 4.13(a)(3), such that non-U.S. person participants, regardless of financial sophistication, would be explicitly permitted in de minimis commodity pools, although several commenters offered suggested edits and raised questions.[68] For instance, several commenters inquired whether the Commission intended this proposed amendment to mean, "non-U.S. persons," as that term is defined in Regulation 4.7(a)(1)(iv),[69] and others requested the Commission consider expanding its definition of "non-U.S. person," to include the definition of that term in Regulation S.[70] Commenters also provided helpful background information to the Commission. Two commenters requested that the Commission confirm the ongoing validity of staff guidance regarding the categories of participants eligible to invest in de minimis commodity pools, i.e., DSIO's CPO-CTA Frequently Asked Questions (CPO-CTA FAQs).[71]

In the CPO-CTA FAQs, DSIO stated its intent to continue permitting non-U.S. persons to participate in de minimis commodity pools, notwithstanding the rescission of Regulation 4.13(a)(4), as well as its plan to specifically amend Regulation 4.13(a)(3) in the future to permit such participants, as a typographical or technical amendment, as opposed to one that is designed to affect the substance of the de minimis exemption.[72] One commenter also offered an alternative change to the proposed amendment: Willkie suggested instead that the Commission delete the outdated provision and simultaneously

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[68] *See, e.g.*, Dechert Letter, at 12; Fried Frank Letter, at 2; Freddie Mac Letter, at 2; IAA Letter, at 12.

[69] Dechert Letter, at 12; IAA Letter, at 12; AIMA Letter, at 8; Fried Frank Letter, at 2.

[70] AIMA Letter, at 8; Freddie Mac Letter, at 2.

[71] Dechert Letter, at 12, and Willkie Letter, at 8, citing "[DSIO] Responds to Frequently Asked Questions – CPO /CTA: Amendments to Compliance Obligations," at 3, *available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpocta.pdf* (last retrieved Oct. 7, 2019) (CPO CTA FAQs).

[72] CPO CTA FAQs, at 3.

amend the immediately preceding paragraph to state, "A 'qualified eligible person,' as that term is defined in § 4.7 of this chapter," which this commenter thought would effectively add non-U.S. persons as permitted participants in this type of pool.[73]

The Commission agrees with the approach of deleting the outdated provision in Regulation 4.13(a)(3)(iii)(E) and also amending Regulation 4.13(a)(3)(iii)(D) to permit as participants in de minimis pools, "[a] 'qualified eligible person,' as that term is defined in § 4.7 of this chapter." The Commission believes that this amendment provides an important update to this exemption, which reflects the general market understanding and practice of permitting non-U.S. persons to invest in de minimis pools in a manner consistent with prior Commission statements and staff guidance. This amendment also responds to the question raised by several commenters of which "non-U.S. person" definition the Commission intended to use – the final amendment incorporates by reference the definition of that term in Regulation 4.7(a)(1)(iv). In particular, this amendment is consistent with CFTC Letter 04-13,[74] which, as discussed above, relied heavily on the rescinded Regulation 4.13(a)(4), and with the guidance provided by DSIO staff in the CPO CTA FAQs.[75] Moreover, because the legal analysis of CFTC Letter 04-13 is primarily based on a CPO registration exemption repealed in 2012, the Commission believes it appropriate, and in fact, the Commission intends, for this amendment to supersede that staff letter. Finally, through the use of a cross-reference, this amendment ensures that any future amendments to the QEP definition are also consistently reflected in the de minimis exemption, simplifying future Commission rulemaking endeavors.

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[73] Willkie Letter, at 8.

[74] CFTC Staff Letter 04-13 (Apr. 14, 2004), *available at: https://www.cftc.gov/sites/default/files/tm/letters/04letters/tm04-13.htm* (last retrieved Oct. 10, 2019).

[75] CPO CTA FAQs, at 3.

III. Related Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that Federal agencies, in promulgating regulations, consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities.[76] Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking. As noted in the Proposal, the regulations adopted herein affect only persons registered or required to be registered as CPOs or CTAs and persons claiming exemptions from registration as such. With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).[77] Because the regulations adopted herein generally apply to persons registered or required to be registered as CPOs with the Commission, and/or provide relief to qualifying persons from registration as such, as well as from related compliance burdens, the RFA is not applicable with respect to CPOs impacted by this release's regulatory amendments.

Regarding CTAs, the Commission has previously considered whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case

[76] 5 U.S.C. 601, et seq.

[77] Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619-20. Regulation 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed $400,000. *See* 17 CFR 4.13(a)(2).

basis, in the context of the particular Commission regulation at issue.[78] As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.[79] The only portion of the Final Rules directly impacting CTAs adds a self-executing registration exemption consistent with the CTA Family Office No-Action Letter, which provides no-action relief from CTA registration to Family Offices providing CTA services to their family clients. This new exemption will not impose any new burdens on market participants or Commission registrants. Rather, because the Commission is adopting an exemption from the requirement to register as a CTA for qualifying Family Offices, the Commission finds that such exemption would be less burdensome to those persons than the full costs of CTA registration and compliance. Affected Family Office CTAs will be transitioning from the CTA registration relief provided through the CTA Family Office No-Action Letter to a self-executing CTA exemption for Family Offices in Regulation 4.14, and there is consequently no significant economic impact on these entities by virtue of this particular regulatory amendment. The Commission's decision not to require an associated notice or filing further supports the Commission's preliminary and final RFA findings. Additionally, the Commission received no comments on the Proposal's RFA discussion.

Therefore, the Commission concludes that, to the extent the regulations adopted herein affect CTAs, it will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted by the

[78] *See* 47 FR 18620.

[79] Proposal, 83 FR 52917.

Commission will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.[80] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The regulations adopted in this release would result in a collection of information within the meaning of the PRA, as discussed below. The Commission is therefore submitting the Final Rules to OMB for approval.

As discussed in the Proposal, the Commission's proposed regulations would have impacted or amended two collections of information for which the Commission has previously received control numbers from OMB. The first collection of information the Commission believed could be impacted by the Proposal is, "Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038-0005" (Collection 3038-0005). Collection 3038-0005 primarily accounts for the burden associated with part 4 of the Commission's regulations that concern compliance obligations generally applicable to CPOs and CTAs, as well as certain enumerated exemptions from registration as such, exclusions from those definitions, and available relief from compliance with certain regulatory requirements. The Commission

[80] *See* 44 U.S.C. 3501, et seq.

had proposed to amend this collection to reflect (1) the notices proposed to be required to claim certain of the CPO registration exemptions and the CPO exclusion proposed therein; and (2) an expected reduction in the number of registered CPOs and CTAs filing Forms CPO-PQR and CTA-PR, pursuant to proposed revisions to Regulation 4.27.[81]

The Commission also proposed to amend a second collection of information entitled, "Part 3 – Registration, OMB control number 3038-0023" (Collection 3038-0023), which pertains to the registration of intermediaries generally, to reduce the number of persons registering as CPOs and CTAs as a result of the regulatory amendments in the Proposal. The responses to these collections of information are mandatory.

The collections of information in the Proposal would have made available to eligible persons: (1) an exemption from CPO registration based upon Commission Staff Advisory 18-96; (2) recordkeeping location relief for qualifying, registered CPOs, also based upon Commission Staff Advisory 18-96; (3) exemptions from CPO and CTA registration for qualifying Family Offices; (4) an expanded exclusion under Regulation 4.5 for investment advisers of BDCs; and (5) exemptive relief made available through amendments to the definition of "Reporting Person" in Regulation 4.27(b), such that qualifying CPOs and CTAs no longer have to file Forms CPO-PQR or CTA-PR.[82] In the instant *Federal Register* release, the Commission is adopting final amendments, effectively adding exemptions from CPO and CTA registration for qualifying Family

[81] Proposal, 83 FR 52918-19.

[82] The Proposal also included proposed amendments to Regulations 4.7(b) and 4.13(a)(3), expanding the availability of relief under those provisions to include registered and exempt CPOs issuing, offering, selling, or reselling securities with general solicitation, pursuant to the JOBS Act. Those amendments do not impact or change the number of CPOs registered or exempt from such registration, but rather affect their ability to broadly solicit the public for investment. *See infra* section II.b. for discussion of that aspect of the Final Rules.

Offices at Regulations 4.13(a)(6) and 4.14(a)(11), respectively, and finalizing other amendments consistent with the JOBS Act Relief Letter issued by Commission staff.

As noted in the Proposal, eligible persons have the option to elect the registration exemptions adopted and/or amended, if they are so qualified, but have no obligation to do so. For this reason, the Commission proposed to amend Collection 3038-0005 for PRA purposes to reflect these alternatives, and Collection 3038-0023 to reduce the number of persons registering as CPOs or CTAs; the Commission further stated its expectation that the Proposal would not impose any significant new burdens on CPOs or CTAs.[83] The Commission emphasized then, "to the extent that the proposed amendments provide registration exemptions or definitional exclusions, and/or alternatives to comprehensive compliance with Commission regulations, through the adoption of amendments consistent with existing exemptive and no-action letter relief, it is reasonable … to infer that the proposed amendments will generally prove to be less burdensome for persons eligible to claim the proposed alternative relief."[84]

i. Revisions to the Collections of Information

(a) OMB Control Number 3038-0005

Collection 3038-0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on March 14, 2017.[85] As stated above, Collection 3038-0005 governs responses made pursuant to part 4 of the Commission's

[83] The Commission also considered in the Proposal the impact that the proposed 18-96 Exemption, as well as related proposed amendments to Regulation 4.23, might have on these collections and the number of persons responding thereunder. Proposal, 83 FR 52918. Because the Commission is not pursuing or finalizing those proposed amendments at this time, the Commission no longer believes any modifications to these collections on those bases are necessary.

[84] Proposal, 83 FR 52918.

[85] *See* Notice of Office of Management and Budget Action, OMB Control No. 3038-0005, *available at: https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005* (last retrieved Oct. 3, 2019).

regulations, governing the operations of CPOs and CTAs. Generally, under Collection 3038-0005, the estimated average time spent per response will not be significantly altered; however, the Commission is making minor adjustments, discussed further below, to Collection 3038-0005 to account for new and/or lessened burdens expected from the regulatory amendments adopted in this release.

In this release, the Commission is adopting new CPO and CTA exemptions for qualifying Family Offices, as well as finalizing amendments to Regulations 4.7(b) and 4.13(a)(3), consistent with to the JOBS Act. In the Proposal, the Commission estimated an increase in the number of persons responding to the portion of Collection 3038-0005 associated with Regulation 4.13(b)(1) (the requirement to file a claim for an exemption under that section) by at least the number of persons claiming the CPO Family Office No-Action Letter, which has provided no-action relief from CPO registration for Family Offices, i.e., 200 CPOs. This estimate was based on the Commission's decision in the Proposal to require a notice filing from Family Offices wishing to claim the proposed CPO exemption.

Given the Commission's adoption today of the CPO exemption for Family Offices with no notice filing requirement, the Commission no longer believes such an increase in the number of persons filing notices under Regulation 4.13(b)(1) is necessary. Regarding the JOBS Act amendments also adopted in this release, the Commission stated in the Proposal that "no adjustments need to be made to Collection 3038-0005 to account for [those] amendments because persons relying on the exemptive relief therein are, as a condition of relief, currently required to claim an exemption under Regulations 4.7(b) or

4.13(a)(3), as applicable to them, and therefore, are already counted in this collection;"[86] the Commission continues to believe this aspect of its PRA analysis to be accurate.

The currently approved total burden associated with Collection 3038-0005, in the aggregate, is as follows:

Estimated number of respondents: 45,270.

Annual responses for all respondents: 129,042.

Estimated average hours per response: 2.83.[87]

Annual burden: 365,764.

Additionally, the currently approved total recordkeeping burden associated with Collection 3038-0005 is as follows:

Estimated number of respondents: 9,838.

Annual responses for respondents: 13,672.

Estimated average hours per response: 5.01.

Annual recordkeeping burden: 68,497.

In the Proposal, the Commission estimated that the proposed CPO registration exemptions, based on Commission Staff Advisory 18-96 and to provide relief for Family Offices, would result in an additional 250 notice filings under Regulation 4.13(b)(1). Because these notice filings will not be required by the final amendments, the Commission no longer believes that such an increase is necessary. As a result of these

[86] Proposal, 83 FR 52918. The Proposal further discussed modifications to Collection 3038-0005 based on the proposed amendments to Regulation 4.5 and 4.27. *Id.* Each of those amendments is being finalized and adopted by the Commission in a concurrently published *Federal Register* release containing the pertinent Preamble and administrative law discussions as well as those final rule amendments.

[87] The Commission has rounded the average hours per response to the second decimal place for ease of presentation.

Final Rules, the Commission believes that the reporting burden associated with Regulation 4.13(b)(1) under Collection 3038-0005 should remain unchanged, as follows:

Estimated number of respondents: 3,622.

Annual responses by each respondent: 3.

Estimated average hours per response: 0.5.

Total annual reporting burden hours: 1,811.

The Commission has taken the position in this release that Family Offices, though eligible for exemption from registration as CPOs under Regulation 4.13 by virtue of the Final Rules, will still be subject to the same recordkeeping requirements in Regulations 4.13(c)(1)(i)-(ii) as all other exempt CPOs. Therefore, the Commission believes an adjustment to account for the recordkeeping burden of approximately 200 newly exempt Family Offices is necessary. As a result, the Commission is amending the recordkeeping burden associated with Regulations 4.13(c)(1)(i)-(ii) as follows:

Estimated number of respondents: 3,812.

Annual responses by each respondent: 1.

Estimated average hours per response: 11.4.

Total annual recordkeeping burden hours: 43,457.

As a result, the total new recordkeeping burden associated with Collection 3038-0005 will be as follows:

Estimated number of respondents: 10,038.

Annual responses for all respondents: 13,872.

Estimated average hours per response: 5.10.

Annual recordkeeping burden: 70,777.

The total new burden associated with Collection 3038-0005, in the aggregate, reflecting the regulatory amendments adopted herein,[88] is as follows:

Estimated number of respondents: 43,397.

Annual responses for all respondents: 112,024.

Estimated average hours per response: 3.16.

Annual reporting burden: 354,367.

(b) OMB Control Number 3038-0023

Based on the contents of the Proposal, the Commission expected that "persons that are currently counted among the estimates for Collection 3038-0023 with respect to CPO and CTA registration with the Commission will deregister as such, due to the availability of the additional registration exemptions and exclusion proposed herein."[89] On that basis, the Commission proposed, "to deduct the expected claimants of that relief from the total number of persons required to register with the Commission as CPOs and CTAs."[90] As discussed above, the Commission is adopting herein CPO and CTA exemptions for Family Offices, with no notice filing requirement, and finalizing amendments to Regulations 4.7(b) and 4.13(a)(3) based upon the JOBS Act. As noted above, the conditions of relief related to the JOBS Act provisions already require that the person be registered as a CPO or exempt from such registration, meaning those amendments will have no impact on the number of respondents in this collection.

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[88] These burden totals include adjustments made to Collection 3038-0005 to reflect the Final Rule amendments contained in this *Federal Register* release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, published elsewhere in this issue of the *Federal Register*.

[89] Proposal, 83 FR 52919.

[90] *Id.*

The currently approved total burden associated with Collection 3038-0023, in the aggregate, excluding the burden associated with Regulation 3.21(e), is as follows:

Estimated number of respondents: 77,857.

Estimated number of responses: 78,109.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 7,029.8.

Frequency of collection: Periodically.

The currently approved total burden associated with Regulation 3.21(e) under Collection 3038-0023, which remains unchanged under the Final Rules, is as follows:

Estimated number of respondents: 396.

Estimated number of responses: 396.

Estimated average hours per response: 1.25.

Estimated total annual burden on respondents: 495.

Frequency of collection: Annually.

The Commission proposed to reduce the number of registrants by the estimated number of claimants with respect to each of the registration exemptions and exclusion in the Proposal. Given the amendments being adopted herein,[91] the Commission continues to estimate that 200 persons will claim relief from registration as the CPO of a qualifying Family Office and that 100 persons will claim relief from registration as the CTA of a

[91] As discussed above, these burden totals include adjustments made to Collection 3038-0023 to reflect the Final Rule amendments contained in this *Federal Register* release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, published elsewhere in this issue of the *Federal Register*.

qualifying Family Office or of family clients.[92] Therefore, the Commission believes that the burden associated with Collection 3038-0023 should be reduced, such that the total burden associated with the collection, excluding the burden associated with Regulation 3.21(e), will be as follows:

Estimated number of respondents: 77,492.

Estimated number of responses: 77,492.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 6,974.

ii. Information Collection Comments

In the Proposal, the Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed therein.[93] The Commission did not receive any such comments.

c. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.[94] Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following 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 CEA section 15(a) considerations.

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[92] As noted above, any modifications necessary to the collections of information related to the proposed amendments to Regulation 4.5 or 4.27 are discussed in a separate *Federal Register* release.

[93] Proposal, 83 FR 52920.

[94] 7 U.S.C. 19(a).

i. General Costs and Benefits

The baseline for the Commission's consideration of the costs and benefits of the Final Rules is the regulatory status quo, as determined by the CEA and the Commission's existing regulations in 17 CFR part 4. The Commission recognizes, however, that to the extent that market participants have relied on relevant Commission staff action, the actual costs and benefits of the Final Rules, as realized in the market, may not be as significant. Because each amendment addresses a discrete issue, which impacts a unique subgroup within the universe of entities captured by the CPO and CTA statutory definitions, the Commission has determined to analyze the costs and benefits associated with each amendment separately, as presented below. The Commission has endeavored to assess the costs and benefits of the amendments adopted herein in quantitative terms wherever possible. Where estimation or quantification is not feasible, however, the Commission has provided its assessment in qualitative terms.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rule on all activity subject to the amended regulations, whether by virtue of the activity's physical location in the United States, or by virtue of the activity's connection with or effect on U.S.

commerce under section 2(i) of the CEA.[95] In particular, the Commission notes that some entities affected by this rulemaking are located outside of the United States.

(a) Summary of the Final Rule

As discussed in greater detail below, and in the foregoing preamble, the Commission believes that the amendments adopted by the Final Rules enable the Commission to discharge its regulatory oversight function with respect to the commodity interest markets. The Commission also believes that the Final Rules will reduce the potential burden on persons whose commodity interest activities are subject to the Commission's regulations applicable to CPOs and CTAs without reducing the overall regulatory benefits of those provisions. The Commission is amending existing 17 CFR part 4 regulations in a manner consistent with DSIO's CPO and CTA Family Office No-Action Letters by adopting new CPO and CTA registration exemptions under Regulations 4.13 and 4.14. Additionally, the Commission is adopting amendments to Regulations 4.7 and 4.13 to permit general solicitation under those provisions, consistent with the JOBS Act.

(b) Benefits of the Final Rule Amendments

The Commission expects that the addition of CPO and CTA registration exemptions for qualifying Family Offices will result in two main benefits. First, qualifying Family Offices will not be subject to the costs associated with registration, NFA membership, or compliance with part 4 of the Commission's regulations. The elimination of these costs should result in a reduction of the costs associated with the establishment and operation of a Family Office, which should ultimately benefit their

[95] 7 U.S.C. 2(i).

family clients. Second, because the exemptions harmonize the Commission's treatment of Family Offices with that of the SEC, Family Offices will generally only be required to comply with one standard to determine their registration and compliance obligations with respect to both their securities and commodity interest transactions. Although DSIO had previously issued no-action relief letters for both CPO and CTA registration, Family Offices wishing to avail themselves of this relief were required to prepare a notice making specific representations and to submit the document electronically to a specific email inbox. Through this *Federal Register* release, the Commission is finalizing the CPO exemption for Family Offices without requiring any notice filing. Moreover, for Family Offices claiming relief from CTA registration, the Commission is adopting that exemption, as proposed, also without a notice filing requirement, consistent with the majority of the existing exemptions available to CTAs under Regulation 4.14.

The Commission believes also that the alignment of Regulations 4.7(b) and 4.13(a)(3) with the SEC's JOBS Act amendments to Regulation D and Rule 144A will result in several benefits. By harmonizing Commission regulations that specifically reference the statutory and regulatory provisions governing unregistered, exempt securities offerings, the amendments will facilitate full implementation of the JOBS Act by making the relief from the prohibition on general solicitation more widely available. Moreover, the amendments eliminate the distinction between private offerings of commodity pools and other privately offered collective investment vehicles that do not transact in commodity interests, thereby treating similarly situated offerors in a consistent manner. Thus, the Commission finds that there is a substantial benefit in aligning its

regulations with those of its sister regulator, in the interest of fostering cooperation and comity, especially where there is limited customer protection risk for the retail public.

(c) Costs of the Final Rule Amendments

The Commission believes there are some costs associated with the Final Rules. Generally, CPOs and CTAs are subject to comprehensive regulation under the Commission's part 4 regulations, including disclosure, reporting, and recordkeeping requirements. Although the Commission continues to find that its regulatory concerns with respect to Family Offices are fundamentally different from those respective of CPOs and CTAs soliciting and serving the general public, the CPO and CTA exemptions adopted for Family Offices could conceivably be detrimental to persons who relied on CPO and CTA regulation with respect to Family Offices for some purpose. The Commission is adopting registration exemptions based on the requirements of the CPO and CTA Family Office No-Action Letters, upon which many Family Offices rely in place of CPO and CTA registration and regulation. As discussed above, the Commission continues to believe that Family Offices and their inherent characteristics present distinctions from the typical CPO-participant or CTA-client relationships that 17 CFR part 4 is designed to regulate, which justify the adoption of these exemptions. In particular, Family Offices eligible for these exemptions will be restricted to soliciting or providing advice to persons that are "family clients," thereby limiting their contact or interaction with the public. The Commission further believes that these characteristics and limitations are a reasonable substitute for the benefits and protections afforded by the Commission's regulatory regime for CPOs and CTAs. Therefore, any detriment resulting

from the CPO and CTA exemptions for Family Offices is expected to be minimal at most.

The Commission has determined to alter certain of its cost estimates from the Proposal, based on specific changes incorporated in the Final Rules. Regarding the CPO and CTA exemptions for Family Offices, the Commission no longer believes that CPOs claiming this relief will incur any expense related to a notice filing because it is adopting that exemption without such a requirement. Family Offices will, however, still be required to incur expenses associated with the initial determination as to their eligibility for the new exemptions. With respect to the CTA exemption for Family Offices, the Commission continues to believe that the costs associated with it will be limited to the expenses associated with making the determination as to the person's initial and ongoing eligibility for the exemption. The Commission does not have the necessary data to estimate the amount of these expenses, and though it requested comment as to the amount of these costs and how they compare to the costs of registration under 17 CFR part 4, no comments addressed this issue or provided any data.

Additionally, the Commission believes there may be some costs associated with the amendments to Regulations 4.7 and 4.13 based on the JOBS Act. By removing the restrictions on solicitation and marketing from those regulations, the Commission will be permitting general solicitation by those exempt operators in vehicles considered to be commodity pools. In considering the costs of similar regulatory amendments, the SEC noted that eliminating the prohibition on general solicitation could result in heightened fraudulent activity in offerings made pursuant to § 506(c) of Regulation D (17 CFR 230.506(c)) because promoters of fraudulent schemes could more easily reach potential

investors through general solicitation; this, the SEC emphasized, could negatively impact capital formation and raising by legitimate issuers, which the JOBS Act was designed to promote.[96] After discussing historical data indicating that "hedge funds" are not disproportionately involved in fraudulent activity, when compared to other types of funds and advisers, the SEC stated further that such costs of general solicitation could be mitigated by the fact that such issuers would continue to be subject to antifraud provisions under the federal securities laws, and importantly, to restrictions on the sale of these securities to accredited investors, as well as verification requirements.[97]

The Commission also believes that permitting general solicitation in offerings subject to an exemption under Regulations 4.7(b) and 4.13(a)(3), consistent with the JOBS Act, could theoretically increase the instance of fraudulent activity or solicitation in those markets. The Commission notes that, consistent with the SEC amendments discussed above, persons complying with the terms of § 506(c) of Regulation D and Rule 144A and claiming relief under Regulations 4.7 or 4.13(a)(3) would still be required to limit participants in the offered pool to the permitted investors listed in those regulations. Maintaining this restriction on the participants in pools subject to these exemptions meets the Commission's goal of permitting such exempt CPOs to rely on JOBS Act relief, without sacrificing the remaining substantive requirements of those exemptions, and while minimizing any impact on or risk to non-permitted investors. Additionally, persons claiming exemptive relief under Regulation 4.7(b) are required to register with the Commission as a CPO, while persons claiming the exemption in Regulation 4.13(a)(3)

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[96] JOBS Act Adopting Release, 78 FR 44798 - 44800.

[97] 78 FR 44799 (noting further that "the public nature of these solicitations may also facilitate detection of fraudulent activity in that the fraudulent nature of some offerings may be inferred from particular statements in solicitation materials").

would be exempt from such registration, and both types of CPO would still subject to antifraud provisions in the CEA. Accordingly, the Commission believes that adopting these amendments will neither result in an erosion of the customer protections provided to non-sophisticated, retail pool participants under 17 CFR part 4, nor will they cause an expansion of the relief available under Regulations 4.7 or 4.13(a)(3), beyond the discrete issue of permitted solicitation with respect to exempt securities offerings and their resales.

ii. Section 15(a)

Section 15(a) of the CEA requires the Commission to consider the effects of its actions in light of the following five factors:

(a) Factor 1: Protection of Market Participants and the Public

The Commission considered whether the amendments adopted in this release would have any detrimental effect on the customer protections of the Commission's regulatory regime. The Commission believes that the CPO and CTA exemptions for Family Offices will have a limited impact on the protection provided to market participants and the public. Because Family Offices, by definition, are not offered to persons other than family clients, the general public would generally not be negatively affected by the failure of Family Offices to register as CPOs and CTAs with the Commission. Moreover, as discussed above, the Commission finds that familial relationships inherent in Family Offices would provide a reasonable alternative mechanism to protect the interests of family clients. The Commission believes its regulatory interest in Family Offices is distinct from and much lower than in the case of

arms-length transactions between CPOs and pool participants, or CTAs and advisory clients.

With respect to the JOBS Act amendments to Regulations 4.7 and 4.13, the Commission does not believe that these amendments will alter the protections currently available to market participants and the public. Pools offered pursuant to claims of relief under either Regulation 4.7 or 4.13(a)(3) will still be limited in their permitted participants to the persons listed in those regulations, and the relief provided will otherwise remain unchanged. As such, the general American public will not be able to purchase interests in pools that would not be subject to the full panoply of the compliance obligations under 17 CFR part 4. Therefore, there will be no reductions to the protections currently in place, by virtue of the JOBS Act amendments in the Final Rules.

(b) Factor 2: Efficiency, Competitiveness, and Financial Integrity of Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of efficiency, competitiveness, and financial integrity considerations. Inasmuch as the Final Rules do not directly impact how futures contracts or other derivatives are actually traded, the Commission believes that they will not have a significant impact on the efficiency, competitiveness, and financial integrity of markets.

(c) Factor 3: Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of price discovery considerations. Similarly, because the Final Rules do not directly impact how futures contracts or other derivatives are actually

traded, the Commission believes that the amendments will not have a significant impact on price discovery.

(d) Factor 4: Sound Risk Management

Section 15(a)(2)(D) requires the Commission to evaluate the costs and benefits of a regulation in light of sound risk management practices. The Commission believes that the Final Rules will not have a significant impact on the practice of sound risk management because the manner in which various funds, operators, and advisors organize, register, or claim exemption from such registration, has only a small influence on how market participants manage their risks overall.

(e) Factor 5: Other Public Interest Considerations

Section 15(a)(2)(e) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of other public interest considerations. The Final Rules reflect the Commission's determination that such amendments harmonize Commission regulations with other federal laws, where appropriate, to exempt and reduce the regulatory burden on certain entities.

d. Antitrust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the

CEA.[98] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments addressing this issue.

The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. Because the Commission has determined the Final Rules are not anticompetitive and have no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 4

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

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 4 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, 6(c), 6b, 6c, 6*l*, 6m, 6n, 6*o*, 12a, and 23.

2. In § 4.7:

a. Revise paragraph (b) introductory text;

b. Redesignate paragraphs (b)(1) through (5) as paragraphs (b)(2) through (6);

[98] 7 U.S.C. 19(b).

c. Add a new paragraph (b)(1); and

d. Revise newly redesignated paragraph (b)(3).

The revisions and addition read as follows:

§ 4.7 Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

* * * * *

(b) *Relief available to commodity pool operators*—(1) *Eligibility.* Relief from specific compliance obligations is available to certain registered commodity pool operators with respect to the pool(s) they operate, *provided that* the registered commodity pool operator files the required notice under paragraph (d) of this section and otherwise complies with the conditions of paragraph (d) of this section in operating the exempt pool(s).

(i) *Types of commodity pools.* (A) Regarding an offering that is exempt from registration under section 4(a)(2) of the Securities Act of 1933, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool; *Provided*, that the prohibition on marketing to the public shall not apply to a registered commodity pool operator who offers or sells participations in a pool offered pursuant to § 230.506(c) of this title.

(B) Regarding an offering that is offered and sold pursuant to Regulation S, §§ 230.901 through 230.905 of this title, any registered commodity pool operator who offers or sells participations in such a pool solely to qualified eligible persons, without

marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(C) Regarding a pool that is a collective trust fund, the securities of which are exempt from registration pursuant to section 3(a)(2) of the Securities Act of 1933, any bank registered as a commodity pool operator that offers or sells participations in such a pool solely to qualified eligible persons, without marketing to the public, may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(ii) *Resales.* A registered commodity pool operator may claim any or all of the relief described in this paragraph (b) with respect to the pools described in paragraphs (b)(1)(i)(A) through (C) of this section, if participations in such pools are resold pursuant to Rule 144A (§ 230.144A of this title).

* * * * *

(3) *Periodic reporting relief.* (i) Exemption from the specific requirements of § 4.22(a) and (b), *provided*, that a statement signed and affirmed in accordance with § 4.22(h) is prepared and distributed to pool participants no less frequently than quarterly within 30 calendar days after the end of the reporting period. This statement must be presented and computed in accordance with generally accepted accounting principles and indicate:

(A) The net asset value of the exempt pool as of the end of the reporting period;

(B) The change in net asset value from the end of the previous reporting period; and

(C) Either the net asset value per outstanding participation unit in the exempt pool as of the end of the reporting period, or the total value of the participant's interest or share in the exempt pool as of the end of the reporting period.

(ii) Where the pool is comprised of more than one ownership class or series, the net asset value of the series or class on which the account statement is reporting, and the net asset value per unit or value of the participant's share, also must be included in the statement required by this paragraph (b)(3); except that, for a pool that is a series fund structured with limitation on liability among the different series, the account statement required by this paragraph (b)(3) is not required to include the consolidated net asset value of all series of the pool.

(iii) A commodity pool operator that meets the conditions specified in § 4.22(d)(2)(i) to present and compute the pool's financial statements contained in the Annual Report other than in accordance with generally accepted accounting principles, and has filed notice pursuant to § 4.22(d)(2)(iii), may also use the alternative accounting principles, standards or practices identified in that notice with respect to the computation and presentation of the account statement.

* * * * *

3. Amend § 4.13 as follows:

a. Revise paragraphs (a)(3)(i) and (a)(3)(iii)(C) and (D);

b. Remove paragraph (a)(3)(iii)(E);

c. Redesignate paragraph (a)(6) as paragraph (a)(7);

d. Add a new paragraph (a)(6); and

e. Revise paragraphs (b)(1) introductory text and (c)(1) introductory text.

The revisions and addition read as follows:

§ 4.13 Exemption from registration as a commodity pool operator.

* * * * *

(a) * * *

(3) * * *

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and the interests are marketed and advertised to the public in the United States solely, if at all, in compliance with § 230.506(c) of this title, or with Rule 144A, § 230.144A of this title, as applicable;

* * * * *

(iii) * * *

(C) A "knowledgeable employee," as that term is defined in § 270.3c-5 of this title; or

(D) A "qualified eligible person," as that term is defined in § 4.7; and

* * * * *

(6) For each pool for which the person claims exemption under this paragraph (a)(6):

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold only to "family clients," as defined in § 275.202(a)(11)(G)-1 of this title;

(ii) The person qualifies as a "family office," as defined in § 275.202(a)(11)(G)-1 of this title; and

(iii) The person reasonably believes, at the time of investment, or in the case of an existing pool, at the time of conversion to a pool meeting the criteria of this paragraph (a)(6) of this section, that each person who participates in the pool is a "family client" of the "family office," as defined in § 275.202(a)(11)(G)-1 of this title.

* * * * *

(b)(1) Any person who desires to claim the relief from registration provided by this section, except for any person claiming the exemption for family offices in paragraph (a)(6) of this section, must file electronically a notice of exemption from commodity pool operator registration with the National Futures Association through its electronic exemption filing system. The notice must:

* * * * *

(c)(1) Each person who has claimed an exemption from registration under this section must:

* * * * *

4. In § 4.14, add paragraph (a)(11) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

* * * * *

(a) * * *

(11) The person's commodity trading advice is solely directed to, and is for the sole use of, "family clients," as defined in § 275.202(a)(11)(G)-1 of this title.

* * * * *

Issued in Washington, DC, on November 27, 2019, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs – Commission Voting Summary and Commissioner's Statement

Appendix 1 – Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, and Stump voted in the affirmative. Commissioner Berkovitz voted in the negative.

Appendix 2 – Dissenting Statement of Commissioner Dan M. Berkovitz

Rulemaking to Provide Exemptive Relief for Family Office CPOs: Customer Protection Should be More Important than Relief for Billionaires

I dissent from today's final rule to provide registration exemptions for operators of commodity pools in large investment management structures euphemistically called "family offices." These investment management structures typically manage hundreds of millions, sometimes billions, of dollars, in private wealth. The regulations that we proposed last year (Proposal) balanced the family office exemption with an annual notice filing requirement and a prohibition on persons who were statutorily disqualified from operating commodity pools from claiming the exemption.[1] Today's final rule provides a blanket exemption for the operators of commodity pools (CPOs) in family offices without either of these minimal checks and balances. It is absurd that the Commission is excusing billionaires from the notice-filing requirement that generally applies to other

[1] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, Notice of proposed rulemaking, 83 Fed. Reg. 52902 (Oct. 18, 2018).

persons—who have a fraction of that immense wealth—who claim exemptions from CPO registration.[2] And persons that are statutorily disqualified from registering should not be permitted to operate under an exemption from registration. Disqualified persons should be disqualified.

Family Office Registration Exemption

The final rule exempts CPOs and commodity trading advisors (CTAs) from registration requirements in connection with commodity pools that are solely for the use of entities that are called "family offices."

"Family Offices" Are Very Large Enterprises

According to the Securities and Exchange Commission ("SEC"), whose definition of "family office" is used in today's rulemaking, "'Family offices' are entities established by wealthy families to manage their wealth and provide other services to family members, such as tax and estate planning services."[3] Family offices, however, are not and have never been used by ordinary families who may have a modest degree of wealth, but rather by the extraordinarily wealthy—including royalty, aristocrats, and wealthy entrepreneurs, bankers and hedge fund operators—who create these organizations to preserve, grow, and pass on their wealth to their descendants.[4] Under the SEC's

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[2] *See* 17 CFR 4.13(b).

[3] SEC, *SEC Adopts Rule Under Dodd-Frank Defining "Family Offices*" (June 22, 2011), available at: *sec.gov/news/press/2011-134.htm*.

[4] According to one guide to family offices:

> Family offices have their roots in the sixth century, when a king's steward was responsible for managing royal wealth. Later on, the aristocracy also called on this service from the steward, creating the concept of stewardship that still exists today. But the modern concept of the family office developed in the 19th century. In 1838, the family of financier and art collector J.P. Morgan founded the House of Morgan to manage the family assets. In 1882, the Rockefellers founded their own family office, which is still in existence and provides services to other families.

EY Family Office Guide, *Pathway to successful family and wealth management*, at 4, available at: *https://www.ey.com/en_us/tax/family-office-advisory-services*.

definition, family offices are not limited to managing the wealth of the related members of a family, but may also include "family clients," which includes key employees of the family office, any non-profit or charitable organization funded exclusively by family members, certain family client trusts, and any company wholly-owned by and operated for the sole benefit of family clients.[5]

By any measure, family offices today manage extremely large amounts of wealth. According to the Global Family Office Report 2019, "[t]he average family wealth of those surveyed for this report stands at USD 1.2 billion, while the average family office has USD 917 million in [assets under management]."[6] Another source reports that, as of 2014, "of the 34 family offices surveyed, the financial size of the office ranged from $42 million to well over $1.5 billion, with a median of $275 million assets under supervision and a mean of $516 million."[7] Although there remain family offices with tens of millions of dollars in assets under management, over the past decade the costs of running a family office have increased significantly. It is now estimated "that the operating costs to build out a fully functioning family office typically require a minimum in the range of $500 million to $1 billion."[8]

The aggregate amount of wealth managed by family offices is staggering. By one estimate, the total assets under management by family offices is over $4 trillion, and the

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[5] 17 CFR 275.202(a)(11)(G)-1. Under the SEC's definition, the term "family member" is quite broad, meaning all lineal descendants of a common ancestor (who may be living or deceased), and such lineal descendants' spouses or spousal equivalents; provided that the common ancestor is no more than 10 generations removed from the youngest generation of family members. 17 CFR 275.202(a)(11)(G)-1(d)(6).

[6] Campden Research and UBS, *The Global Family Office Report 2019*, at 10, available at: *https://www.ey.com/en_us/tax/family-office-advisory-services*.

[7] Kirby Rosplock, The Complete Family Office Handbook, A Guide for Affluent Families and the Advisors Who Serve Them, at 8 (Wiley, Bloomberg Press, 2014).

[8] *Id*.

number of family offices has grown ten-fold in the last decade.[9] A recent Forbes article noted that "[f]amily offices are now capable of making transactions that were traditionally reserved for big companies or private-equity firms and therefore are becoming a *disruptive force in the market-place*."[10]

The Family Office Exemption

As explained in both the Proposal and today's final rule, family offices typically have been exempt from CPO registration. When the previous regulation that family offices relied upon for an exemption was repealed in 2012, the Commission provided no-action relief to enable family offices to continue to be exempt from registration. Family offices are currently operating on an exempt basis under this no-action relief.

The rationale for providing registration relief to pools investing the money of family members has merit. The commodity pool regulatory regime is in significant part directed at those who solicit funds for the pools and preventing investor fraud and misuse of customer funds. Presumably, these concerns are less likely to arise if a pool is an investment vehicle for investors who are related to each other and do not solicit funds from the general public.[11] I voted for the Proposal to seek comments on making permanent the no-action relief from registration currently available to family office pool operators.

Family Offices Are Currently Required to Provide Notice for a CPO Exemption

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[9] Francois Botha, *The Rise of the Family Office: Where Do They Go Beyond 2019?*, Forbes (Dec. 17, 2018), available at: *https://www.forbes.com/sites/francoisbotha/2018/12/17/the-rise-of-the-family-office-where-do-they-go-beyond-2019/#426044f55795*.

[10] *Id* (emphasis added).

[11] However, affinity fraud, including defrauding relatives, is not unheard of. *See, e.g.*, Consent Order, *CFTC v. Carter*, No. 18-cv-242, 2018 WL 7140335 (N. D. Ill. Nov. 13, 2018) and Complaint, *CFTC v. Williams*, No. 2:17-cv-01325, 2017 WL 1755463 (D. Ariz. May 3, 2017).

But whereas the Proposal included sensible initial and annual notice filing requirements for an exempt CPO that would notify the Commission that it is electing the exemption, the final rule eliminates that requirement. To date, family office CPOs claiming an exemption from registration has been required to provide notice to the CFTC of their claim for exemption. The current no-action relief imposes a notice requirement,[12] as did the previous regulatory exemption that was relied upon by family office CPOs prior to its repeal in 2012.[13] Neither of these notice requirements placed any significant burdens or costs upon family office CPOs.[14]

The Proposal would have subjected persons claiming an exemption from CPO registration to the same notice requirements that apply to other types of CPOs claiming an exemption from registration under Regulation 4.13. Under Regulation 4.13, a person claiming any of the enumerated exemptions from CPO registration is required to provide his or her name, address, telephone number, fax number, and email address, and the name of the pool for which it is claiming the exemption.[15] In the Proposal the Commission estimated that the notice filing would cost approximately $28.50 per pool annually.[16]

The estimated $28.50 annual cost of filing a notice of claim of exemption is trivial compared to the hundreds of millions of dollars managed by the average family office CPO. All other types of CPOs claiming an exemption under Regulation 4.13, such as

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[12] CFTC Letter No. 12-37, at 2-3 (Nov. 29, 2012), available at: *https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/12-37.pdf*.

[13] 17 CFR 4.13(b) (2011).

[14] Under the current no-action relief, a person claiming the exemption must provide the claimant's name, business address, and telephone number, state the capacity (i.e., CPO) and name of the pool for which the claim is being filed, and be electronically signed by the CPO. CFTC Letter No. 12-37, at 2-3.

[15] 17 CFR 4.13(b)(1) (2019).

[16] Proposal, at 52923. Based on the notices filed under the CFTC No Action Letter 12-37, the Commission estimated that approximately 200 CPOs would be affected, with an average of 3 pools each that would be subject to the notice requirement. *Id*.

operators of single pools without compensation, or operators of small pools with less than $400,000 in capital, are required to file the same notice of a claim of exemption. There is no rational justification for exempting large family office pools with hundreds of millions of dollars, or in many cases billions of dollars, under management from the minimal notice requirements that apply to other, less wealthy persons claiming exemptions from CPO registration.

The CFTC's interest in commodity pool operators is not limited to the protection of investors in the pool. The Commission has a significant interest in how the activities of these pool operators may affect the commodity markets. Congress has declared in section 4l of the Commodity Exchange Act (CEA) that the activities of commodity trading advisors and commodity pool operators are affected with a national public interest in that, among other things their operations are directed toward and cause the purchase and sale of commodities for future delivery and the foregoing transactions occur in such volume as to affect substantially transactions on contract markets.[17] The Commission has a significant interest in knowing the identity of the persons that operate these pools, including those that are exempt from registration. This significant interest is manifested in the Commission's requirement that all other exempt CPOs provide the Commission with annual notices claiming or affirming their exemption from registration. The Commission's interest in the activities of large, multimillion dollar family pool CPOs is certainly no less than the Commission's interest in the activities of smaller CPOs, all of which are required to provide annual notice when they claim an exemption from registration.

[17] 7 U.S.C. 6l.

The Commission eliminates the notice requirement largely on the basis that this will harmonize the Commission's regulations with those of the SEC. Harmonization for harmonization's sake is not a rational basis for agency action. The question for the CFTC is not whether the SEC has determined whether a notice requirement is appropriate, but rather whether the CFTC would benefit from a notice requirement under the CFTC's system of regulations. To the extent that the Commission believes it has no regulatory interest in the operation of commodity pools beyond the protection of investors in the pool, such a belief is manifestly wrong and inconsistent with Congress's finding in CEA section 4l. The Commission has a significant regulatory interest in knowing the identity of CPOs that may be "a disruptive force in the market-place."[18] The Commission's mission would be better served by harmonizing the family pool CPO exemption process with its own regulations for exempt CPOs rather than the SEC's regulations.

Disqualification of Disqualified Persons

The Proposal would have prohibited any person who was subject to a statutory disqualification from registration from claiming an exemption from registration. The logic underlying this provision is simple: a person who is disqualified from operating a commodity pool in a registered capacity should also be disqualified from operating a pool in an unregistered capacity. Disqualified persons should be disqualified. In the Proposal the Commission stated:

> The Commission is concerned that it poses undue risk from a customer protection standpoint for its regulations in their current form to permit statutorily disqualified persons or entities to legally operate exempt commodity pools, especially when those same persons would not be permitted to register with the Commission. The Commission preliminarily believes that preserving the prohibition on statutory disqualifications from

[18] *See supra* note 10.

> Advisory 18-96 and applying it to exemptions under § 4.13 would provide a substantial customer protection benefit by prohibiting statutorily disqualified persons from operating and soliciting participants for investment in exempt commodity pools.[19]

The National Futures Association (NFA) submitted a comment letter "fully support[ing]" the disqualification of disqualified persons. NFA stated:

> [T]he Commission aptly states in the *Federal Register* release that the proposed prohibition would provide a substantial customer protection benefit. In particular, the proposed change addresses a significant regulatory gap in the Commission's exemption framework and will certainly strengthen customer protection by ensuring that a person who may be prohibited from registering as a CPO is not able to operate an exempt fund outside of the Commission's and NFA's regulatory oversight.[20]

In today's final rule the Commission states that commenters raised a number of issues regarding the statutory disqualification proposal that require further consideration. I agree that the Commission should address these comments. But it should have done so prior to granting today's exemptions from registration. Customer protection should be our first priority, and not deferred indefinitely. The Commission should have addressed these comments and finalized the disqualification rule prior to granting today's exemption for family offices. Customer protection should not take a back seat to exemptions from regulations for billionaires.

The approval of this rule without any checks and balances on exempt family office CPOs will increase risks to our markets and market participants. I therefore dissent.

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[19] Proposal, 83 FR 52906.

[20] Letter from Carol Wooding, Vice President, General Counsel and Secretary, National Futures Association, to Christopher J. Kirkpatrick, Secretary of the Commission, Re: RIN 3038-AE76: Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors (Dec. 17, 2018).

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