6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AF25

Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools: Updating the 'Qualified Eligible Person' Definition; Adding Minimum Disclosure Requirements for Pools and Trading Programs; Permitting Monthly Account Statements for Funds of Funds; Technical Amendments

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is proposing amendments to certain provisions of its regulations that would: update the Portfolio Requirement thresholds within the "Qualified Eligible Person" definition; require commodity pool operators (CPOs) and commodity trading advisors (CTAs) operating pools and trading programs under the applicable Commission regulations to provide certain minimum disclosures to their prospective pool participants and advisory clients; include revisions that are consistent with long-standing Commission exemptive letters addressing the timing of certain pools' periodic financial reporting; and several technical amendments related to the structure of the regulations that are the subject of this proposal.

DATES: Comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, which must be in writing and identified by RIN 3038-AF25, by any of the following methods:

- *CFTC Comments Portal*: *https://comments.cftc.gov*. Select the "Submit Comments" link for this rulemaking and follow the instructions on the Public Comment Form.

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

- *Hand Delivery/Courier*: Follow the same instruction as for Mail, above.

Please submit your comments using only one of these methods. Submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to *https://comments.cftc.gov*. You should only submit information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures in § 145.9 of the Commission's regulations. The Commission reserves the right, but shall have no obligation, to review, prescreen, filter, redact, refuse, or remove any or all of your submission from *https://comments.cftc.gov* that it may deem to be inappropriate for publication, such as obscene language. All submissions that have been redacted or removed that contain comments on the merits of the rulemaking will be retained in the public comment file and will be considered as required under the Administrative Procedure Act (APA) and other applicable laws and may be accessible under the FOIA.

FOR FURTHER INFORMATION CONTACT: Amanda L. Olear, Director, 202-418-5283 or *aolear@cftc.gov*; Pamela M. Geraghty, Acting Deputy Director, 202-418-5634 or *pgeraghty@cftc.gov*; Elizabeth Groover, Special Counsel, 202-418-5985 or *egroover@cftc.gov*; or Andrew Ruggiero, Special Counsel, 202-418-5712 or

aruggiero@cftc.gov; each in the Market Participants Division at the Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581.

SUPPLEMENTARY INFORMATION:

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I. Background

As amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),[1] section 1a(11) of the Commodity Exchange Act (CEA or Act) defines the term "commodity pool operator" as any person 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.[2] CEA section 1a(10) defines a "commodity pool" as any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests.[3] CEA section 1a(12) defines the term "commodity

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).

[2] 7 U.S.C. 1a(11).

[3] 7 U.S.C. 1a(10).

trading advisor" as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writing, or electronic media, as to the value of or the advisability of trading in commodity interests.[4]

Generally, CEA section 4m(1) requires each person whose intermediary activities satisfy either the CPO or CTA definition to register as such with the CFTC.[5] With respect to both CPOs and CTAs, the CEA also authorizes the Commission to include persons within, or exclude them from, such definitions, by rule, regulation, or order, if the Commission determines that such action will effectuate the purposes of the CEA.[6] In addition to the general registration authority set forth in CEA section 4m(1), CEA section 4n specifically empowers the Commission to impose compliance obligations related to the registration process, recordkeeping, disclosure, and reporting.[7] Finally, the CEA also gives the Commission authority to make and promulgate such rules and regulations, as in the judgment of the Commission, are reasonably necessary to effectuate the provisions or to accomplish any purposes of the CEA.[8]

Part 4 of the Commission's regulations specifically governs the operations and activities of CPOs and CTAs.[9] These regulations implement the statutory authority provided to the Commission by the CEA and also establish registration exemptions and definitional exclusions for CPOs and CTAs.[10] Part 4 also contains detailed regulations that establish the ongoing compliance requirements applicable to registered CPOs and CTAs. These compliance requirements pertain to the commodity pools and separate

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[4] 7 U.S.C. 1a(12).

[5] 7 U.S.C. 6m(1) (noting that it is unlawful for any CTA or CPO, unless registered under the provisions of that chapter, to make use of the mails or any means or instrumentality of interstate commerce with his business as such CTA or CPO). *See also* 17 CFR 3.10.

[6] 7 U.S.C. 1a(11)(B); 7 U.S.C. 1a(12)(B)-(C).

[7] 7 U.S.C. 6n.

[8] 7 U.S.C. 8a(5).

[9] 17 CFR part 4.

[10] *See* 7 U.S.C. 6n; 17 CFR 4.5, 4.6, 4.13, 4.14.

accounts that CPOs and CTAs operate and advise, and provide customer protection, disclosures, and regular reporting to a registrant's pool participants or advisory clients.

Regulation 4.7 provides exemptions from certain part 4 compliance requirements regarding disclosure, periodic reporting, and recordkeeping for registered CPOs and CTAs, whose prospective and actual pool participants and/or advisory services are restricted to individuals and entities considered "Qualified Eligible Persons," and who claim the desired exemptions, pursuant to paragraph (d) of that section.[11] As of the end of FY 2022, 837 registered CPOs operated approximately 4,304 commodity pools pursuant to claimed Regulation 4.7 exemptions (4.7 pools, and together with CTA programs operated under Regulation 4.7, the 4.7 pools and trading programs).[12] Relatedly, approximately 865 CTAs claim an exemption under Regulation 4.7 for their trading programs, which the Commission estimates to number in the thousands. During discussions with CFTC staff, the National Futures Association (NFA), the registered futures association to whom the Commission has delegated many of its regulatory oversight functions with respect to CPOs and CTAs, has predicted that this population of CPOs, CTAs, commodity pools, and trading programs operating pursuant to Regulation 4.7 will only continue to grow in the future.[13] Since its adoption over thirty years ago, the Commission has occasionally amended Regulation 4.7 to enhance its usability and ensure that it remains fit for purpose.[14] For the reasons discussed below, however, it is

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[11] 17 CFR 4.7.

[12] These numbers are drawn from data in National Futures Association Form PQR filings for Q4 2022.

[13] In fact, as of March 31, 2023, there were approximately 1,128 CPOs registered with the Commission, and on average, approximately 5,257 pools were reported via CFTC Form CPO-PQR on a quarterly basis in FY 2022. Assuming there is no material difference in the number of registered CPOs and pools reported between the closings of Q4 2022 and of Q1 2023, NFA and CFTC data show that approximately 69% of registered CPOs operate 4.7 pools, and approximately 81% of all pools reported on CFTC Form CPO-PQR are 4.7 pools. After amendments to Form CPO-PQR and Regulation 4.27 adopted in 2020, the Commission accepts NFA Form PQR as substituted compliance for the required completion of its own Form CPO-PQR. *See* 17 CFR 4.27. Therefore, the data sources for both NFA and CFTC are fundamentally the same, if not identical.

[14] *See, e.g.*, 84 FR 67355 (Dec. 10, 2019).

the Commission's preliminary view that certain aspects of Regulation 4.7 no longer align with the Commission's intentions and thus require amendment.

After a careful review of the existing language and structure of Regulation 4.7, and considering the clear public and regulatory interest of maintaining and modernizing older, but still widely utilized provisions, the Commission is issuing this Notice of Proposed Rulemaking (NPRM or Proposal) comprised of targeted amendments to update the regulation in several ways. In particular, the Commission is proposing amendments that would: (1) increase the financial thresholds in the Portfolio Requirement of the "Qualified Eligible Person" (QEP) definition in Regulation 4.7(a) to reflect inflation; (2) require certain minimum disclosures for 4.7 pools and trading programs operated and offered by CPOs and CTAs; (3) add a process under Regulation 4.7(b)(3) permitting CPOs to elect an alternative account statement schedule for certain 4.7 pools consistent with long-standing exemptive letters issued by the Commission;[15] and (4) improve the structure and utility of Regulation 4.7 through several technical adjustments (for example, reorganizing the QEP definition, updating cross-references, etc.).

II. The Proposal

a. Updating Financial Thresholds in the Portfolio Requirement of the "Qualified Eligible Person" Definition

As discussed above, Regulation 4.7 provides exemptions to CPOs and CTAs for their 4.7 pools and trading programs from various compliance, disclosure, and recordkeeping requirements within part 4 of the Commission's regulations, provided that their prospective and actual pool participants and advisory clients are restricted to QEPs. Regulation 4.7(a) bifurcates the definition of QEP into paragraphs (a)(2) and (a)(3)

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[15] Such exemptive letters are routinely drafted by Commission staff in the Market Participants Division (MPD) and constitute an exercise of the authority in Regulation 4.12(a), which is delegated by the Commission to MPD's predecessor division, the Division of Swap Dealer and Intermediary Oversight, through Regulation 140.93. *See* 17 CFR 4.12(a) and 140.93.

representing two different QEP categories: (1) those persons[16] who do not need to satisfy an additional "Portfolio Requirement," as defined in Regulation 4.7(a)(1)(v), to be considered a QEP,[17] and (2) those persons who do.[18] Notably, natural persons are among those listed under Regulation 4.7(a)(3) and are thus required to satisfy the Portfolio Requirement to be considered QEPs. Pursuant to Regulation 4.7(a)(3), to be considered QEPs, such natural persons must meet the "accredited investor" definition adopted by the Securities and Exchange Commission (SEC) under Regulation D applicable to private securities offerings exempt from registration under the Securities Act, as well as the Portfolio Requirement adopted by the Commission.[19]

Currently, the Portfolio Requirement contains two thresholds; if either (or some combination of the two) is satisfied by a person listed under Regulation 4.7(a)(3), then a CPO or CTA may consider them a QEP eligible to invest in the offered 4.7 pool or trading program. More specifically, a person can satisfy the Portfolio Requirement by: (1) owning securities (including pool participations) of issuers not affiliated with such

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[16] 17 CFR 1.3 (defining "person" as "includ[ing] individuals, associations, partnerships, corporations, and trusts").

[17] 17 CFR 4.7(a)(2). Generally, this list includes, but is not limited to: (1) registered futures commission merchants (FCMs), registered retail foreign exchange dealers (RFEDs), registered swap dealers, and principals thereof; (2) a registered broker or dealer, or principal thereof; (3) certain registered CPOs, and principals thereof; (4) certain registered CTAs, and principals thereof; (5) certain investment advisers registered under the Investment Advisers Act of 1940 (IAA), and principals thereof; (6) "qualified purchasers" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (ICA); (7) "knowledgeable employees" as defined in 17 CFR 270.3c-5 pursuant to the ICA; (8) certain persons associated with an exempt pool or account, outlined in Regulation 4.7(a)(2)(viii)(A) and (B), respectively; (9) certain trusts; (10) organizations described in section 501(c)(3) of the Internal Revenue Code (IRC), subject to some conditions; (11) non-United States persons; and (12) exempt pools. *Id.*

[18] 17 CFR 4.7(a)(3). Generally, this list includes, but is not limited to: (1) certain investment companies registered under the ICA or a business development company as defined in section 2(a)(48) of the ICA; (2) banks as defined in section 3(a)(2) of the Securities Act of 1933 (Securities Act), or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Securities Act acting for its own account or for the account of a QEP; (3) certain insurance companies acting for their own account or that of a QEP; (4) certain state employee benefit plans; (5) certain employee benefit plans within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA); (6) private business development companies; (7) certain corporations, Massachusetts or similar business trusts, or partnerships, limited liability companies or similar business ventures; (8) natural persons meeting the individual net worth or joint net worth tests within the "accredited investor" definition; (9) natural persons who would otherwise be considered accredited investors; (10) certain pools, trusts, insurance company separate accounts, or bank collective trusts; and (11) certain government entities.

[19] 17 CFR 4.7(a)(3)(ix) and (x). For the SEC's "accredited investor" definition, see 17 CFR 230.501.

person and other investments with an aggregate market value of at least $2,000,000[20] (Securities Portfolio Test); (2) having on deposit with a futures commission merchant, for its own account at any time during the six months preceding either the date of sale to that person of a pool participation in the exempt pool or the date the person opens an exempt account with the CTA, at least $200,000 in exchange-specified initial margin and option premiums, together with required minimum security deposit for retail forex transactions for commodity interest transactions[21] (Initial Margin and Premium Test); or (3) owning a portfolio comprised of a combination of the funds or property specified in the Securities Portfolio Test and the Initial Margin and Premium Test, which, when expressed as percentages of the required amounts, meet or exceed 100%.[22]

The Portfolio Requirement has remained unchanged since its original adoption by the Commission in 1992.[23] When it developed the QEP definition and the associated Portfolio Requirement, the Commission sought to create "objective criteria" by which one could assess a person's commodity interest experience, believing that appropriate experience would involve an investment portfolio of a size sufficient to indicate that the participant has substantial investment experience and thus a high degree of sophistication with regard to investments as well as financial resources to withstand the risk of their investments.[24] The Commission sought in the 1992 Final Rule to harmonize Regulation 4.7 with existing securities laws and regulations for sophisticated investors by incorporating the SEC's "accredited investor" definition into the QEP definition, which was intended to capture similarly experienced and sophisticated persons participating in

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[20] 17 CFR 4.7(a)(1)(v)(A).

[21] 17 CFR 4.7(a)(1)(v)(B).

[22] 17 CFR 4.7(a)(1)(v)(C).

[23] 57 FR 34853 (Aug. 7, 1992) (1992 Final Rule).

[24] 57 FR 3148, 3152 (Jan. 28, 1992) (1992 Proposed Rule).

the commodity interest markets.[25] However, the Commission determined that an additional, higher standard of experience was necessary for certain natural and other persons, citing the differences between futures and securities investments.[26]

The 1992 Proposed and Final Rules provide insight into the level of sophistication the Commission then considered necessary for natural persons (and other persons listed within Regulation 4.7(a)(3)) to qualify as QEPs. For example, in response to comments suggesting that the Commission not adopt any Portfolio Requirement, and instead rely solely on the parameters of the SEC's "accredited investor" definition, the Commission explicitly declined to do so.[27] The Commission continues to believe that a Portfolio Requirement provides a reasonable proxy for the experience, acumen, and resources necessary for certain persons, including natural persons, to be considered QEPs eligible to invest in complex commodity interest products without receiving the full panoply of information otherwise required under part 4.[28] These dollar thresholds have not been modified since their adoption over 30 years ago, and the Commission preliminarily believes it is long overdue to update these measures.

In determining an appropriate increase for each threshold, the Commission preliminarily believes two inflation indexes published by the United States Bureau of Labor Statistics (BLS) are appropriate to consider. Specifically, the Commission consulted the Consumer Price Index for All Urban Consumers (CPI-U) and the Consumer

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[25] *See* the persons listed within 17 CFR 4.7(a)(2) and (3); *cf.* 17 CFR 230.501.

[26] 1992 Proposed Rule, 57 FR at 3151.

[27] *Id.*

[28] Although in the 1992 Final Rule the Commission cited the lack of disclosure requirements as one of the reasons for adopting a Portfolio Requirement, it was not the only policy justification; the inherent differences between futures and securities investments, as discussed above, were also cited. *See* 1992 Final Rule, 57 FR at 34855. Despite the Commission's original rationale in adopting the QEP definition including the policy decision of not requiring disclosures, the Commission has preliminarily concluded that retaining and increasing the Portfolio Requirement, while also proposing new disclosure requirements, is necessary given the increased variety and general evolution of the commodity interest markets since 1992. *See infra* Proposal, pt. II.b.

Price Index for Urban Wage Earners and Clerical Workers (CPI-W).[29] The CPI-U and CPI-W indexes indicate that inflation has had a considerable impact on the monetary thresholds established in the 1992 Final Rule. The CPI-U and CPI-W data reveal that the current monetary thresholds in Regulation 4.7(a)(1)(v) may no longer reasonably indicate the high level of investor sophistication, acumen, and resources that the Commission intended when the Portfolio Requirement was adopted. For example, based on analysis using CPI-U data, as of February 2023, the $2,000,000 threshold in the Securities Portfolio Test has the same buying power as approximately $4,270,000, and the $200,000 threshold in the Initial Margin and Premiums Test has the same buying power as approximately $427,000.[30]

Given these results, the Commission is proposing to update the Portfolio Requirement's thresholds by doubling the Securities Portfolio Test in Regulation 4.7(a)(1)(v)(A) to $4,000,000, and the Initial Margin and Premium Test in Regulation 4.7(a)(1)(v)(B) to $400,000. Although these figures do not match the results provided by the CPI-U and CPI-W indexes exactly, being slightly lower than the February 2023 buying power stated above, the Commission preliminarily believes that Portfolio

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[29] *See* the U.S. BLS Handbook of Methods, for more information on the CPI, CPI-U, and CPI-W, *available at* https://www.bls.gov/opub/hom/cpi/presentation.htm. As described by the BLS Handbook of Methods, "CPI-U represents the buying habits of the residents of urban and metropolitan areas in the United States and covers over 90 percent of the U.S. population." *Id.* Comparatively, "the CPI-W is computed using the same prices as the CPI-U, but the weights of the CPI-W are based on a subset of the CPI-U population, covering approximately 30 percent of the U.S. population." *Id.* The CPI-W also includes "households where more than one-half of the household's earners must have been employed for at least 37 weeks during the previous 12 months." *Id.* Given the relevance of these indexes to the population of natural persons that may qualify as QEPs via the Portfolio Requirement, the Commission believes these indexes are the most appropriate to use in determining today's buying power of the Portfolio Requirement's monetary thresholds established in 1992.

[30] The actual calculator for CPI-U can be found at https://www.bls.gov/data/inflation_calculator.htm. The Commission is preliminarily choosing to include the February 2023 CPI-U data above because it provides a clear example of today's buying power of the Portfolio Requirement, as it was established in 1992, and because the data can be easily accessed and verified via the BLS inflation calculator link provided herein. In comparing the results of each index, as applied to the Portfolio Requirement thresholds, the Commission found no material difference between the CPI-W and CPI-U. Analysis using the CPI-W provided similar buying power figures to those produced by the CPI-U analysis. Given that the Commission is proposing updated thresholds rounded down to the nearest million and hundred thousand, the Commission believes that providing the CPI-U analysis is sufficient for purposes of this Proposal.

Requirement thresholds rounded down to the nearest million and hundred thousand would be simpler for CPOs and CTAs relying on Regulation 4.7 to apply in determining if a prospective pool participant or advisory client is a QEP. Additionally, the Commission would continue to permit persons to meet the Portfolio Requirement through a combination of the two Portfolio Requirement thresholds as currently allowed under Regulation 4.7(a)(1)(v)(C), which would largely remain unchanged by this NPRM, except to update the example provided therein of how the two tests could be combined to reflect the higher proposed thresholds.

The Commission recognizes that these increases to the Portfolio Requirement will likely result in a certain portion of currently-qualifying QEPs no longer meeting the thresholds. Regulation 4.7(a)(3) provides that CPOs must assess a person's QEP status, including satisfaction of the Portfolio Requirement, at the time of sale of any pool participation units, and that CTAs must make a similar assessment at the time that a person opens an exempt account.[31] The Commission believes that continuing this requirement, as opposed to requiring mandatory redemptions or terminations of advisory relationships for those current QEPs who may not meet the proposed heightened thresholds, minimizes the potential for disruption to the 4.7 pool or trading program, as well as possible negative consequences for the current QEPs. Therefore, the Commission is proposing to retain the requirements of current Regulation 4.7(a)(3) in Proposed Regulation 4.7(a)(6)(ii), and requests comment on this aspect of the proposal.

The Commission solicits comment on these proposed increases to the Portfolio Requirement in the QEP definition. In addition, the Commission also seeks comment on the following:

1. Are the CPI-U and the CPI-W indexes the most appropriate for considering the impact of inflation on the thresholds within the Portfolio Requirement, and if they

[31] 17 CFR 4.7(a)(3).

are not, what other suggested indexes or methods should the Commission consider using to assess inflationary effects?

2. The Commission is also seeking any data or information, from CPOs and CTAs that utilize Regulation 4.7, on the estimated number of advisory clients and pool participants that currently qualify as QEPs via the existing Portfolio Requirement, but would not so qualify if the increased monetary thresholds in the Portfolio Requirement described above are adopted.
3. How much time would CPOs and CTAs need to determine that their existing QEP pool participants and clients would continue to satisfy the increased Securities Portfolio or Initial Margin and Premium Tests, if adopted as proposed?

b. Establishing Minimum Disclosure Requirements Under Regulation 4.7

As stated above, Regulation 4.7 provides exemptions from the broader part 4 compliance requirements, including those regulations requiring disclosures of general and performance information about a pool or trading program, for CPOs with respect to pools offered solely to QEPs, and for CTAs advising or managing the accounts of QEPs. More specifically, Regulation 4.7(b)(2) provides an exemption for CPOs with respect to their pools offered solely to QEPs regarding: (1) the requirement to deliver a disclosure document in Regulation 4.21; (2) the general disclosures required by Regulation 4.24; (3) the performance disclosures required by Regulation 4.25; and (4) the use and amendment requirements in Regulation 4.26; so long as the CPO provides a form statement on the cover page of any offering memorandum it chooses to distribute to its prospective pool participants (or near the signature line of the pool's subscription agreement, if its CPO chooses not to distribute an offering memorandum).[32] Similarly, Regulation 4.7(c)(1)

[32] 17 CFR 4.7(b)(2) (providing an exemption from the specific requirements of §§ 4.21, 4.24, 4.25, and 4.26 with respect to each exempt pool). The prescribed "form statement" indicates that the CPO's offering

provides an exemption for CTAs with respect to their trading programs offered to QEPs regarding: (1) the requirement to deliver a disclosure document in Regulation 4.31; (2) the general disclosures required by Regulation 4.34; (3) the performance disclosures required by Regulation 4.35; and (4) the use and amendment requirements in Regulation 4.36; provided that the CTA includes a form statement on the cover page of any brochure or disclosure statement it chooses to distribute to its prospective advisory clients (or near the signature line of the advisory agreement, if the CTA chooses not to distribute a brochure or disclosure statement).[33] Currently, because of Regulations 4.7(b)(2) and (c)(1), CPOs and CTAs claiming these exemptions[34] are not required to deliver or disseminate any offering memoranda, brochures, or disclosure statements to their prospective QEP pool participants or advisory clients (QEP Disclosures). Rather, these CPOs and CTAs are only required to ensure that any QEP Disclosures they elect to provide, "include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading."[35]

At the time of Regulation 4.7's adoption in 1992, the Commission's rationale for providing these broad disclosure exemptions was, in part, based on the belief that QEPs are able to identify and obtain the information they deem necessary to evaluate the investment offered and thus that prescriptive rules imposing specific disclosure requirements are not essential.[36] The 1992 Final Rule further stated that the QEP definition is designed to assure that 4.7 offerings are made only to investors with

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memorandum has not been, nor is it required to be, filed with the Commission, and that the CFTC has not reviewed or approved such offerings or any related offering memoranda for the 4.7 pool. *Id.*

[33] 17 CFR 4.7(c)(1) (providing an exemption "from the specific requirements of §§ 4.31, 4.34, 4.35, and 4.36"). The prescribed "form statement" indicates that the CTA's brochure has not been, nor is it required to be, filed with the Commission, and that the CFTC has not reviewed or approved such trading program or brochure. *Id.*

[34] *See* 17 CFR 4.7(d).

[35] 17 CFR 4.7(b)(2); 17 CFR 4.7(c)(1).

[36] 1992 Final Rule, 57 FR at 34857.

sufficient sophistication and expertise to assess the appropriateness of the investment for their purposes and to obtain all the information they need to evaluate and monitor the contemplated investment, and placed the responsibility for obtaining such information about 4.7 pools and trading programs squarely on the prospective QEP pool participant or advisory client.[37] The Commission also noted that requirements under other regulatory structures may apply to investor pools or their principals and require the CPO of an investor pool to make disclosure[s] to such participants.[38] The Commission explained then that, despite the relief provided by Regulation 4.7, CPOs and CTAs relying on those exemptions with respect to the disclosure requirements in part 4 remain subject to the generally applicable statutory provisions in the CEA that prohibit defrauding or misleading investors, as well as those that specifically prohibit CPOs, CTAs, and their associated persons from defrauding or deceiving their participants and clients.[39] In sum, the Commission sought in 1992 to create a simplified regulatory and compliance framework for CPO and CTA offerings to QEPs, leveraging the applicability of other Federal regulations to require disclosures to investors, and relying upon its broader enforcement powers to safeguard against fraud at inception, and throughout the lifecycle of the 4.7 offering, as well as the ability of QEPs to demand and receive such disclosures on their own.

In proposing Regulation 4.7, the Commission explained that, with respect to its oversight of CPOs and CTAs, it had endeavored to construct a regulatory framework that avoids unnecessary burdens without reducing investor protection and refined that framework as appropriate to respond to changing market conditions and to simplify and streamline the regulatory structure without creating regulatory gaps.[40] Although the

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[37] *Id.* at 34858.

[38] *Id.* (citing pension plan regulations as an example).

[39] *Id.*

[40] 1992 Proposed Rule, 57 FR at 3149.

Commission expects QEPs meeting a properly calibrated Portfolio Requirement to generally possess the level of financial sophistication, as described by the Commission in 1992, the Commission preliminarily concludes in this proposalthat current market conditions and industry practices support proposing an evolved disclosure regime in Regulation 4.7. The Commission is concerned that the absence of minimal disclosure obligations and an ongoing requirement to keep them accurate fails to ensure that all QEPs have the leverage and resources to demand the information necessary for QEPs to make informed investment decisions, or to engage in ongoing close monitoring to confirm that the information provided remains accurate and complete to facilitate their continued understanding of their investments. The definition of QEP in Regulation 4.7 encompasses a broad spectrum of market participants from large fund complexes and other institutional investors with significant assets under management to individuals with varying backgrounds and experience, each of which has vastly different resources available to insist upon the disclosure of information regarding the offered 4.7 pool or trading program and then to analyze whatever information is provided.

In 2014, staff in the Commission's Division of Swap Dealer and Intermediary Oversight (DSIO) convened a roundtable on the risk management practices of CPOs.[41] As part of that discussion, participants addressed the manner in which CPOs of pools that are "Funds of Funds,"[42] or that allocate some or all of their assets under management to unaffiliated asset managers, engage with their underlying funds and asset managers. Specifically, several large CPOs discussed the ongoing oversight that they engage in regarding their investee funds, from analyzing past performance and understanding liquidity limitations, both of which require a deep understanding of the investment

[41] Public Roundtable to Discuss Risk Management Practices by Commodity Pool Operators (Mar. 18, 2014), *available at* www.cftc.gov/idc/groups/public/@newsroom/documents/file/transcript031814.pdf (Roundtable Transcript).

[42] "Funds of funds" as used in this document means pools that invest in unrelated funds, pools, or other collective investment vehicles.

activities of the underlying funds, to addressing issues of governance, organization, and staffing; these CPOs explained that all of these efforts are undertaken to ensure that underlying investments remain the right fit for their investor fund's strategy and their participants.[43] Such large asset managers have the market power necessary to demand detailed investment information across all aspects of their underlying funds and managers, due to their role as gatekeepers for enormous pools of investor capital.[44] Moreover, they also possess the resources necessary to develop sophisticated internal systems and technology to digest that information and engage in real-time monitoring of whether the underlying fund or manager's actual trading and conduct is consistent with the information being provided.[45] Conversely, individual natural persons, who meet the QEP definition through the Portfolio Requirement, but nonetheless do not command the assets of large financial institutions, likely lack the ability to demand the same level of transparency afforded through the prospect of additional significant asset allocations, and thus are more likely to be reliant upon whatever information the CPO or CTA is providing as its baseline disclosure with limited ability to demand more, or analyze its accuracy and completeness.[46] This perceived disparity may increase the likelihood of

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[43] *See, e.g.*, *id.* at 31-35 (comments from representative of UBS Alternative and Quantitative Investments); *id.* at 39-41 (comments from representative of Mesirow Advanced Strategies, Inc.).

[44] *See, e.g.*, Blackstone Alternative Asset Management, a registered CPO, manages approximately $81bn in client assets and uses the services of other asset managers, *available at* https://www.blackstone.com/our-businesses/hedge-fund-solutions-baam/ (noting, "Our size also gives us the ability to negotiate customized mandates and improved terms with managers," and touting their "rigorous process for evaluating managers and opportunities"); Lighthouse Investment Partners, LLC, another registered CPO that similarly allocates assets to other managers, manages approximately $15bn, *available at* https://www.linkedin.com/company/lighthouse-investment-partners-llc and http://lighthousepar.wpengine.com/our-funds/ (noting that their portfolio of hedge funds uses a "proprietary managed account framework" that enables them to "negotiate better terms" and ensures that Lighthouse retains the "ability to revoke manager trading authority at any time").

[45] Roundtable Transcript, at 40-41 (comments from representative of Mesirow Advanced Strategies, Inc., describing how the firm had their "tracking index running next to their performance at all times and if at any time their performance deviates from that basic tracking index, [they] are on the phone with that manager trying to understand why that happens").

[46] *See, e.g.*, Herbert Moskowitz and Ari Moskowitz v. Accredited Investment Management Corp., Peter G. Catranis, and Russell E. Tanner, CFTC Docket Nos. 13-R15 and 13-R20, Default Judgment, Apr. 20, 2018, *available at* https://www.cftc.gov/idc/groups/public%40lrdispositions/documents/legalpleading/idmoskowitz05122016.

CPOs and CTAs with less rigorous risk management and controls to seek capital from such individuals who are generally less able to engage in the same rigorous monitoring.[47]

Moreover, particularly once their relationship with a CPO or CTA is established, QEPs of all types may have diminished power over time to demand the same level of information about their investments as they had received at the outset, due to the presence of lock-up periods or infrequently permitted redemptions that may require extended notice periods following initial investment.[48] The Commission understands that, with respect to CPOs and CTAs who claim and operate under Regulation 4.7 exemptions, NFA staff has observed situations where the quality and provision of the information presented to the customer may be inconsistent.[49] The Commission preliminarily believes that these factors warrant reconsideration of the disclosure exemptions. Furthermore, these circumstances, acting together, could foster an environment in which QEPs seeking to participate in a pool or advisory program must choose between a very limited number

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pdf (finding in favor of the plaintiffs regarding a 4.7 CTA's failure to provide "fair and balanced" disclosures regarding the risks and rewards of the offered trading program); Susan Taylor Martin, How Tampa's James Cordier went from high roller to YouTube apology after losing $150 million, Tampa Bay Times, Feb. 11, 2019, *available at* https://www.tampabay.com/business/how-tampas-james-cordier-went-from-high-roller-to-youtube-apology-after-losing-150-million-20190206/ (describing how Mr. Cordier, according to deposition testimony from a former client, failed to provide an accurate statement regarding the treatment of customer funds held at a futures commission merchant and characterized the only risk to the client's funds as "market risk"); Leanna Orr, Remember Wall Street's Viral Laughingstock, OptionSeller.com?, Institutional Investor, May 13, 2020, *available at* https://www.institutionalinvestor.com/article/b1lm2xg8g69vbc/Remember-Wall-Street-s-Viral-Laughingstock-OptionSeller-com (quoting counsel to the failed 4.7 CTA's clients, many of whom were retirees, "These people work their whole lives to make a nice middle class life, and then the bottom drops out and they drop out of the middle class. They don't even understand why it happened . . . They rely on these [expletives] who said they knew what they were doing.").

[47] Susan Taylor Martin, How Tampa's James Cordier went from high roller to YouTube apology after losing $150 million, Tampa Bay Times, Feb. 11, 2019, *available at* https://www.tampabay.com/business/how-tampas-james-cordier-went-from-high-roller-to-youtube-apology-after-losing-150-million-20190206/ (reciting allegations from a complaint against a 4.7 CTA stating that the CTA promised "fastidious" risk management, but failed to hedge its naked options appropriately for the risk profile of its clients).

[48] *See, e.g.*, In the Matter of: Highland Quantitative Driven Investments LLC and Michael Todd Zatorski, NFA Case No. 20-BCC-004 (alleging that the named CPO and its principal failed to update their private placement memoranda, and thereby inform their current and prospective 4.7 pool participants, with respect to significantly increased fees, while simultaneously imposing a one- to two-year lock up period, which foreclosed the possibility of threatening to withdraw their capital contributions absent updated disclosures).

[49] *See id.*; *see also* U.S. CFTC v. Mankad, 2022 WL 17752224 (D.C. Ariz. Oct. 19, 2022) (finding that the defendant and his CPO failed to update the private placement memorandum for its 4.7 pool following changes to their trading strategy).

of offerings subject to the full panoply of compliance requirements under part 4 that provide them with more complete and regular information about their holdings, or a more varied and growing collection of QEP offerings, with substantially lower compliance obligations and no formal regulatory requirements with respect to disclosure that would ensure QEPs receive consistent, accurate, and current information about these products.

In addition to the aforementioned concerns about the unequal bargaining power of QEPs, in the 30 years since that provision was adopted, the Commission has, as described above, witnessed a significant expansion and growth in the complexity and diversity of commodity interest products offered to QEPs via 4.7 pools and trading programs, as well as an expansion in the asset classes subject to the Commission's jurisdiction and oversight. Broadly speaking, since the CFTC's authority over swaps and the swap markets was expanded under the Dodd-Frank Act, there has been a considerable change in the way that swaps trade. For example, when Regulation 4.7 was adopted in 1992, swaps trading occurred over-the-counter and the total estimated size of the market was approximately $9T in today's dollars;[50] whereas, after the Dodd-Frank Act's implementation, many swaps products are exchange-traded and the total size of the swaps market has increased exponentially,[51] and many CPOs and CTAs today incorporate swaps into the portfolios of their pools and trading programs. Regarding the products

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[50] *See* Adam R. Waldman, *OTC Derivatives and Systemic Risk: Innovative Finance or the Dance into the Abyss?*, 43 Am. U. L. Rev. 1023, 1025 n.5 (1994) (citing Andrew Barry, BARRON'S, Sept. 13, 1993, at 49, reporting a swaps market size of $3.8T, as compiled by the International Swaps and Derivatives Association, Inc. (ISDA), which equates to roughly $8.8T based on CPI-U).

[51] *See* the ISDA SwapsInfo First Quarter 2023 Review, May 2023, *available at* https://www.isda.org/2023/05/02/swapsinfo-first-quarter-of-2023-review-summary/ (stating that the interest rate derivatives market alone was valued at $106.1T notional in the first quarter of 2023); Bank for International Settlements, "OTC derivatives statistics at end-June 2022," *available at* https://www.bis.org/publ/otc_hy2211.pdf (stating that "the notional value of outstanding over-the-counter (OTC) derivatives rose to $632 trillion at end-June 2022, up from $598 trillion at end-2021").

themselves, there has also been considerable development of new and complex commodity interest products.[52]

Although the Commission in 1992 considered the commodity interest products then available in developing existing customer protections for QEPs in Regulation 4.7, product innovation in the commodity interest markets has continued at a rapid and unrelenting pace[53] raising concern that certain QEP participants and clients may not have the level of information necessary to fully appreciate the nature of the risk associated with their trading. For example, futures are now available on digital assets, which, although subject to the same regulatory regime as other futures products, often experience higher levels of volatility than more traditional commodity reference assets.[54] Moreover, the technology underlying these assets is highly complex, subject to rapid innovation, and can pose substantially different principal risks as compared to traditional commodities, including unique cybersecurity risks and the potential for hacks and vulnerabilities in the storage and transmission of these assets. Given the relatively recent development of digital assets, it remains unclear as to whether the underlying markets, to

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[52] Most notable, and as widely covered in the press, is the recent development and availability of commodity interest products linked to digital assets, such as bitcoin, discussed *infra*.

[53] *See* Katherine Ross, CME Group to add ether/bitcoin ratio futures in July pending regulatory approval, Blockworks, June 29, 2023, *available at* https://blockworks.co/news/cme-adds-ether-bitcoin-ratio-futures.

[54] The risks of these products to investors are of such concern that the CFTC and SEC have both acknowledged their volatility in various publications. In fact, and most relevant to this discussion, the SEC and CFTC released a joint investor alert to investors thinking about investing in a fund with exposure to bitcoin futures. The alert emphasized that investors should understand the unique characteristics and heightened risks compared to other funds. *See* CFTC/SEC Investor Alert: Funds Trading in Bitcoin Futures, *available at* https://www.cftc.gov/LearnAndProtect/AdvisoriesAndArticles/fraudadv_funds_trading_in_bitcoin_futures.html. Although these are not the only new products that have launched over the last 30 years, the Commission believes they are examples that highlight a need for updating the customer protections provided under Regulation 4.7. *See* Hannah Smith, Bitcoin crash: what was behind the crypto collapse?, The Times (May 22, 2023), *available at* https://www.thetimes.co.uk/money-mentor/article/is-bitcoin-crash-coming/#Why-is-bitcoin-so-volatile? (noting that bitcoin "has no underlying asset" and that "means that the movements in its price are solely based on speculation among investors about whether it will rise or fall in the future"); Nicole Lapin, Explaining Crypto's Volatility, Forbes (Dec. 23, 2021), *available at* https://www.forbes.com/sites/nicolelapin/2021/12/23/explaining-cryptos-volatility/?sh=1640938f7b54 (noting that "it isn't intrinsically valuable," which "means the investment's value isn't very grounded, which makes its price incredibly sensitive to even slight changes in investors' expectations or perceptions").

which the futures and other derivatives are tied, are subject to market fundamentals similar to those of the traditional commodities markets. The Commission preliminarily believes that this can result in unpredictable movements in both the spot and commodity interest markets. As the financial system continues to experience a period of rapid evolution in the era of artificial intelligence and other technological advancements, the Commission expects to see continued development of novel investment products that, although structured like the traditional asset classes enumerated under the CEA, may in fact deviate from the typical operations of markets now subject to the Commission's oversight. In view of these developments, the Commission believes that minimum disclosure requirements are essential to ensure that pool participants and advisory clients fully understand the risks associated with their investments.

In addition to developments regarding products, market structure has also evolved in the years following the initial adoption of Regulation 4.7. Commodity pools and CTA advisory clients can access the futures markets either directly[55] or through an FCM, which present different risks and benefits to pool participants and advisory clients. Where FCMs are not part of the market structure, there may be fewer independent sources of information available to pool participants and advisory clients, making it even more important that QEPs receive full and accurate information regarding the risks related to their investments.

Thus, given these developments in the commodity interest markets, among others, and similar to the circumstances underlying the 1992 Final Rule, with respect to Regulation 4.7, the Commission continues seeking to construct a regulatory framework that avoids unnecessary burdens without reducing investor protection and to respond to

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[55] *See, e.g.*, In the Matter of the Application of LedgerX, LLC For Registration as a Derivatives Clearing Organization, Amended Order of Registration, *available at* https://www.cftc.gov/media/4556/ledgerxllcamededdcoorder9-2-2020/download.

changing market conditions without creating regulatory gaps.[56] The Commission preliminarily believes that requiring the provision of specific minimum disclosures for CPOs and CTAs operating 4.7 pools and trading programs will assist in mitigating the customer protection gaps that have developed since 1992 by ensuring that QEPs receive the information necessary to make informed investment decisions, and that such disclosures are subject to Commission and NFA oversight.

Importantly, the Commission does not intend this NPRM to dissuade registered CPOs and CTAs from structuring their pools and trading programs to qualify for and utilize the exemptions in Regulation 4.7. Rather, the Commission preliminarily believes that, as a result of the changing market conditions described above, an evolved approach to QEP Disclosures under Regulation 4.7 is necessary to ensure that QEPs consistently receive specific, baseline information with respect to their investments in the commodity interest markets, and further, that such proposed regulatory adjustments would not greatly reduce the benefits intermediaries currently derive from relying upon the relief in Regulation 4.7.

With this Proposal, the Commission is not proposing to rescind the disclosure exemptions in Regulations 4.7(b)(2) and (c)(1) in their entirety. Rather, the Commission aims to make targeted updates to these provisions that are designed to enhance customer protection, transparency, and fairness within the market of 4.7 pools and trading programs. The proposed amendments are intended to: (1) recognize the increasingly complex and diverse commodity interest investment products offered to QEPs today, and reflect the resulting evolution in view by the Commission that requiring basic disclosures to encourage informed investment decisions is the necessary and preferred approach for 4.7 pools and trading programs; (2) create a formalized Commission regulatory regime

[56] 1992 Proposed Rule, 57 FR at 3149.

for promotional, advertising, and disclosure practices for CPOs and CTAs relying on Regulation 4.7 with respect to their QEP offerings, allowing for prospective and current participants and clients to better compare strategies, fees, and other characteristics of 4.7 pools and trading programs through consistent QEP Disclosures; and (3) strengthen intermediary oversight by incorporating the review of QEP Disclosures into existing examination processes used by the Commission and NFA, which, in turn, would increase their accuracy and quality over time.

By creating a formalized regulatory regime in part 4 for the promotional, advertising, and disclosure practices of CPOs and CTAs with respect to their 4.7 pools and trading programs, the Commission preliminarily believes that this would strengthen its oversight of CPOs and CTAs relying on Regulation 4.7 and that QEPs and the commodity interest markets overall would benefit as a result. The promotional, advertising, and disclosure practices of CPOs and CTAs utilizing Regulation 4.7 have changed a great deal since the original adoption of these exemptions. The Commission has observed that, despite there being no such requirements in Regulation 4.7, many CPOs and CTAs currently provide and distribute some disclosures and information regarding their 4.7 pools and trading programs to prospective QEP pool participants and advisory clients. These QEP Disclosures are commonly delivered in the form of private placement memoranda or trading program brochures, and typically include much of the information the Commission is proposing to require in this rule proposal. This practice results both from investor demand seeking to understand the 4.7 pools and trading programs offered in the current marketplace, as described above, as well as the requirements of other applicable regulatory regimes, like the Federal securities laws.[57]

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[57] *See, e.g.*, Rule 502(b)(2) of Regulation D, 17 CFR 230.502(b)(2) (requiring certain disclosures for offerings under Rule 506(b) of Regulation D, 17 CFR 230.506(b)). Additionally, many CPOs and CTAs operating under Regulation 4.7 are also registered with the SEC as investment advisers. All investment advisers registered with the SEC under the IAA, 15 U.S.C. 80b-1, *et seq.*, are required to comply with the applicable disclosure requirements under the IAA and the SEC's regulations promulgated thereunder,

The Commission notes, however, that some CTAs, which are not also regulated as registered investment advisers by the SEC, may not be otherwise required to provide any disclosures and may, in fact, only provide cursory promotional material.

The Commission preliminarily believes that establishing minimum content requirements would ensure that existing QEP Disclosures are consistent in structure, accurate, kept up-to-date, and contain materially complete information regarding 4.7 pools and trading programs. As a result, current and prospective QEP participants and clients would be able to better compare investment programs, trading strategies, fees, and other characteristics of 4.7 pools and trading programs. Additionally, even if the QEP Disclosures provided by CPOs and CTAs relying upon Regulation 4.7 differ in form and detail, the minimum required disclosures proposed in this NPRM would result in all QEPs receiving the same level of basic information prior to making an investment decision. The Commission preliminarily concludes that replacing the existing broad exemptions with a targeted minimum disclosure regime under Regulation 4.7 will ultimately bring discipline to the current *ad hoc* QEP Disclosure process, resulting in more uniform and consistent disclosures for prospective and current QEP advisory clients and pool participants.

Finally, the Commission believes that amending Regulation 4.7 to require CPOs and CTAs to disclose certain information about their 4.7 pools and trading programs, as well as to keep such QEP Disclosures as business records, would facilitate more effective oversight of registered CPOs and CTAs and their offerings by the Commission and NFA. The Commission expects that creating a formalized, affirmative regulatory requirement that materially accurate QEP Disclosures be delivered and kept current, would likely

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regardless of the financial sophistication of any or all of their clients. Conversely, "Exempt Reporting Advisers" have limited reporting requirements with the SEC under the IAA, but otherwise are not required to register, and therefore, are not required to comply with the disclosure requirements imposed on registered investment advisers. *See* 15 U.S.C. 80b-3(l) and (m) (providing registration exemptions for advisers to venture capital funds and certain advisers to private funds).

enhance investor confidence in commodity interest products generally by providing an increased level of transparency for the Commission and NFA into these registrants' activities for examination and enforcement purposes, thereby improving oversight.[58] Moreover, by facilitating Commission and NFA access to QEP Disclosures kept amongst CPO and CTA business records, the Commission believes that the proposed affirmative recordkeeping requirements in Regulations 4.7(b)(5) and (c)(2) would serve as an additional deterrent to CPOs or CTAs engaging in fraud or providing misleading representations in QEP Disclosures.

The amendments proposed in this NPRM strike an appropriate balance, in the Commission's opinion, by establishing minimum content requirements for QEP Disclosures regarding 4.7 pools and trading programs, and mandating that they be kept as business records of the intermediary, while still retaining exemptions from the provisions of part 4 that require filing and pre-approval of non-4.7 Disclosure Documents by the Commission and NFA.[59] These proposed amendments would elevate the disclosure provided for 4.7 pools and trading programs to a higher standard than that imposed on non-required promotional material under Regulation 4.41.[60] In particular, the Commission believes that, if adopted, these amendments would permit it and NFA to monitor and assess the accuracy of distributed QEP Disclosures, as compared to a CPO's or CTA's actual trading activities, via existing examination processes, as well as through comparison to information these intermediaries regularly provide in other filings, like Forms CPO-PQR and/or CTA-PR. Having the ability to review QEP Disclosures during routine examinations, combined with an affirmative requirement that CPOs and CTAs

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[58] The Commission notes here its belief and understanding that the current applicable requirement that any information in QEP Disclosures a CPO or CTA decides to provide is, "in the context in which it is furnished, not misleading" is fundamentally different and a much lower standard than the proposed requirement that QEP Disclosures be generally required and regularly updated so that they remain "materially accurate and complete."

[59] *See, e.g.*, 17 CFR 4.26(d).

[60] 17 CFR 4.41.

provide information that is materially complete, accurate and up-to-date, would, in the Commission's preliminary opinion, provide the CFTC and NFA with an additional level of oversight that simply does not exist under the current regulatory framework. Moreover, the Commission further preliminarily believes that QEP Disclosures would likely qualitatively improve over time, should these proposed amendments be adopted, by virtue of the QEP Disclosures being regularly examined and/or reviewed by Commission and NFA staff possessing the unique, deep subject matter expertise with respect to commodity interests that other Federal agencies simply do not and are not reasonably expected to possess.

Among the existing disclosures outlined in part 4 for registered CPOs and CTAs not claiming Regulation 4.7, the Commission believes that both the general disclosures, as described in Regulations 4.24 and 4.34, and performance disclosures, as described in Regulations 4.25 and 4.35, form the foundational level of information about a pool's or advisory program's trading strategies, material risks, fees, and conflicts associated therewith; furthermore, the Commission preliminarily believes that disclosure by a CPO or CTA is the primary source of information a prospective or actual participant or client would rely upon to make an appropriately informed investment decision, even for those financially sophisticated persons who are QEPs. Specifically, the subset of general disclosures listed in Regulations 4.24 and 4.34 that the Commission is proposing to now be required for 4.7 pools and trading programs would provide prospective QEP pool participants and clients with important information on principal risk factors, investment programs, use of proceeds, custodians, fees and expenses, and conflicts of interest. The subset of performance disclosures from Regulations 4.25 and 4.35 that the Commission is proposing to require would further involve the presentation of vital current and past performance metrics in a format consistent with that already developed for non-QEP pool participants and advisory clients. Combined, the Commission intends the proposed

addition of these disclosures to Regulation 4.7 to both provide appropriate customer protection safeguards and to support its intermediary oversight through methods that have been assessed and further developed since their adoption, nearly thirty years ago.[61]

The Commission requests comment on all aspects of the proposed amendments outlined below that would require certain information be disclosed to prospective QEP pool participants and advisory clients under Regulation 4.7, that QEP Disclosures are regularly updated and materially complete, and that they be included in the business records of CPOs and CTAs claiming Regulation 4.7 exemptions. In addition, the Commission seeks comment on the following questions:

1. Should the Commission increase or decrease the types of information included in Proposed Regulations 4.7(b)(2) and (c)(1)? In particular, should additional disclosure requirements listed in Regulations 4.24 and 4.34 be included for CPOs and CTAs, respectively? If so, what disclosures?
2. The Commission is seeking specific data or information regarding: (i) the current number of CPOs and CTAs utilizing Regulation 4.7 that provide the proposed minimum disclosures to their QEP participants and clients; (ii) the level of disclosure currently provided by CPOs and CTAs to their QEP participants and clients; (iii) if disclosures are provided, the general format, tenor, and manner used in both structuring and delivering the disclosures; and (iv) the context and timing of when any such disclosures are provided (*e.g.*, whether during solicitation or otherwise during the course of the investment relationship).

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[61] The Commission notes that it developed these part 4 required disclosures originally in response to changing market conditions and to implement its statutory mandates in regulating and overseeing CPO and CTA activities. In fact, in the final rule establishing the initial requirements under Regulations 4.24, 4.25, 4.34, and 4.35, the Commission explicitly highlighted that, since the adoption of the part 4 framework, the number of registered CPOs had more than doubled and the number of CTAs had increased threefold; assets under the management of CPOs had grown dramatically; and the range of available futures and option contracts had increased substantially. 60 FR 38147 (July 25, 1995) (1995 Final Rule). This justification, cited in 1995, is arguably even more relevant to today's CPO and CTA population using Regulation 4.7 because the growth of that specific category of intermediaries and that sector of the commodity interest markets has continued significantly since the 1995 Final Rule.

3. What specific challenges would CPOs and CTAs face in complying with the disclosure requirements in Proposed Regulations 4.7(b)(2) and (c)(1)? Should the Commission consider an implementation period for the proposed amendments, and if so, how much time should the Commission allow for CPOs and CTAs to develop and prepare QEP Disclosures that would comply with the proposed amendments?

The following sections explain the proposed amendments in more detail.

i. Proposed Amendments to Regulations 4.7(b)(2) and (b)(5)

The Commission is proposing to amend the disclosure relief outlined in Regulations 4.7(b)(2)(i) and (ii) to require CPOs to deliver to their 4.7 pools' prospective participants QEP Disclosures that enumerate certain specific disclosures, including descriptions of the 4.7 pool's principal risk factors, its investment program, use of proceeds, custodians, fees and expenses, conflicts of interest, and certain performance disclosures, including basic past performance information. As a consequence of requiring these minimum disclosures for 4.7 pools, the Commission is also proposing a corresponding amendment to remove the exemption from disclosing the past performance of 4.7 pools in the Disclosure Documents of non-4.7 pools. That provision had been proposed and adopted "in connection with" the previous policy position that 4.7 pools had no minimum or mandatory disclosure requirements,[62] which the Commission, as just discussed, now seeks to change through the amendments in this NPRM; the Commission further preliminarily believes such information would be valuable to commodity pool participants of all types. Finally, the Commission proposes to amend Regulation 4.7(b)(5) to additionally require that CPOs maintain such QEP Disclosures among the other books and records of their 4.7 pools, and made available upon request to the

[62] 1992 Proposed Rule, 57 FR at 3151; 1992 Final Rule, 57 FR at 34858.

Commission, NFA, and the U.S. Department of Justice, in accordance with Regulation 1.31.[63]

As proposed, Regulation 4.7(b)(2)(i) would no longer provide an exemption from Regulation 4.21, and instead of requiring compliance with Regulations 4.24 and 4.25 in their entirety, the proposed amendments include new Regulations 4.7(b)(2)(i)(A) through (E) that enumerate the specific disclosures the Commission preliminarily believes prospective QEP pool participants should receive, and that incorporate certain subparagraphs of those part 4 disclosure regulations by reference. As mentioned above, the specific disclosures proposed to be required for 4.7 pools include: descriptions of the 4.7 pool's principal risk factors, its investment program, use of proceeds, custodians, fees and expenses, conflicts of interest, and certain performance disclosures, including past performance. Importantly, the Commission is not proposing to require that CPOs provide QEP Disclosures identical to the Disclosure Documents subject to the full panoply of requirements under Regulations 4.24 and 4.25. Rather, the Commission has specifically chosen what it believes to be the most meaningful and important information for prospective QEP pool participants, and is proposing to require that CPOs provide this information in QEP Disclosures, subject to the substance and formatting requirements of Regulations 4.24 and 4.25. The Commission is also proposing to retain, but reformat, the existing language in Regulation 4.7(b)(2)(i) into Proposed Regulations 4.7(b)(2)(i)(F) and (G). Proposed Regulation 4.7(b)(2)(i)(F) would include the requirement that QEP Disclosures provide all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading, and Proposed Regulation 4.7(b)(2)(i)(G) would continue to require a form disclaimer like that currently required by Regulation 4.7(b)(2)(i).

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[63] 17 CFR 1.31.

Furthermore, it is crucial that QEP Disclosures used and distributed by CPOs be kept current and that they be maintained as business records to ensure compliance with the proposed general and performance disclosure requirements and to facilitate Commission and NFA oversight of these intermediaries. The Commission is therefore proposing to amend Regulation 4.7(b)(5) to require that QEP Disclosures be maintained among a CPO's other books and records for a 4.7 pool and made available to any representative of the Commission, NFA, or the U.S. Department of Justice in accordance with Regulation 1.31. This amendment would allow the Commission and NFA to review QEP Disclosures as part of routine examinations and civil enforcement actions. Finally, Proposed Regulation 4.7(b)(2)(i) no longer provides an exemption from Regulation 4.26 in its entirety; the Commission is proposing to restrict this exemption to Regulation 4.26(d) only, such that compliance with Regulations 4.26(a) through (c), provisions that generally govern the use and amendment of this information, would otherwise be required. Because the Commission is not proposing to require that QEP Disclosures for 4.7 pools be filed and approved by NFA prior to their first use, Proposed Regulation 4.7(b)(2)(i) retains an exemption from Regulation 4.26(d).

A. Principal Risk Factors

The Commission is proposing to add Proposed Regulation 4.7(b)(2)(i)(A) that would require QEP Disclosures distributed in connection with soliciting prospective participants in a 4.7 pool to include a description of the principal risk factors as required by Regulation 4.24(g). Specifically, Regulation 4.24(g) requires CPOs to describe, in their Disclosure Documents, the principal risk factors of a pool investment including, without limitation, risks relating to volatility, leverage, liquidity, counterparty creditworthiness, as applicable to the types of trading programs to be followed, trading structures to be employed and investment activity (including retail forex and swap

transactions) expected to be engaged in by the offered pool.[64] Proposed Regulation 4.7(b)(2)(i)(A) would incorporate Regulation 4.24(g) by reference and would similarly require CPOs to provide a description of their 4.7 pool's principal risk factors in their QEP Disclosures.

B. Investment Program and Use of Proceeds

The Commission is also proposing to require that QEP Disclosures include the information mandated by Regulation 4.24(h), *i.e.*, a 4.7 pool's investment program, custodians, and use of proceeds. Specifically, Regulation 4.24(h) requires CPOs to disclose: (1) the types of commodity interests and other interests which the pool will trade; (2) a description of the trading and investment programs and policies that will be followed by the offered pool; (3) a summary description of the pool's major CTAs, including their respective percentage allocations of the pool assets and a description of the nature and operation of the trading programs such CTAs will follow; (4) a summary description of the pool's major investee pools or funds, including their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds; and (5) certain use of proceeds information, including the manner in which the pool will fulfill its margin requirements, the percentage of the pool's assets held in segregation pursuant to the CEA, and information regarding to whom income from margin or security deposits will be paid.[65] Additionally, Regulation 4.24(h)(1)(iii) requires CPOs to disclose both the types of commodity interests and other interests the pool will be trading, including the custodian or other entity (*e.g.*, bank or broker-dealer) that will hold such interests, and if such interests will be held in jurisdictions outside of the United States, the jurisdiction in which such interests or assets

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[64] 17 CFR 4.24(g).

[65] 17 CFR 4.24(h).

will be held.[66] Proposed Regulation 4.7(b)(2)(i)(B) would require QEP Disclosures to include the information described above by incorporating Regulation 4.24(h) by reference.

C. Fees and Expenses

The Commission is also proposing to require that CPOs disclose information regarding their fees and expenses for their 4.7 pools in a manner consistent with Regulation 4.24(i). Regulation 4.24(i) requires CPOs to provide a complete description of each fee, commission, and other expense, which the CPO knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year, including fees and other expenses incurred in connection with the pool's participation in investee pools and funds.[67] Proposed Regulation 4.7(b)(2)(i)(C) would incorporate Regulation 4.24(i) by reference and require, without limitation, the disclosure of all the fees specifically enumerated in Regulation 4.24(i), subject to the other provisions therein, including the requirement to provide, in a tabular format, an analysis setting forth how the break-even point for a 4.7 pool was calculated, including all fees, commissions, and other expenses of the 4.7 pool.

D. Conflicts of Interest

The Commission is proposing to amend Regulation 4.7(b)(2)(i) to require the disclosure of conflicts of interest in QEP Disclosures for 4.7 pools, as required by Regulation 4.24(j). Regulation 4.24(j) requires CPOs to provide a full description of any actual or potential conflicts of interest regarding any aspect of the pool on the part of: (1) the CPO; (2) the pool's trading manager, if any; (3) any major CTA; (4) the CPO of any major investee pool; (5) any principal of the foregoing; and (6) any other person providing services to the pool, soliciting participants for the pool, acting as a counterparty

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[66] 17 CFR 4.24(h)(1)(iii).

[67] 17 CFR 4.24(i)(1).

to the pool's retail forex or swap transactions, or acting as a swap dealer with respect to the pool.[68] Additionally, Regulation 4.24(j) requires the disclosure of any other material conflict involving the offered pool, as well as a description of any arrangements described in Regulation 4.24(j)(3).[69] Proposed Regulation 4.7(b)(2)(i)(D) would incorporate Regulation 4.24(j) by reference, requiring comparable disclosure of these conflicts of interest by CPOs with respect to their 4.7 pools.

E. Past Performance of 4.7 Pools

The Commission is further proposing to require CPOs to disclose certain performance information as required by Regulation 4.25 in the QEP Disclosures for their 4.7 pools. Specifically, the Commission is proposing to partially remove the existing complete exemption from Regulation 4.25 by requiring CPOs to disclose all performance information listed under Regulation 4.25 with respect to their 4.7 pools, with the exception of performance information for pools other than the 4.7 pool. Regulation 4.25 requires CPOs to include capsule performance information for both pools and accounts, subject to certain presentation and content requirements outlined in paragraph (a) of that section.[70] Regulation 4.25(a) also provides requirements for the time period for required performance, trading programs, the calculation of and recordkeeping concerning performance information, proprietary trading results, as well as a legend for all performance disclosures, whether mandatory or voluntary, that is prominently displayed and states, "PAST PERFORMANCE IS NOT INDICATIVE OF FUTURE RESULTS."[71] Among the additional requirements within Regulation 4.25, paragraph

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[68] 17 CFR 4.24(j).

[69] 17 CFR 4.24(j)(2) and (3). Regulation 4.24(j)(3) requires a description of the conflicts of interest of any arrangements whereby someone may benefit, directly or indirectly, from the pool's account maintenance with an FCM or RFED; from maintenance of the pool's swap positions with a swap dealer; from the introduction of the pool's account by an introducing broker to an FCM, RFED, or swap dealer; or from the investment of the pool's assets in other investee pools or funds or other investments. 17 CFR 4.24(j)(3).

[70] 17 CFR 4.25.

[71] 17 CFR 4.25(a).

(a)(3) requires CPOs to disclose certain past performance information for pools other than the offered pool. Finally, Regulations 4.25(b) and (c) clarify and establish the required performance disclosures for offered pools that have at least a three-year operating history, and for those with less than a three-year operating history, respectively.[72] For the purposes of targeting this NPRM to requiring performance disclosures the Commission preliminarily believes are most important and valuable to prospective QEP participants, and to lessen the potential burden on CPOs resulting from incorporating minimum QEP Disclosures in Regulation 4.7, the Commission is not proposing to require that CPOs of 4.7 pools provide the disclosures referenced in paragraphs (a)(3) or (c)(2) of Regulation 4.25 regarding past performance information for pools other than the 4.7 pool in their QEP Disclosures, which the Commission preliminarily believes strikes the appropriate balance of these potentially competing interests. Therefore, Proposed Regulation 4.7(b)(2)(i) would no longer provide the specific exemption from Regulation 4.25, and the Commission is proposing to add Regulation 4.7(b)(2)(i)(E), which would require QEP Disclosures to include performance disclosures that comply with Regulation 4.25, except paragraphs (a)(3) and (c)(2) of that section.

ii. Proposed Amendments to Regulations 4.7(c)(1) and (c)(2)

Consistent with the proposed amendments regarding additional disclosures for 4.7 pools discussed above, the Commission is also proposing to specifically enumerate additional disclosure requirements for 4.7 trading programs in Regulation 4.7(c)(1). Specifically, Proposed Regulation 4.7(c)(1)(i) would no longer provide an exemption from Regulation 4.31, and, in lieu of requiring compliance with Regulations 4.34 and 4.35 in their entirety, the Commission is proposing to enumerate specific disclosure

[72] 17 CFR 4.25(b) and (c).

requirements it wishes to prioritize for 4.7 trading programs. Proposed Regulation 4.7(c)(1)(i) would also include new paragraphs (c)(1)(i)(A) through (F) that list the specific disclosures the Commission is proposing to require for CTAs and their 4.7 trading programs, including descriptions of certain persons to be identified, the principal risk factors of the investment, the CTA's trading program, fees, conflicts of interest, and performance disclosures. The Commission also proposes to relocate the existing disclosure requirements in current Regulation 4.7(c)(2)(i) into Proposed Regulations 4.7(c)(2)(i)(G) and 4.7(c)(2)(i)(H). Proposed Regulation 4.7(c)(2)(i)(G) continues to require that QEP Disclosures provide all additional disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading, and Proposed Regulation 4.7(c)(2)(i)(H) continues to require a form statement like that currently required by Regulation 4.7(c)(1)(i).

Additionally, the Commission is proposing to remove the exemption from disclosing past performance of 4.7 trading programs in the Disclosure Documents of non-4.7 trading programs. That provision had been proposed and adopted in connection with the previous policy position that 4.7 trading programs offered by CTAs had no minimum or mandatory disclosure requirements for their prospective QEP advisory clients, which the Commission is proposing to change through this NPRM. Moreover, the Commission preliminarily believes such information would be valuable to all prospective CTA clients, regardless of their sophistication or experience, and therefore, proposes to require more complete disclosure of a CTA's programs, whether 4.7 or not, in Disclosure Documents provided to non-QEP advisory clients.

Further, as discussed in relation to 4.7 pools above, the Commission preliminarily believes that it is crucial that QEP Disclosures used by CTAs be maintained as business records of the CTA to ensure compliance with the general and performance disclosure requirements proposed in this NPRM and to facilitate Commission and NFA oversight of

these intermediaries. Therefore, the Commission is also proposing to amend Regulation 4.7(c)(2), such that CTAs would be required to maintain the QEP Disclosures among the other books and records for their 4.7 trading programs, making them available to the Commission, NFA, and the U.S. Department of Justice, in accordance with Regulation 1.31. Finally, Proposed Regulation 4.7(c)(1)(i) would also no longer provide an exemption from Regulation 4.36 in its entirety; the Commission is proposing to restrict this exemption to Regulation 4.36(d) only, such that compliance with Regulations 4.36(a) through (c), provisions that generally govern the use and amendment of this information, would be required. Because the Commission is not proposing to require that QEP Disclosures used by CTAs for their 4.7 trading programs be filed and approved by the Commission or NFA prior to their first use, Proposed Regulation 4.7(c)(1)(i) purposefully retains an exemption from Regulation 4.36(d).

A. "Persons to be Identified"

The Commission is proposing to require that CTAs provide their prospective QEP clients with information on certain persons to be identified, as mandated by Regulation 4.34(e). Specifically, Regulation 4.34(e) requires CTAs to identify by name each principal of the CTA, the FCM and/or RFED with which the CTA will require its client to maintain an account, and the introducing broker through which the CTA will require the client to introduce its account (or, if the client is free to choose which FCM, RFED, or introducing broker it uses, then a statement to that effect).[73] Proposed Regulation 4.7(c)(1)(A) would incorporate Regulation 4.34(e) by reference and require CTAs offering 4.7 trading programs to identify the persons listed therein in their QEP Disclosures in the same manner as required for non-4.7 trading programs under part 4.

B. Principal Risk Factors

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[73] 17 CFR 4.34(e).

The Commission is proposing to require that QEP Disclosures contain a discussion of the 4.7 trading program's principal risk factors, identical to that required by Regulation 4.34(g). Regulation 4.34(g) requires CTAs to discuss in their Disclosure Documents the principal risk factors of their trading programs, including, without limitation, risks due to volatility, leverage, liquidity, and counterparty creditworthiness, as applicable to the offered trading program and the types of transactions and investment activity expected to be engaged in pursuant to such program (including retail forex and swap transactions, if any).[74] Proposed Regulation 4.7(c)(1)(i)(B) would incorporate Regulation 4.34(g) by reference, and thus require CTAs to similarly discuss in QEP Disclosures their 4.7 trading programs' principal risk factors.

C. Description of the 4.7 Trading Program

The Commission is also proposing to require CTAs to provide in their QEP Disclosures a description of the 4.7 trading program as required by Regulation 4.34(h). Regulation 4.34(h) requires CTAs to include a description of their trading programs in their Disclosure Documents; such description must include: (1) the method chosen by the CTA concerning how FCMs and/or RFEDs carrying accounts it manages treat offsetting positions pursuant to Regulation 1.46, if the method is other than to close out all offsetting positions or to close out offsetting positions on other than a first-in, first-out basis; and (2) the types of commodity interests and other interests the CTA intends to trade, with a description of any restrictions or limitations on such trading established by the CTA or otherwise.[75] Proposed Regulation 4.7(c)(1)(i)(C) would incorporate Regulation 4.34(h) by reference, and thus require CTAs to provide the same description of their 4.7 trading programs in QEP Disclosures.

D. Fees

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[74] 17 CFR 4.34(g).

[75] 17 CFR 4.34(h).

The Commission is further proposing to require CTAs to provide in the QEP Disclosures a description of each fee they will charge QEP advisory clients, as required by Regulation 4.34(i). Regulation 4.34(i) requires CTAs to include within their Disclosure Documents a complete description of fees they will charge their clients. Pursuant to this requirement, the description must specify the dollar amount of each fee, wherever possible, and must provide additional detail and explanation of certain fees, where the fees are dependent on specifically listed base amounts, or on any increase in a client's commodity interest account.[76] Proposed Regulation 4.7(c)(1)(i)(D) would incorporate Regulation 4.34(i) by reference, and thus require CTAs offering 4.7 trading programs to provide the same description of their fees in QEP Disclosures.

E. Conflicts of Interest

With respect to conflicts of interest, the Commission is proposing to require CTAs offering 4.7 trading programs to disclose their conflicts of interest as required by Regulation 4.34(j) in their QEP Disclosures. Regulation 4.34(j) requires CTAs to include a full description of any actual or potential conflicts of interest regarding any aspect of their trading programs on the part of: (1) the CTA; (2) any FCM and/or RFED with which the client will be required to maintain its commodity interest account; (3) any introducing broker through which the client will be required to introduce its account to an FCM and/or RFED; and (4) any principal of the foregoing, within their Disclosure Documents.[77] Under Regulation 4.34(j), such description of the conflicts of interest must also include any other material conflicts involving any aspect of the offered trading programs and any certain specified direct or indirect arrangements where the CTA or any principal thereof may benefit.[78] Proposed Regulation 4.7(c)(1)(i)(E) would incorporate

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[76] 17 CFR 4.34(i).

[77] 17 CFR 4.34(j).

[78] Regulation 4.34(j)(3) requires a description of the conflicts of interest of any arrangements whereby the CTA or any of its principals may benefit, directly or indirectly, from the client's account maintenance with

Regulation 4.34(j) by reference, and thus require CTAs to list and fully describe any conflicts of interest in QEP Disclosures for their 4.7 trading programs.

F. Past Performance of 4.7 Trading Programs

Finally, the Commission is also proposing to require CTAs offering 4.7 trading programs to include past performance information in their QEP Disclosures as required by Regulation 4.35. Currently, CTAs are exempt from disclosing performance information for their 4.7 trading programs. Because the Commission preliminarily believes such performance information regarding 4.7 trading programs would be valuable and provide necessary detail to prospective QEP advisory clients, the Commission is proposing to require CTAs include all performance information required under Regulation 4.35 with respect to the offered 4.7 trading program in their QEP Disclosures.

Regulation 4.35 requires CTAs to include in their Disclosure Documents capsule performance information for past performance of an account or trading program, subject to certain presentation and content requirements as outlined paragraph (a) of that section.[79] Regulation 4.35(a) also provides detailed requirements for composite presentation, how current the disclosed information must be, the time period that must be covered in the performance disclosures, the calculation of and recordkeeping concerning the disclosed performance information, disclosing the performance of partially-funded accounts, the presentation of proprietary trading results, and a mandatory legend for all performance disclosures, stating, "PAST PERFORMANCE IS NOT NECESSARILY INDICATIVE OF FUTURE RESULTS."[80] Additionally, Regulation 4.35(b) provides that a CTA must disclose the actual performance of all accounts directed by the CTA and

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an FCM or RFED, and/or from the maintenance of the client's swap positions with a swap dealer or from the introduction of such an account through an introducing broker (such as payment for order flow or soft dollar arrangements). 17 CFR 4.34(j)(3).

[79] 17 CFR 4.35.

[80] 17 CFR 4.35(a)(3) through (9).

by each of its trading principals, unless the CTA or its trading principals previously have not directed any accounts; in that case, the CTA must disclose this using one of three form disclosures listed thereunder.[81] Proposed Regulation 4.7(c)(1)(i) would remove the existing exemption from Regulation 4.35, and Proposed Regulation 4.7(c)(2)(i)(F) would require QEP Disclosures to include performance information as required by Regulation 4.35 with respect to 4.7 trading programs.

c. Permitting Monthly Account Statements for Certain 4.7 Pools Consistent with Commission Exemptive Letters

Regulation 4.7(b)(3) currently provides an exemption from the requirement in Regulations 4.22(a) and (b) that CPOs provide monthly account statements containing specific information to participants in their commodity pools.[82] For 4.7 pools, CPOs are permitted to distribute account statements "no less frequently than quarterly within 30 days after the end of the reporting period."[83] CPOs of 4.7 pools that are Funds of Funds[84] have reported to Commission staff that they often have difficulty complying with this quarterly account statement schedule in Regulation 4.7(b)(3). Such CPOs regularly request exemptive letters from the Commission to permit them to follow an alternate account statement schedule, explaining that they cannot control the timing of when they receive financial information from the underlying investee collective investment vehicles, which often results in the investor Fund of Funds CPO not receiving the requisite information for its own 4.7 pool reporting until the 30-day period for distribution is nearly expired. The Commission has routinely granted these exemptive letter requests, thereby permitting the requesting CPOs to distribute monthly, rather than quarterly,

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[81] 17 CFR 4.35(b).

[82] 17 CFR 4.7(b)(3), 4.22(a) and (b).

[83] 17 CFR 4.7(b)(3)(i); cf. 17 CFR 4.22(a) and (b).

[84] *See supra* n. 42 (defining "Funds of Funds").

account statements for their 4.7 Fund of Funds pools within 45 days of the month-end.[85] This approach of providing exemptive letter relief from Regulation 4.7(b)(3) has allowed these CPOs additional time to receive and gather the information required for their account statements required by Regulation 4.7, while also ensuring that their QEP participants receive both more accurate and more frequent reporting.

Consistent with past Commission efforts to memorialize routinely granted Commission letter relief via regulatory amendments that streamline availability, provide consistency, and eliminate the need to process and respond to requests individually, the Commission proposes to amend Regulation 4.7 in a manner that would allow the CPOs of 4.7 pools that are Funds of Funds to distribute monthly account statements within 45 days of the month-end, provided that a CPO notifies its QEP pool participants, so they are aware of the schedule for the distribution of account statements. The Commission solicits comment generally on Proposed Regulation 4.7(b)(3)(iv); in particular, the Commission requests comment on whether the proposed amendment effectively creates a mechanism in Regulation 4.7(b)(3) that is equivalent to the exemptive letters currently issued by the Commission, and whether the alternate account statement distribution schedule and notice requirements are clear.

d. Other Technical Amendments

Finally, the Proposal also includes a number of technical amendments to Regulation 4.7 that are designed to improve its efficiency and usefulness for intermediaries and their prospective and actual QEP pool participants and advisory clients, as well as the general public. For example, the Commission is proposing to delete the introductory paragraph to Regulation 4.7 and to generally restructure the definitions section in Regulation 4.7(a), eliminating what it preliminarily views as

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[85] *See, e.g.*, CFTC Letters 18-29, 19-01, 19-03, 20-11, 21-16, 23-04.

unnecessary subparagraph levels in the QEP definition and alphabetizing the definitions. The Commission has also proposed amendments to ensure that cross-references within Regulation 4.7 and other part 4 regulations are accurate. The Commission is seeking comment on these and any other technical amendments that it should consider for ease of use, as well as whether there are any other cross-references within Regulation 4.7 not addressed by the Proposal that should also be corrected. The Commission intends to include additional conforming amendments correcting cross-references to Regulation 4.7 provisions found in other parts of the Commission's regulations as technical amendments in a future final rule. The Commission requests comment and public input on this approach as well.

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.[86] The regulatory amendments proposed by the Commission hereinwould affect only persons registered or required to be registered as CPOs and CTAs and those commodity pools and trading programs operated under Regulation 4.7 and offered solely to QEPs.

i. CPOs

The Commission has previously established certain definitions of "small entities" to be used by the Commission in evaluating the impact of its rules on such entities in

[86] 5 U.S.C. 601, *et seq*.

accordance with the requirements of the RFA.[87] With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, only if it meets the criteria for an exemption from registration under Regulation 4.13(a)(2).[88] The regulations proposed herein apply to persons registered or required to be registered as CPOs with the Commission (specifically, those registered CPOs whose prospective and actual pool participants are restricted to QEPs) and/or provide relief to qualifying registrants from certain periodic reporting burdens. Accordingly, the Chairman, on behalf of the Commission, certifies pursuant to 5 U.S.C. 605(b) that this NPRM will not have a significant economic impact on a substantial number of small entities, with respect to CPOs.

ii. CTAs

Regarding CTAs, the Commission has previously considered whether such registrants would be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.[89] Because certain of these registered CTAs may be small entities for the purposes of the RFA, the Commission is considering whether this Proposal would have a significant economic impact on such registrants.

The portions of this NPRM directly impacting CTAs would affect only CTAs registered or required to register with the Commission that offer and operate trading programs designed for QEPs. These proposed amendments would, in particular: (1) require CTAs claiming the Regulation 4.7 exemption to provide certain general and

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[87] *See, e.g.*, Policy Statement and Establishment of Definitions of "Small Entities" for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18620 (Apr. 30, 1982).

[88] *Id.* at 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).

[89] *Id.* at 18620.

performance disclosures enumerated in other part 4 regulations regarding their 4.7 trading programs to their prospective and current QEP advisory clients; (2) require such CTAs to include past performance information for their 4.7 trading programs in any Disclosure Documents they use and distribute for their non-4.7 trading programs' advisory clients; and (3) require such registered CTAs to retain the proposed limited QEP Disclosures regarding their 4.7 trading programs as business records of the intermediary. As stated above, these proposed requirements primarily impact registered CTAs offering 4.7 trading programs to QEP advisory clients and claiming the compliance exemptions currently offered by Regulation 4.7. Although data on the specific size of registered CTAs offering 4.7 trading programs is limited, it is the Commission's anecdotal experience that such CTAs claiming compliance exemptions in Regulation 4.7 for the purposes of soliciting and serving QEP advisory clients are frequently large financial institutions with substantial financial assets and advisory experience, or affiliates thereof. Given that registered CTAs do not have a capital requirement applicable to them, it is not possible for the Commission to readily determine the typical or average size of registered CTAs, or even of registered CTAs who solely offer 4.7 trading programs; moreover, registered CTAs frequently offer a mix of 4.7 trading programs and trading programs or strategies subject to the full application of the Commission's part 4 regulations. Therefore, although the Commission has previously determined whether CTAs are small entities for RFA purposes on a case-by-case basis, the Commission is not currently in a position to determine whether registered CTAs affected by this NPRM would include a substantial number of small entities, on which the NPRM would have a significant economic impact. Therefore, pursuant to 5 U.S.C. 603, the Commission offers for public comment this initial regulatory flexibility analysis addressing the impact of the Proposal on small entities:

A. A description of the reasons why action by the agency is being considered.

As discussed in detail above in this Preamble, since the 1992 Final Rule adopting Regulation 4.7, the Commission has witnessed substantial increases in the intermediary population utilizing those exemptions for 4.7 pools and trading programs offered and available to QEPs. This development also coincides with current commodity interest market conditions, in which the Commission has also seen significant expansion and growth in the complexity and diversity of commodity interest products offered via 4.7 pools and trading programs, which may be more challenging to fully understand. Given further that QEPs, for a variety of reasons, may have varying levels of resources and leverage to demand and monitor the information necessary for them to make informed investment decisions, the Commission believes it is no longer appropriate to rely solely on QEPs' individual ability to obtain such information, absent formal regulatory requirements that such information be provided.

B. A succinct statement of the objectives of, and legal basis for, the Proposal.

The objective of these proposed amendments is to establish minimum disclosure requirements applicable to all CTAs offering 4.7 trading programs, replacing the current *ad hoc* methods of informing QEPs that have developed over time, and leveling the playing field amongst QEP advisory clients who may currently receive varying levels of investment information dependent upon their size and available resources. The proposed amendments are also intended to raise the quality and consistency of QEP Disclosures provided by registered CTAs by requiring them to be materially complete, accurate, and subject to regular updates by the CTA, and to enable the consistent review of such QEP Disclosures by the Commission or NFA through regular examinations of registered CTAs' business records. As stated above, the CEA grants the Commission the authority

to regulate and register CTAs, as well as to require the maintenance of books and records and filing of reports that the Commission believes is necessary to accomplish its regulatory mission and the goals of the CEA.[90]

C. A description of and, where feasible, an estimate of the number of small entities to which the Proposal would apply.

As mentioned above, CTAs are generally not subject to any minimum capital requirements, nor does the Commission collect data on the "size" of registered CTAs via Commission registration applications or other required Commission filings or reports. Therefore, the Commission has no data to analyze that would enable it to estimate how many registered CTAs[91] may be considered small entities for RFA purposes. It is the Commission's experience that registered CTAs claiming Regulation 4.7 exemptions and offering 4.7 trading programs to QEP advisory clients are frequently large financial institutions offering a variety of trading programs and strategies. Nonetheless, the Commission acknowledges that a certain percentage or portion of the population of CTAs affected by this Proposal, *i.e.*, those registered or required to register with the Commission and utilizing the exemptions in Regulation 4.7, may, in fact, be considered small entities as defined by the RFA, though the Commission lacks the information or data necessary to determine or estimate how many.

D. A description of the projected reporting, recordkeeping, and other compliance requirements of the Proposal, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

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[90] 7 U.S.C. 6m, 6n.

[91] As of June 2023, there were approximately 1,280 CTAs registered with the Commission.

The proposed amendments would require CTAs registered and claiming the exemption in Regulation 4.7(c)(1) to provide certain general and performance disclosures regarding their 4.7 trading programs to prospective and current QEP advisory clients, to ensure that the information provided is materially complete and accurate, and to periodically update such information as needed. As noted above, the proposed amendments would, in particular: (1) require CTAs relying on the Regulation 4.7 exemption to provide certain general and performance disclosures enumerated in other part 4 regulations regarding their 4.7 trading programs to their prospective and current QEP advisory clients; (2) require such CTAs to include past performance information for their 4.7 trading programs in the Disclosure Documents they use and distribute for their non-4.7 trading programs; and (3) require such registered CTAs to retain the proposed QEP Disclosures regarding their 4.7 trading programs as business records of the intermediary. The Commission expects that some CTAs may already be disclosing some of this information, via the existing *ad hoc* industry practices that have developed for QEP Disclosures like private placement memoranda and trading program brochures, as discussed above. Additionally, the proposed amendments would require registered CTAs to provide past performance information regarding their 4.7 trading programs in the Disclosure Documents of other trading programs they operate that are subject to broader part 4 compliance. Finally, CTAs offering 4.7 trading programs would be required to keep their QEP Disclosures containing the information the Commission proposes to require as business records, subject to routine examination and inspection by the Commission and/or NFA.

The Commission anticipates that the proposed amendments would affect registered CTAs claiming Regulation 4.7 and offering 4.7 trading programs, which, as stated above, may include some small entities for RFA purposes. Nonetheless, regardless of whether a CTA is considered a small entity, the Commission believes that all

registered CTAs offering and managing 4.7 trading programs generally possess the professional skills necessary to generate and distribute the subset of disclosures proposed to be required and to appropriately retain such QEP Disclosures as business records of their registered intermediary, *i.e.*, the CTA, as such skills are not significantly different from those already necessary to establish, register, and operate a CTA subject to the broader part 4 compliance requirements beyond Regulation 4.7.

E. An identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the Proposal.

The Commission is generally unaware of any Federal rules or regulations which may conflict with the proposed amendments. Federal securities laws and regulations do govern investment disclosures by registered investment advisers, which may result in those entities that are dually registered with the SEC and CFTC being subject to more than one regulatory regime. The Commission does not expect the proposed amendments to conflict with those laws and regulations, based on its understanding of those disclosure requirements. Moreover, some 4.7 CTAs are registered only with the Commission and thus, are not currently subject to any other regulations mandating disclosures to their QEP advisory clients.

F. A description of any significant alternatives to the Proposal which accomplish the stated objectives of applicable statutes and which minimize significant economic impact of the Proposal on small entities.

Potential alternatives to the proposed amendments would be: (1) to not amend Regulation 4.7 to add disclosure requirements for 4.7 trading programs; or (2) to amend Regulation 4.7(c)(1) to require compliance with the entirety of the disclosure regulations generally applicable to registered CTAs offering trading programs to non-QEP advisory clients. Additionally, the Commission could also consider limiting the application of the

proposed amendments to registered CTAs claiming Regulation 4.7 and offering 4.7 trading programs to those CTAs who are not small entities for RFA purposes.

The Commission believes that there have been significant developments in the commodity interest markets since Regulation 4.7 was adopted in 1992. Based on current market conditions and the increasing complexity of commodity interest products, among other factors, the Commission preliminarily believes it necessary to establish minimum disclosures for CTAs offering 4.7 trading programs at this time. Although declining to require any disclosures would certainly minimize the economic impact on registered CTAs that are also small entities, the Commission believes that, due to the circumstances explained above, including the varying resources available to QEPs to independently demand and assess the accuracy of such disclosures, certain information should be required to be disclosed to all QEP advisory clients, in furtherance of the Commission's regulatory goals and the purposes of the CEA. Additionally, the Commission believes it would be overly burdensome if registered CTAs offering 4.7 trading programs were required to comply with the entirety of Regulations 4.34 and 4.35, and to comply with the review and filing requirements in Regulation 4.36, given the characteristics of their advisory clients. Through these proposed amendments, the Commission is seeking to balance its customer protection and regulatory concerns for QEP advisory clients and 4.7 trading programs with the existing compliance burdens of registered CTAs. Thus, the proposed amendments prioritize and require certain disclosures, while providing relief from others, and permit CTAs to use and distribute QEP Disclosures containing that information without filing or advance review by the Commission or NFA, provided that they are complete, accurate, and kept as business records of the CTA. In the Commission's opinion, the proposed amendments offer a more tailored approach to QEP Disclosure requirements applicable to CTAs' 4.7 trading programs and would have less

of an economic impact on CTAs claiming Regulation 4.7 than requiring compliance with the entirety of the part 4 disclosure requirements.

Finally, as stated above, CTAs are generally not subject to capital requirements under the Commission's regulatory regime, and CTAs manage the assets of their advisory clients, whether QEPs or not, without receiving or taking custody of those assets, due to the statutory and regulatory provisions defining the permitted activities of CTAs. The Commission also does not collect data on the size of CTAs registered or required to register with it, beyond their assets under management, and it would be difficult to determine or estimate the number of registered CTAs that may be considered small entities for RFA purposes. Therefore, the Commission is unable to limit the application of the proposed amendments to CTAs offering 4.7 trading programs who are not small entities for RFA purposes, though anecdotally the Commission believes that the majority of CTAs utilizing Regulation 4.7 would not be considered small entities. As noted earlier, regardless of whether a CTA is considered a small entity, the Commission believes that all registered CTAs offering and managing 4.7 trading programs generally possess the resources and know-how necessary to generate and distribute the subset of disclosures proposed to be required and to appropriately retain such QEP Disclosures as business records of their registered intermediary.

To the extent the proposed amendments may apply to an unknown number of small entities who are registered CTAs offering 4.7 trading programs, the Commission believes that its customer protection and oversight concerns under the CEA in ensuring that QEP advisory clients are adequately and consistently informed regarding 4.7 trading programs, and that the Commission can effectively oversee the activities of all CTAs claiming exemptions under Regulation 4.7, nevertheless outweigh that concern. The Commission understands that the direct effect of these proposed amendments would be an increase in the operating costs of CTAs utilizing Regulation 4.7, due to the addition of

minimum content, dissemination, and recordkeeping requirements for QEP Disclosures. The Commission also understands, however, that some of the information proposed to be required is similar in content to information many CTAs are already providing based on the demands of their QEP advisory clients, or because they are required to provide them by other applicable regulatory regimes. Notwithstanding these additional operating costs, the Commission preliminarily believes that mandating the provision of certain foundational information to all QEPs, which the proposed amendments would require to be kept up-to-date and accurate, is expected to result in more consistent disclosures to all persons gaining exposure to the commodity interest markets through registered CTAs, which may include small entities for RFA purposes. The Commission preliminarily concludes that the proposed amendments would result in better informed QEP advisory clients, who may, as a result of consistent, detailed disclosures, possess enhanced confidence in their intermediaries and the commodity interest markets overall, by virtue of their increased understanding of the nature of the advisory services they are procuring. The Commission therefore believes that the QEP Disclosures proposed in this NPRM would benefit both the CTAs and their QEP advisory clients by requiring certain general and performance disclosures, thereby promoting transparency and consistency, as well as increasing confidence in the CTAs and the commodity interest markets overall.

Therefore, in comparing the aforementioned alternatives of (1) not amending Regulation 4.7 to impose disclosure requirements for 4.7 trading programs, and (2) amending Regulation 4.7(c)(1) to require compliance with the entirety of the disclosure regulations generally applicable to registered CTAs offering trading programs to non-QEP advisory clients, the Commission believes that the proposed minimum disclosure requirements strike an appropriate balance that achieves the Commission's regulatory objectives without burdening the small entity population of CTAs offering 4.7 trading

programs with the compliance costs and burdens that would be associated with the full disclosure regime required under part 4.

b. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA)[92] imposes certain requirements on Federal agencies, including the Commission, in connection with their conducting or sponsoring any "collection of information," as defined by the PRA. 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 valid control number from the Office of Management and Budget (OMB).[93] The PRA is intended, in part, to minimize the paperwork burden created for individuals, businesses, and other persons as a result of the collection of information by Federal agencies, and to ensure the greatest possible benefit and utility of information created, collected, maintained, used, shared, and disseminated by or for the Federal Government.[94] The PRA applies to all information, regardless of form or format, whenever the Federal Government is obtaining, causing to be obtained, or soliciting information, and includes required disclosure to third parties or the public, of facts or opinions, when the information collection calls for answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons.[95]

This NPRM, if adopted, would result in a collection of information within the meaning of the PRA, as discussed below. The Proposal affects a collection of information for which the Commission has previously received a control number from OMB. The title for this collection is, "Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting

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[92] 5 U.S.C. 601, *et seq.*

[93] *See* 44 U.S.C. 3507(a)(3); 5 CFR 1320.5(a)(3).

[94] *See* 44 U.S.C. 3501.

[95] *See* 44 U.S.C. 3502(3).

by Futures Commission Merchants" (Collection 3038-0005).[96] Collection 3038-0005 primarily accounts for the burden associated with the Commission's part 4 regulations that concern compliance generally applicable to CPOs and CTAs, as well as certain exemptions from registration as such and exclusions from those definitions, and available relief from compliance with certain regulatory requirements, *e.g.*, Regulation 4.7.

The Commission is therefore submitting this NPRM to OMB for review.[97] Responses to this collection of information would be mandatory. The Commission will protect any proprietary information according to FOIA and part 145 of the Commission's regulations.[98] In addition, CEA section 8(a)(1) strictly prohibits the Commission, unless specifically authorized by the CEA, from making public any "data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers."[99] Finally, the Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[100]

i. Collection 3038-0005: Revisions to the Collection of Information

Collection 3038-0005 governs responses made pursuant to part 4 of the Commission's regulations, pertaining to the operations of CPOs and CTAs, including the itemization of compliance burdens remaining after CPOs and CTAs elect certain exemptions from broader compliance obligations in the part 4 regulations. The Commission is proposing to amend Collection 3038-0005 to account for the amendments proposed in this NPRM, as follows: (a) adding reporting burdens for the proposed required general and performance disclosures to prospective or actual QEP pool

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[96] *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=202011-3038-006 (last visited Sept. 27, 2023).

[97] *See* 44 U.S.C. 3507(d) and 5 CFR 1320.11.

[98] *See* 5 U.S.C. 552; *see also* 17 CFR part 145 (Commission Records and Information).

[99] 7 U.S.C. 12(a)(1).

[100] 5 U.S.C. 552a.

participants and advisory clients by CPOs and CTAs, pursuant to the proposed amendments to Regulations 4.7(b)(2) and (c)(1); (b) increasing the existing recordkeeping requirements of Regulations 4.7(b)(5) and (c)(2) to include the proposed maintenance of QEP Disclosures as business records by CPOs and CTAs utilizing Regulation 4.7; and (c) adding monthly account statements as a permissible reporting schedule by CPOs of 4.7 pools that are Funds of Funds through Proposed Regulation 4.7(b)(3)(iv). In addition, and more generally, the Commission is proposing to update its estimates of the number of respondents subject to the information collection requirements under Regulation 4.7, such that they are better aligned with more recent NFA data provided to the Commission on the number of CPOs (and pools) and CTAs subject to those requirements. Accordingly, the Commission proposes to revise Collection 3038-0005 to address the reporting and recordkeeping burdens associated with these proposed amendments as described in further detail below.

A. Proposed Amendments Affecting CPOs

As stated above, Regulation 4.7 currently provides exemptions from the broader part 4 compliance requirements, and Regulation 4.7(b)(2), in particular, provides exemptions for CPOs with respect to 4.7 pools offered solely to QEPs from the requirements of Regulations 4.21, 4.24, 4.25, and 4.26, under certain additional conditions further specified in the regulation.[101] As a result, Collection 3038-0005 does not currently include any reporting burden with respect to Regulation 4.7(b)(2). Proposed Regulation 4.7(b)(2), if adopted, however, would result in additional reporting burdens for CPOs offering and operating 4.7 pools because certain general and performance disclosures would become required for their prospective and actual QEP pool participants. Therefore, the Commission is proposing to amend Collection 3038-

[101] *See supra* Section II.b for additional discussion of these regulations.

0005 in a manner that accounts for the additional reporting burden associated with Proposed Regulation 4.7(b)(2). To that end, the Commission has endeavored to add reporting burden for this proposed amendment that is based upon the burden already itemized in Collection 3038-0005 for compliance with Regulations 4.21/4.26, but that is proportionate to the more limited scope of disclosures the Commission is proposing to require from CPOs with respect to their 4.7 pools. Accordingly, the aggregate annual estimate for the reporting burden associated with Proposed Regulation 4.7(b)(2) would be as follows:

Estimated number of respondents: 1,000.

Estimated frequency/timing of responses: At least annually, or as-needed.

Estimated number of annual responses per respondent: 5.

Estimated number of annual responses for all respondents: 5,000.

Estimated annual burden hours per response: 1.5.

Estimated total annual burden hours per respondent: 7.5.

Estimated total annual burden hours for all respondents: 7,500.

Additionally, this NPRM proposes to amend Regulation 4.7(b)(5) to require that CPOs retain the QEP Disclosures they use and distribute to their prospective and actual QEP pool participants as business records of the CPO. Collection 3038-0005 currently contains a recordkeeping burden associated with Regulation 4.7(b)(5) which estimates that each CPO expends approximately 2 hours maintaining business records related to its 4.7 pool(s), as that provision requires. The Commission recommends an increase of 0.5 hours to this existing burden, to account for the additional burden of retaining the QEP Disclosures as CPO business records, and estimates that the respondents include 1,000 CPOs each operating up to five 4.7 pools. Accordingly, the aggregate annual estimate for the recordkeeping burden associated with Proposed Regulation 4.7(b)(5) would be as follows:

Estimated number of respondents: 1,000.

Estimated frequency/timing of responses: Annual.

Estimated number of annual responses per respondent: 5.

Estimated number of annual responses for all respondents: 5,000.

Estimated annual burden hours per response: 2.5

Estimated total annual burden hours per respondent: 12.5.

Estimated total annual burden hours for all respondents: 12,500.

Finally, the Commission is also proposing amendments to Regulation 4.7(b)(3) that would, consistent with routinely issued Commission exemptive letters, permit CPOs of 4.7 pools that are Funds of Funds to distribute monthly account statements within 45 days of the month-end.[102] Collection 3038-0005 currently lists a reporting burden associated with Regulation 4.7(b)(3) that accounts for the quarterly account statements currently required to be distributed by such CPOs to their 4.7 pools' QEP participants. The Commission is proposing to add an additional reporting burden associated with Proposed Regulation 4.7(b)(3)(iv), the provision that, if adopted, would add this monthly reporting as an option for 4.7 pools that are Funds of Funds. The Commission believes that a smaller subset of CPOs and 4.7 pools would rely on this reporting schedule, and therefore, burden estimates below are based on 100 CPOs utilizing this alternative monthly account statement schedule for up to three 4.7 pools each. Accordingly, the aggregate annual estimate for the reporting burden associated with Proposed Regulation 4.7(b)(3)(iv) would be as follows:

Estimated number of respondents: 100.

Estimated frequency/timing of responses: Monthly.

Estimated number of annual responses per respondent: 36.

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[102] *See supra* Section II.c for additional discussion of this proposed amendment.

Estimated number of annual responses for all respondents: 3,600.

Estimated annual burden hours per response: 1.

Estimated total annual burden hours per respondent: 36.

Estimated total annual burden hours for all respondents: 3,600.

B. Proposed Amendments Affecting CTAs

Similar to Regulation 4.7(b)(2), Regulation 4.7(c)(1) provides exemptions for CTAs with respect to their 4.7 trading programs offered to QEPs from Regulations 4.31, 4.34, 4.35, and 4.36, subject to additional conditions specified in that regulation.[103] Consequently, Collection 3038-0005 does not currently include any reporting burden associated with Regulation 4.7(c)(1). Proposed Regulation 4.7(c)(1), if adopted, would result in CTAs incurring additional burden because certain general and performance disclosures with respect to their 4.7 trading programs would be required to be distributed to their prospective and actual QEP advisory clients. Therefore, the Commission is proposing to amend Collection 3038-0005 in a manner that would account for the additional reporting burden associated with Proposed Regulation 4.7(c)(1). To that end, the Commission has endeavored to add reporting burden for this proposed amendment that is based upon the burden already itemized in this information collection for compliance with Regulations 4.31/4.36, but that is proportionate to the more limited scope of disclosures the Commission is proposing to require from CTAs with respect to their 4.7 trading programs. Accordingly, the aggregate annual estimate for the reporting burden associated with Proposed Regulation 4.7(c)(1) would be as follows:

Estimated number of respondents: 1,000.

Estimated frequency/timing of responses: At least annually, or as-needed.

Estimated number of annual responses per respondent: 12.

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[103] *See supra* Section II.b for additional discussion of these regulations.

Estimated number of annual responses for all respondents: 12,000.

Estimated annual burden hours per response: 1.5.

Estimated total annual burden hours per respondent: 18.

Estimated total annual burden hours for all respondents: 18,000.

Additionally, this NPRM proposes to amend Regulation 4.7(c)(2) to require that CTAs retain the QEP Disclosures they use and distribute to their prospective and actual QEP advisory clients as business records of the CTA. Collection 3038-0005 currently contains a recordkeeping burden associated with Regulation 4.7(c)(2) which estimates that each CTA expends approximately 2 hours maintaining business records related to its 4.7 trading program(s), as that provision requires. The Commission recommends an increase of 0.5 hours to account for the additional burden of retaining QEP Disclosures as business records of the CTA, and estimates that the respondents include 1,000 CTAs offering and operating up to 12 4.7 trading programs each. Accordingly, the aggregate annual estimate for the recordkeeping burden associated with Proposed Regulation 4.7(c)(2) would be as follows:

Estimated number of respondents: 1,000.

Estimated frequency/timing of responses: Annual.

Estimated number of annual responses per respondent: 12.

Estimated number of annual responses for all respondents: 12,000.

Estimated annual burden hours per response: 2.5.

Estimated total annual burden hours per respondent: 30.

Estimated total annual burden hours for all respondents: 30,000.

e. **Request for Comment**

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comment in order to (1) evaluate

whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) evaluate the accuracy of the estimated burden of the proposed information collection requirements, including the degree to which the methodology and assumptions the Commission employed were valid; (3) determine whether there are ways to enhance the quality, utility, and clarity of the information proposed to be collected; and (4) minimize the burden of the proposed collections of information on those who are required to respond, *i.e.*, CPOs and CTAs, including through the use of appropriate automated, electronic, mechanical, or other technological information collection techniques.

The public and other Federal agencies may submit comments directly to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, D.C. 20503, Attn: Desk Officer of the Commodity Futures Trading Commission, by fax at (202) 395-6566, or by email at *OIRAsubmissions@omb.eop.gov*. Please provide the Commission with a copy of submitted documents, so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this NPRM for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting *https://www.RegInfo.gov*. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of receiving full consideration if OMB (and the Commission) receives it within 30 days of the publication of this document. Nothing in the foregoing affects the deadline enumerated above for public comment to the Commission on the proposed regulations.

c. Cost-Benefit Considerations

i. Statutory and Regulatory Background

Section 15(a)[104] of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of five broad areas of market and public concern: (1) protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The Commission recognizes that the proposed amendments to Regulation 4.7 in this NPRM will result in additional costs for CPOs and CTAs operating 4.7 pools and trading programs. However, the Commission lacks the data necessary to reasonably quantify all of the costs and benefits considered below. Additionally, any initial and recurring compliance costs for any particular CPO or CTA will depend on its size, existing infrastructure, practices, and cost structures. The Commission welcomes comments on such costs, particularly from existing CPOs and CTAs utilizing Regulation 4.7 exemptions, who may be better able to provide quantitative cost data or estimates, based on their respective experiences. Commenters may also suggest other alternative(s) to the proposed approach that would be expected to further the Commission's stated policy and regulatory goals as described in this NPRM.

The Commission is also including a number of questions herein for the purpose of eliciting direct cost estimates from public commenters wherever possible. Quantifying other costs and benefits, such as the effects of potential induced changes in the behavior of CPOs, CTAs, and their QEPs resulting from the proposed amendments are inherently

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[104] 7 U.S.C. 19(a).

harder to measure *ex ante*. Thus, the Commission is similarly requesting comment through questions to help it better quantify these impacts. Due to these quantification difficulties, for this NPRM, the Commission offers the following qualitative discussion of its costs and benefits.

ii. Increasing Financial Thresholds in the Portfolio Requirement of the "Qualified Eligible Person" Definition

A. *Baseline*:

As described in more detail above, the QEP definition in Regulation 4.7 outlines two categories, those that do not have to satisfy the Portfolio Requirement, listed in Regulation 4.7(a)(2), and those that do, listed in Regulation 4.7(a)(3). Persons listed in Regulation 4.7(a)(3), including natural persons who must also be considered "accredited investors," must meet the Portfolio Requirement by either: (1) owning securities and other assets worth at least $2,000,000; (2) having on deposit with an FCM for their own account at least $200,000 in initial margin, option premiums, or minimum security deposits; or (3) owning a portfolio of funds and assets that, when expressed as percentages of the first two thresholds, have a combined value of at least 100%.

B. *The Proposal*:

The Commission is proposing in this NPRM to increase the Portfolio Requirement in Regulation 4.7 such that persons listed in Regulation 4.7(a)(3) could satisfy the QEP definition by either: (1) owning securities and other assets worth at least $4,000,000; (2) having on deposit with an FCM for their own account at least $400,000 in initial margin, option premiums, or minimum security deposits; or (3) owning a portfolio of funds and assets that, when expressed as percentages of the prior two thresholds, have a combined value of at least 100%. As stated previously in this release, the Commission preliminarily believes that increasing such thresholds appropriately accounts for the impacts of inflation on the Portfolio Requirement's ability to adequately

address the Commission's concerns regarding the financial sophistication of QEPs required to meet its terms.

C. *Benefits*:

The Portfolio Requirement was adopted to identify those prospective participants in the commodity interest markets that are of a size sufficient to indicate that the participant has substantial investment experience and thus a high degree of sophistication with regard to investments as well as financial resources to withstand the risk of their investments.[105] As discussed in detail above in this NPRM, these Portfolio Requirement thresholds have not been changed since their adoption in 1992. The Commission preliminarily believes that updating these thresholds would have the benefit of bringing the Portfolio Requirement back in line with the Commission's original intent when adopting the QEP definition.

The Commission understands that raising the Portfolio Requirement thresholds may cause some QEPs to no longer be so qualified, turning them into non-QEP participants in the commodity interest markets. The Commission nonetheless believes preliminarily that this proposed amendment would benefit the commodity interest markets and the general public by realigning financial thresholds in its most commonly used regulations to account for the impacts of inflation since its original adoption and to more accurately reflect the current economic reality, such that the scope of Regulation 4.7 would be more closely aligned with the Commission's original intent in the 1992 Final Rule. Additionally, to the extent that former QEPs choose to continue investing in commodity pools or allocate their funds to be managed by CTAs, such persons may then purchase participations in pools or utilize the services of CTAs not operating pursuant to Regulation 4.7. This, in turn, could result in the creation and offering of additional pools

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[105] 1992 Proposed Rule, 57 FR at 3152.

and trading programs by registered CPOs and CTAs outside of the Regulation 4.7 regime, given the potential additional demand by non-QEPs. Because more capital may, as a result, likely be deployed to such pools and trading programs subject to the full panoply of the Commission's part 4 compliance requirements, this could indirectly lead to greater transparency in the offerings of registered CPOs and CTAs, as well as improved customer protection for persons engaging with CPOs and CTAs. Moreover, if additional pools and trading programs are created for the non-QEP investing public, this would be expected to enhance the variety and vibrancy of the non-QEP pool and trading program marketplace. As a result, more options for non-QEP individuals and entities to gain access to the commodity interest markets in a manner consistent with their individual risk appetites and exposure needs would become available.

D. *Costs*:

If the proposed amendments are adopted, CPOs that currently offer pools operated under Regulation 4.7 may no longer accept additional investment from pool participants that fall in the gap between the old and new Portfolio Requirement thresholds. Such registered CPOs and CTAs may decide to offer pools and trading programs not exempt under Regulation 4.7 that would necessarily have higher operating and compliance costs, due to the unavailability of Regulation 4.7 compliance exemptions for those investment products.

E. *Questions*:

The Commission poses the following questions to better assess the costs and benefits of the proposed increases to the QEP definition's Portfolio Requirement in Regulation 4.7(a)(1)(v). The Commission requests further that, to the extent possible, commenters please provide quantitative bases for your responses.

1. How many QEPs would intermediaries expect to no longer be considered QEPs, if the Portfolio Requirement threshold increases are adopted?

2. How many CPOs and CTAs that currently offer pools and trading programs exclusively to QEPs have participants and clients that would no longer be QEPs under the new thresholds?
3. If the increased thresholds are adopted, will registered CPOs and CTAs form and begin offering new pools and trading programs designed for non-QEPs?

F. *Section 15(a) Factors*:

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of the proposed amendments to Regulation 4.7 with respect to the following factors: protection of market participants and the public; efficiency, competitiveness, and financial integrity of markets; price discovery; sound risk management practices; and other public interest considerations. As discussed above, the proposed revision of Regulation 4.7(a)(1)(v) would increase the financial thresholds for the Portfolio Requirement in the definition of QEPs. These proposed updates to the thresholds would, in the Commission's preliminary opinion, more closely align the QEP definition with the intent of the regulation, which is to assure that offerings operated pursuant to Regulation 4.7 compliance exemptions are only made to persons with sufficient expertise and assets.

a. Protection of Market Participants and the Public

As stated above, the Commission believes preliminarily that this proposed amendment would benefit the commodity interest markets and the general public by realigning financial thresholds in its most commonly used regulations in a manner that accounts for the impacts of inflation since their original adoption and more accurately reflects current economic circumstances; the Commission expects that this would result in persons investing in commodity interest products offered by registered CPOs and CTAs being more accurately categorized as QEPs, and thus, more appropriately limited in their investment choices. Moreover, raising the Portfolio Requirement thresholds, as a practical matter, would likely limit the prospective investor population for 4.7 pools and

trading programs to a smaller number of persons. To the extent persons who meet the higher Portfolio Requirement thresholds are (on average) more financially sophisticated or resilient than those who no longer qualify, this proposed amendment should result in individuals and entities, both QEPs and non-QEPs, being offered pools and trading programs that are regulated in a manner commensurate with their respective needs for customer protection. If the increased thresholds further lead to the creation of more commodity pools and trading programs subject to the full part 4 compliance requirements by registered CPOs and CTAs, this too would potentially lead to greater transparency in their activities, which also protects persons investing in commodity interest investment products. Additionally, greater variety in the commodity pools and trading programs available to non-QEPs would provide more options for this population to consider, which may further enable them to make more appropriate investment decisions by choosing the offerings best suited to their individual risk appetite or other portfolio needs.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The proposed amendments to the Portfolio Requirement may also affect the size, composition, or number of commodity pools and trading programs in the commodity interest markets, especially those offered solely to QEPs. This may, in turn, affect the flow of investing in commodity interests. Financial economics literature suggests that, to the extent changing the QEP definition reduces the flow of non-commercial funds into commodity interest markets, the cost to commercial traders using futures markets to hedge their risks may increase.[106] Via this mechanism, this proposed amendment may have an indirect effect on efficiency of the futures markets with respect to the hedging costs of operating companies, commodity producers, or other commercial traders.

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[106] Goldstein and Yang, "Commodity Financialization and Information Transmission," 2022, *Journal of Finance*, 77, 2613-2668.

c. Price Discovery

The increased Portfolio Requirement thresholds are likely to result in fewer persons being considered QEPs, which may further result in fewer participants and clients in offered pools and trading programs operated under Regulation 4.7. An additional indirect effect of the proposed rule change could be a change in the flow of investment in commodity interests by non-commercial traders. The financial economics literature has found ambiguous results regarding the relationship between increased investment by non-commercial traders in commodity interest markets and price discovery.[107] As such, it is difficult to *ex ante* predict how changes in the Portfolio Requirement thresholds would impact price discovery.

d. Sound Risk Management Practices

Increasing the Portfolio Requirement thresholds may result in registered CPOs and CTAs that previously only offered pools and trading programs to QEPs creating and offering pools and trading programs designed for persons that are not QEPs. Consequently, these non-QEP pools and trading programs operated by registered CPOs and CTAs would then be subject to the full complement of part 4 compliance requirements, which could result in more diligent risk management practices by the CPOs and CTAs.

e. Other Public Interest Considerations

The original Portfolio Requirement thresholds in the QEP definition were intended to ensure that only persons possessing an appropriate and high level of trading experience, acumen, and financial resources would be eligible to invest in complex commodity interest investments offered and operated under Regulation 4.7. The Commission determined it appropriate to lessen the compliance burdens for registered

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[107] *Id.*

CPOs and CTAs limiting their prospective participants and clients to financially sophisticated QEPs through the exemptions provided by Regulation 4.7 for their 4.7 pools and trading programs. The 1992 Portfolio Requirement thresholds were adopted to provide a metric by which CPOs and CTAs could approximately assess the experience and financial wherewithal of potential pool participants or advisory clients, ensuring that they truly possessed the sophistication and resilience of other QEPs not subject to such thresholds. Updating these thresholds to account for inflation would realign the Portfolio Requirement with the original intent of the QEP definition and modernize its provisions consistent with today's economic circumstances.

iii. Requiring Minimum Disclosures for 4.7 Pools and Trading Programs

A. *Baseline*:

In general, registered CPOs and CTAs are required by several part 4 regulations (*i.e.*, Regulations 4.24-4.26 for CPOs and 4.34-4.36 for CTAs) to provide Disclosure Documents containing specific types of information about their commodity pools and trading programs to prospective pool participants and advisory clients; such Disclosure Documents must be filed with and reviewed and approved by NFA prior to being used and distributed. Currently, Regulation 4.7 makes available exemptions from these regulatory requirements for the 4.7 pools and trading programs of registered CPOs and CTAs. While registered CPOs and CTAs are not required to disclose any information to prospective QEP pool participants or advisory clients about their 4.7 pools or trading programs, if they do choose to provide any disclosures, Regulation 4.7 requires the CPO or CTA to include a form disclaimer and to ensure that they provide all disclosures necessary to make the information, in the context in which it is being provided, not misleading.[108]

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[108] 17 CFR 4.7(b)(2); 17 CFR 4.7(c)(1).

B. *The Proposal*:

The Proposal would narrow the existing exemptions in Regulation 4.7 by proposing to require compliance with portions of the broader disclosure requirements in part 4, thereby establishing minimum content, use, and recordkeeping requirements applicable to QEP Disclosures, and bringing the disclosure requirements for 4.7 pools and trading programs closer to those applicable to pools and trading programs offered to non-QEPs by registered CPOs and CTAs. Specifically, CPOs and CTAs utilizing Regulation 4.7 would be required by the proposed amendments to provide QEP Disclosures containing, at a minimum, the information outlined above through offering memoranda or trading program brochures delivered to their prospective QEP pool participants or advisory clients. Although the extent of information proposed to be required under Regulation 4.7 is less than that required by the part 4 regulations for non-QEP pools and trading programs, these proposed amendments represent a significant policy change from the current status quo, where Regulation 4.7 currently provides broad exemptions from the entirety of the CPO and CTA disclosure regulations. Under the Proposal, CPOs and CTAs offering and operating 4.7 pools and trading programs would be required to provide information to their prospective QEP participants and clients regarding principal risk factors, investment programs, use of proceeds, custodians, fees and expenses, conflicts of interest, and certain performance information. Importantly, the Proposal also includes amendments to Regulation 4.7 that would require that the QEP Disclosures be materially complete and accurate, be kept up-to-date through routine reviews and updated as needed to reflect any changes to a 4.7 pool or trading program, and be maintained among an intermediary's other books and records for the pool or trading program and made available to any representative of the Commission, NFA, or the U.S. Department of Justice, in accordance with Regulation 1.31.

C. *Benefits*:

The direct effects of these proposed amendments would include greater availability and increased accuracy and reliability of the information QEPs receive prior to making their investment decisions. Mandating the provision of certain foundational information to all QEPs, which the proposed amendments would require to be kept up-to-date and accurate, is expected to result in more consistent disclosures to all persons gaining exposure to the commodity interest markets through CPOs and CTAs; better informed pool participants and advisory clients are likely to enhance market participant confidence in intermediaries and the commodity interest markets as a whole, as they better understand the nature of the services they are procuring. Moreover, the Commission preliminarily believes that this potential benefit is likely to be further bolstered by the proposed change in the material accuracy required of the QEP Disclosures. Rather than any disclosures being acceptable provided that they are, in totality, not materially misleading—meaning that material information could be permissibly omitted provided that it does not render the information that is disclosed false—the Proposal would further require that the QEP Disclosures be materially complete and accurate, which would mandate that all material information be included and be correct. This change is expected to result in more complete disclosures by CPOs and CTAs operating under Regulation 4.7, which is likely to result in a better-informed universe of market participants served by such intermediaries. Additionally, by requiring that specific topics be addressed by all CPOs and CTAs offering 4.7 pools and trading programs, QEPs could more readily compare and understand the differences between offered pools and trading programs, and as such, the Proposal could lead to better quality investment decisions by QEPs.[109]

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[109] Sirra and Tufano ("Costly Search and Mutual Fund Flows," *Journal of Finance*, 1998, 53, 1589-1622) show that investments in mutual funds are highly influenced by both past returns and fees. Although there is some disagreement in the literature regarding the reason for this relationship, Berk and van Binsbergen ("Measuring Skill in the Mutual Fund Industry" *Journal of Financial Economics*, 2015, 118, 1-20) provide evidence that this reflects investor money flowing to more skillful managers. Although the Commission is

Several aspects of the Proposal may also indirectly enhance Commission and NFA oversight of CPOs and CTAs utilizing Regulation 4.7. First, the improved ability of QEPs to more easily compare and understand critical information about 4.7 pools and trading programs offered to them may provide incentives for better governance of those commodity interest investment products by CPOs and CTAs.[110] Second, as discussed above, QEP Disclosures would be required by the Proposal to be materially complete and accurate, kept current by CPOs and CTAs, and maintained by them as business records available to the CFTC and NFA during routine examinations; these proposed amendments would likely also ensure that QEPs receive accurate information in QEP Disclosures, while also incentivizing good management and operational practices by CPOs and CTAs.

Disclosure of information about an offered 4.7 pool or trading program may also result in additional benefits inuring to QEP pool participants and advisory clients. One such benefit would be the expectation that CPOs and CTAs may seek to compete with one another to offer lower or more cost-efficient fees and expenses, or to minimize potential conflicts of interest, for the purposes of presenting more attractive and competitive investment products to prospective QEP participants and clients. This may result in CPOs and CTAs attempting to eliminate any fees and expenses extraneous to their 4.7 pools and trading programs, and/or to mitigate or resolve their conflicts of interest, each of which would benefit QEPs investing in these offerings. Additionally, by requiring the provision of standard disclosures to QEP pool participants and advisory clients, and the maintenance of such disclosures by the CPO or CTA in its books and records (which are subject to routine review by the Commission and NFA as part of their

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not aware of any analogous studies for investments in commodity pools, it seems plausible that the same factors matter in commodity interest markets.

[110] For example, Del Guercio and Reuter ("Mutual Fund Performance and the Incentive to Generate Alpha," *Journal of Finance*, 2014, 1673-1704) show that investors who buy directly from mutual funds managers are highly responsive to funds' risk-adjusted returns.

examination functions), the Commission preliminarily believes that these proposed amendments would result in higher quality disclosures on an on-going basis, even after a QEP participant or client receives information initially, due to the consistent and regular review of such QEP Disclosures by subject matter expert regulators, *i.e.*, the Commission and NFA, that this NPRM would facilitate. As previously acknowledged in this Proposal, many, if not most, CPOs and CTAs offering 4.7 pools and trading programs currently provide some level of disclosure, due to other applicable Federal statutory and regulatory requirements and/or investor demand. Given the complexity and unique nature of the commodity interest markets, especially in light of market and product developments in the past 30 years, the Commission preliminarily believes, however, that participants therein would benefit overall from the application of deep market and product expertise regarding the appropriate disclosure of risks, costs, and investing strategies for such products by the Commission and NFA to QEP Disclosures they may already regularly receive. By enabling this review of QEP Disclosures and requiring updates by CPOs and CTAs when necessary, the Commission preliminarily believes that these proposed amendments would thereby improve the quality and accuracy of QEP Disclosures, and as a result, enhance the understanding of market participants accessing the commodity interest markets through 4.7 pools and trading programs.

D. *Costs*:

The direct effect of these proposed amendments would be an increase in the operating costs of CPOs and CTAs utilizing Regulation 4.7, due to the addition of minimum content requirements for QEP Disclosures and requirements that such information be produced, disseminated to prospective pool participants and advisory clients, updated regularly, and kept as business records of the CPO or CTA. Regarding information production, CPOs and CTAs claiming Regulation 4.7 would be required to disclose information on several important features of their 4.7 pools and trading programs

relevant to expected future performance and activities of the CPO or CTA, including past performance, fees and expenses, principal risk factors, and potential conflicts of interest.

The Commission understands that some of the information proposed to be required is similar in content to information that many CPOs and CTAs are already providing based on the demands of such QEPs, or because they are otherwise required to produce such information for compliance requirements in other regulatory regimes, like that of the SEC. Additionally, though, the QEP Disclosures would also require the provision of information that CPOs and CTAs already produce to comply with other CFTC regulations. For example, CPOs are already required by Regulations 4.7(b)(3) and 4.22(a) and (b) to calculate the net asset value of 4.7 pool(s), accounting for fees, expenses, commissions, and other financial information, no less frequently than on a quarterly basis, for the purposes of producing account statements for QEP pool participants. The Proposal would also require CPOs and CTAs to provide past performance information prospectively to QEP pool participants. The Commission expects that the information required to produce a 4.7 pool's or trading program's performance history is already calculated by CPOs and CTAs for the purposes of providing periodic account statements, as required by other part 4 regulations.

In addition to this direct effect, the proposed disclosure requirements may affect how CPOs and CTAs operate more generally. For example, providing descriptions of 4.7 pools' and trading programs' investment program information, principal risk factors and past returns routinely may likely make such information more publicly available,[111] in

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[111] For example, the JOBS Act of 2012 required the SEC to adopt regulations that would permit the use of "general solicitation" and/or general advertising in private placements under its existing Regulation D. Pub. L. 112-106, 126 Stat. 306 (Apr. 5, 2012). As a result, the SEC adopted Regulation 506(c), which permits the use of general solicitation in Regulation D securities offerings, subject to certain conditions, including that all purchasers in the offering are accredited investors and that the issuer takes reasonable steps to verify their accredited investor status. *See also* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902, 52909-11 (Oct. 18, 2018); "Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings," A Small Entity Compliance Guide, SEC, *available at*

turn potentially making it easier for new pools and trading programs to replicate or copy such investment plans and activities of previously formed successful ones. Although this could theoretically discourage CPOs and CTAs from developing more innovative or novel investment offerings, the Commission believes that this potential risk, however, is mitigated by the fact that the complexity, variety, and novelty of commodity interest products appear to be increasing constantly and are expected to continue to generate and propel innovation by asset managers in the future.

E. *Questions*:

The Commission poses the following questions to better assess the costs and benefits of the proposed disclosure requirements that would be added to Regulations 4.7(b) and (c). The Commission requests further that, to the extent possible, commenters please provide quantitative bases for your responses.

1. To what extent is the information necessary to provide past performance and fees already gathered in order to provide account information under Regulations 4.7 and 4.22? What additional steps would be required to process and disseminate that information in QEP Disclosures, as required under the Proposal?
2. What are the costs of gathering and disseminating the other types of information required to be included in QEP Disclosures?
3. How will the fees and expenses charged by CPOs and CTAs for pools and trading programs operated under Regulation 4.7 be affected by the proposed disclosure requirements?
4. To what extent would CPOs' and CTAs' trading strategies be revealed in QEP Disclosures? How would such proposed disclosure requirements impact the

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https://www.sec.gov/info/smallbus/secg/general-solicitation-small-entity-compliance-guide. When relying on the exemption in Regulation 506(c), offerors today may comfortably use general solicitation and advertising in their Regulation D offerings, which has led to the use of advertisements, press releases, and other broadly available publications discussing the details of this type of investment.

development of such trading strategies and/or directly affect the behaviors of CPOs and CTAs utilizing Regulation 4.7?

F. *Section 15(a) Factors*:

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of the proposed amendments to Regulations 4.7(b)(2), (b)(5), (c)(1), and (c)(2), with respect to the following factors: protection of market participants and the public; efficiency, competitiveness, and financial integrity of markets; price discovery; sound risk management practices; and other public interest considerations.

As discussed above, for CPOs and CTAs operating pools and trading programs under Regulations 4.7, the NPRM would narrow the existing exemptions from the part 4 disclosure regulations available under Regulations 4.7(b)(2) and (c)(1). Under the Proposal, such CPOs and CTAs would be required to provide QEP Disclosures containing information regarding past performance, fees and expenses, principal risk factors, potential conflicts of interest, and other aspects of their investments to prospective QEP pool participants and advisory clients.

a. Protection of Market Participants and the Public

These proposed amendments to Regulation 4.7 would mandate a minimum amount of transparency into pools and trading programs trading commodity interests and restricting their offerings to QEPs. This could help such QEPs protect themselves against excessive fees and self-dealing, and generally help insure that the products offered by such CPOs and CTAs are performing and being operated, as anticipated. In addition, mandating QEP Disclosures and requiring that they be materially accurate and complete, rather than just optional and not materially misleading, will benefit market participants and the public by ensuring that prospective investors would receive QEP Disclosures containing, at a minimum, certain important general and performance information that they can reliably assume is kept current and materially complete with respect to the items

proposed to be required. Finally, requiring that such QEP Disclosures be maintained among CPOs' and CTAs' other books and records, and thus made available to the Commission and NFA, would allow for improved oversight of the regulated activities of CPOs and CTAs.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The proposed amendments regarding QEP Disclosures may also indirectly affect the functioning of commodity interest markets. To the extent that the proposed changes would increase transparency and affect the number or composition of pools and trading programs operated under Regulation 4.7, the NPRM might also affect the flow of investing in commodity interests. Financial economics literature suggests that, to the extent greater transparency into pools and trading programs increases the flow of non-commercial funds into commodity interest markets, that may also tend to reduce the costs to commercial traders using the futures market to hedge.[112] In that sense, the NPRM may have an indirect effect on the efficiency of the futures market in regard to the hedging costs of operating companies, commodity producers, and other commercial traders.

This increase in transparency resulting from the Proposal may also lead to QEPs having better information about fees and expenses, performance, and potential returns on their investments in 4.7 pools and trading programs, which may lead further to enhanced competition amongst CPOs and CTAs relying on Regulation 4.7. There is considerable evidence that eliminating prohibitions on price advertising, or mandating transparency of prices can lead to more "competitive markets," in the sense that service providers and vendors compete to offer lower prices to consumers of their products.[113] This general

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[112] Goldstein and Yang, "Commodity Financialization and Information Transmission," 2022, *Journal of Finance*, 77, 2613-2668.

[113] Milyo and Waldfogel ("The Effect of Price Advertising on Prices: Evidence in the Wake of 44 Liquormart," 1999, *American Economic Review*, 89, 1081-1096) show that the removal of a ban on liquor

trend suggests that by increasing transparency of information about 4.7 pools and trading programs through requiring minimum QEP Disclosures, CPOs and CTAs may, as a result, compete to offer lower fees and expenses and more efficiently and honestly implement their investment programs, resulting in better returns for QEPs.

c. Price Discovery

As noted above, an indirect effect of the Proposal could be a change in the flow of investment into commodity interests by non-commercial traders. Financial economics literature has found ambiguous results regarding the relationship between increased investment by non-commercial traders in commodity interest markets and price discovery.[114] As such, it is difficult for the Commission to *ex ante* predict how increasing transparency in the returns, fees, etc. of pools and trading programs operating under Regulation 4.7 would impact price discovery.

d. Sound Risk Management Practices

The NPRM may also help some QEPs better manage their business risks. For example, some QEPs are insurance companies and pensions funds that have specific operational risks that may be mitigated through appropriate financial investment. The availability and provision of more accurate and complete information about 4.7 pools and trading programs, including their fees and principal risk factors, may assist such QEPs in making more appropriate and targeted investment decisions that support their operations.

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price advertising led to decreases in the prices of advertised products, and an associated increase in quantity of sales by retailers who chose to advertise. More recently, Itern and Rigbi ("Price Transparency, Media, and Informative Advertising," 2023, *American Economic Journal: Microeconomics*, 15, 1-29) show that a law requiring price transparency on grocery prices led to 4-5% lower prices, as well as less price dispersion. Similarly, Brown ("Equilibrium Effects of Health Care Price Information," 2019, *The Review of Economics and Statistics*, 101, 699–712) finds that providing online information on health care procedure pricing led to lower prices and less price dispersion. In a paper on hedge fund returns, Aragon, Liang and Park ("Onshore and Offshore Hedge Funds: Are They Twins?" 2014, *Management Science*, 60, 74-91) show that advertising restrictions on hedge funds reduce the impact of past returns on new investment.

[114] Goldstein and Yang, "Commodity Financialization and Information Transmission," 2022, *Journal of Finance*, 77, 2613-2668.

As discussed above, the Proposal may also promote sound risk management by CPOs and CTAs. Specifically, requiring QEP Disclosures be maintained among CPOs' and CTAs' other books and records would allow for greater regulatory oversight of such intermediaries by the Commission and NFA. This requirement would help identify those intermediaries that lack suitable risk management practices, or that are engaging in practices that do not match their QEP Disclosures and other regulatory filings, potentially encouraging the adoption of better risk management practices. Finally, the anticipation of greater regulatory oversight and transparency in their operations might also provide an incentive for CPOs and CTAs to adopt and follow sound risk management practices.

e. Other Public Interest Considerations

The proposed requirement for CPOs and CTAs to include past performance information in their QEP Disclosures may enable regulators and the general public to gain a better understanding of the trading behavior of CPOs and CTAs utilizing Regulation 4.7, and consequently, the impact they have on commodity interest markets through their 4.7 pools and trading programs.

iv. Permitting Monthly Account Statements Consistent with Commission Exemptive Letters for Certain 4.7 Pools

A. *Baseline*:

CPOs operating pools under Regulation 4.7 are required to provide account statements to investors "no less frequently than quarterly within 30 days after the end of the reporting period."[115] Some of these 4.7 pools invest some or all of their assets in other pools or other types of collective investment vehicles, and are colloquially referred to, as discussed above, as "Funds of Funds." It is the Commission's understanding that the requirement that a 4.7 Fund of Funds pool provide account statements within 30 days

[115] 17 CFR 4.7(b)(3).

of the end of each quarter may become difficult to meet when its CPO may not receive an account statement regarding underlying investment returns until nearly the end of the required 30-day period. For example, if a 4.7 Fund of Funds pool regularly receives account statements from its investee pool's CPO 29 days after the end of the quarter, the CPO of the 4.7 Fund of Funds pool will likely find it difficult to provide accurate and complete account statements to its 4.7 Fund of Funds pool participants within 30 days of quarter end, as Regulation 4.7(b)(3) requires. In recognition of this potential difficulty, the Commission has routinely issued exemptive letters providing relief from this requirement, upon individual request, that permit the requesting CPO to distribute account statements for its 4.7 Fund of Funds pool(s) on a monthly basis within 45 days of the month-end. Nevertheless, the regulatory baseline remains the reporting requirements of Regulation 4.7(b)(3).

B. *Proposal*:

Consistent with longstanding exemptive letter relief described herein, the Proposal would add a provision to Regulation 4.7(b)(3) allowing CPOs of 4.7 pools that are Funds of Funds to distribute account statements on a monthly basis, within 45 days of the end of the month-end, provided that such CPOs notify their pool participants, so they know when to expect to receive their account statements.

C. *Benefits*:

Relative to the baseline, the primary benefit of this proposed amendment is to make it more feasible for 4.7 pools to invest in other pools or collective investment vehicles without potentially violating the periodic reporting requirements in Regulation 4.7. This proposed amendment may also allow CPOs of 4.7 pools to seek higher returns and/or better diversification for their participants by investing in other pools or other collective investment vehicles, without having to seek an exemptive letter to ensure they can meet their periodic reporting requirements, or without risking chronic compliance

violations. Consequently, this proposed amendment may encourage more CPOs to operate their 4.7 pools as Funds of Funds, and that may further result in higher returns and/or more effective diversification for their QEP pool participants. Additionally, offering this alternative account statement schedule would allow CPOs of 4.7 Fund of Funds pools to provide more accurate and complete account statements to their QEP participants more frequently, rather than generating quarterly account statements containing estimates of such information, if they have not yet received it. The Commission further predicts that an overall benefit of this proposed amendment would be more frequent, accurate, and complete periodic reporting to QEP participants in 4.7 Fund of Funds pools.

Finally, as noted above, exemptive letters providing relief from this reporting requirement have been commonly issued by the Commission for many years. Hence, as a practical matter, a primary benefit from this proposed amendment is CPOs of 4.7 Fund of Funds pools being able to adopt an alternative account statement schedule at their convenience or immediately when necessary, rather than being required to seek an exemptive letter individually from the Commission and potentially delaying operational decisions or changes until such letter is received. Moreover, the proposed amendment would also ensure that similarly situated registrants are treated in a consistent manner by making the alternative schedule available to all qualifying CPOs and 4.7 pools without the need for individual requests. Finally, if this proposed amendment were adopted, such CPOs would no longer have to expend legal and other compliance resources for the purpose of seeking such exemptive letters from the Commission for each of their 4.7 Fund of Funds pools needing this account statement schedule.

D. *Costs*:

Relative to the baseline, the primary cost of the proposed amendment would be the offering of a monthly account statement schedule, provided such monthly statements

are provided within 45 days of the end of the month, as an alternative to the current at least quarterly statement schedule provided within 30 days of the end of the quarter. Although the addition of 15 days may slightly delay the arrival of account information to QEP pool participants each month, such participants would also be receiving account statements containing more complete and accurate information more often, as a monthly schedule is more frequent than that required by Regulation 4.7(b)(3) currently, and the 15 days is designed to allow CPOs to compile more information about the 4.7 pool's underlying investments in such statements. CPOs of 4.7 Fund of Funds pools may also incur costs to effectively notify QEP participants of their adoption of this alternative account statement schedule. To the extent this alternative account statement schedule encourages CPOs to operate more of their 4.7 pools as Funds of Funds, QEP participants therein may experience slightly higher costs, as the fees and expenses from underlying pools or other collective investment vehicles could possibly be passed along to them by their 4.7 Fund of Funds pool's CPO.

E. *Questions*:

The Commission poses the following questions to better assess the costs and benefits of the proposed amendment permitting an alternative monthly account statement schedule for Fund of Funds pools operated by CPOs utilizing Regulation 4.7. The Commission requests further that, to the extent possible, commenters please provide quantitative bases for your responses.

1. How many CPOs operate their 4.7 pools as Funds of Funds, meaning such pools invest in other 4.7 pools, other commodity pools, or other collective investment vehicles?
2. How many CPOs operating 4.7 pools provide sufficiently timely account statements to their participants that are other 4.7 commodity pools, so as to allow

their CPOs to also produce their own account statements within 30 days of the quarter-end?

3. How many 4.7 Fund of Funds pools are currently able to provide quarterly account statements within 30 days of the end of the quarter, without the alternative monthly schedule currently provided exemptive relief?

F. *Section 15(a) Factors*:

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of the proposed amendments to Regulation 4.7(b)(3) with respect to the following factors: protection of market participants and the public; efficiency, competitiveness, and financial integrity of markets; price discovery; sound risk management practices; and other public interest considerations. As discussed above, the addition to Regulation 4.7(b)(3) of a permissible monthly account statement schedule would facilitate compliance with periodic reporting deadlines for CPOs of 4.7 Fund of Funds pools. Absent this change (and assuming such 4.7 pool has received no exemptive letter from the Commission), it may otherwise be impractical for such 4.7 pools to operate as Funds of Funds.

a. Protection of Market Participants and the Public

The baseline requirement in Regulation 4.7(b)(3) for at least quarterly account statements distributed within 30 days of the quarter-end helps ensure that QEP pool participants have access to timely information about the 4.7 pool's performance, and serves to protect such participants from malfeasance and other sources of poor pool performance. As discussed above, relative to the baseline, the proposed amendment would permit CPOs of 4.7 Fund of Funds pools to adopt an alternative monthly account statement schedule, provided such statements are provided within 45 days of the end of each month, and provided that they notify their QEP pool participants of such reporting schedule. To the extent the proposed amendment may encourage QEPs to participate in

4.7 Fund of Funds pools, rather than other 4.7 pools, it may require them to adjust to a different account statement schedule, but would likely ultimately provide them with more complete and accurate account statements on a more frequent basis. Additionally, the proposed amendment may facilitate the formation of 4.7 Fund of Funds pools by making it easier for their CPOs to comply with the applicable periodic reporting requirements under Regulation 4.7; this trend may also serve to benefit QEP participants, in that the CPOs of 4.7 Fund of Funds pools may be able to operate them in a manner that achieves exposure to a wider variety of underlying investment strategies through their investee pools, while continuing to remain compliant with their regulatory obligations. Finally, such CPOs would also have greater incentive and may possess more resources to monitor the behavior of their 4.7 Fund of Funds pools' underlying investments in other pools or funds, than QEPs directly investing therein.

b. Efficiency, Competitiveness, and Financial Integrity of Markets

The proposed amendment to Regulation 4.7(b)(3) may indirectly affect the functioning of commodity interest markets. To the extent that the proposed amendment affects the behavior of CPOs or the size and composition of their 4.7 Fund of Funds pools, it might also affect the flow of investing in commodity interests. The financial economics literature suggests that increased investment by non-commercial traders in commodity interest markets will generally reduce the difference between futures prices and expected future spot prices.[116] This effect means that, to the extent that offering an alternative schedule for periodic reporting in 4.7 Fund of Funds pools increases the flow of non-commercial funds into commodity interest markets, it will tend to also reduce the cost to commercial traders of using the futures market to hedge their risks. In that sense,

[116] Goldstein and Yang, "Commodity Financialization and Information Transmission," 2022, *Journal of Finance*, 77, 2613-2668.

this proposed amendment may have an indirect effect on efficiency of the futures markets in regard to the hedging costs of operating companies, commodity producers, or other commercial market participants.

c. Price Discovery

To the extent that the proposed amendment to Regulation 4.7(b)(3) affects the size or composition of 4.7 pools, it might also affect the flow of investing in commodity interests. The financial economics literature has found ambiguous results regarding the relationship between increased investment by non-commercial traders in commodity interest markets and commodity price discovery.[117] As such, it is difficult for the Commission to *ex ante* predict how the addition of an alternative account statement schedule for 4.7 Fund of Funds pools would impact price discovery.

d. Sound Risk Management Practices

Periodic reporting requirements in the form of regular account statements provided to pool participants serve as an effective means for participants as well as CPOs to monitor pools' risk management. Because the amount of funds a CPO manages through its operated pools is likely responsive to its past performance,[118] requiring the provision of complete financial information on pool performance through regular account statements can serve to provide an incentive for sound risk management by such CPOs. As discussed above, relative to the baseline, the proposed amendment to Regulation 4.7(b)(3) may encourage the formation of 4.7 Fund of Funds pools, whose CPOs may be better able to monitor the performance of underlying commodity pools or funds in which they invest, as compared to QEP participants investing directly therein. This also may

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[117] *Id.*

[118] Sirra and Tufano, "Costly Search and Mutual Fund Flows," Journal of Finance, 1998, 53, 1589-1622; Del Guercio and Reuter, "Mutual Fund Performance and the Incentive to Generate Alpha," Journal of Finance, 2014, 1673-1704.

positively influence CPOs' risk management practices in their pools, to the extent their participants are other 4.7 pools.

e. Other Public Interest Considerations

A key practical consideration is that, absent exemptive letters issued by the Commission, the existing Regulation 4.7(b)(3) appears to make it very difficult for CPOs to operate their 4.7 pools as Funds of Funds, while complying with applicable periodic reporting requirements. To the extent that facilitating the operation of such 4.7 pools as Funds of Funds is a legitimate policy goal of the Commission (as suggested by its routine granting of exemptive letters on this topic), changing the regulations to explicitly permit this alternative account statement schedule would be a more effective and direct means of accomplishing that objective that further ensures more consistent treatment of similarly situated registrants.

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.[119] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requests comment on whether the Proposal implicates any other specific public interest to be protected by the antitrust laws.

The Commission has considered the proposed amendments in this NPRM to determine whether they are anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the NPRM is anticompetitive and, if it is, what the anticompetitive effects are.

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[119] 7 U.S.C. 19(b).

Because the Commission has preliminarily determined that the Proposal is not anticompetitive and has no anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA. The Commission requests comment on whether there are less anticompetitive means of achieving the relevant purposes of the CEA that would otherwise be served by adopting the amendments proposed in this NPRM.

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 proposes to amend 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, 6l, 6m, 6n, 6o, 12a, and 23.

2. In § 4.7:

a. Remove the introductory text;

b. Revise paragraphs (a) and (b)(2)(i);

c. Add paragraphs (b)(2)(i)(A) through (G);

d. Remove and reserve paragraph (b)(2)(ii);

e. Add paragraph (b)(3)(iv);

f. Revise paragraphs (b)(5) and (c)(1)(i);

g. Add paragraphs (c)(1)(i)(A) through (H);

h. Remove and reserve paragraph (c)(1)(ii); and

i. Revise paragraphs (c)(2) and (d)(4)(i) and (ii).

The revisions and additions 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.

(a) *Definitions*. (1) *Affiliate* of, or a person *affiliated* with, a specified person means a person that directly or indirectly through one or more persons, controls, is controlled by, or is under common control with the specified person.

(2) *Exempt account* means the account of a qualified eligible person that is directed or guided by a commodity trading advisor pursuant to an effective claim for exemption under this section.

(3) *Exempt pool* means a pool that is operated pursuant to an effective claim for exemption under this section.

(4) *Non-United States person* means:

(i) A natural person who is not a resident of the United States;

(ii) A partnership, corporation or other entity, other than an entity organized principally for passive investment, organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction;

(iii) An estate or trust, the income of which is not subject to United States income tax regardless of source;

(iv) An entity organized principally for passive investment such as a pool, investment company or other similar entity; *Provided*, that units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a

pool with respect to which the operator is exempt from certain requirements of this part by virtue of its participants being Non-United States persons; and

(v) A pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States.

(5) *Portfolio Requirement* means that a person:

(i) Owns securities (including pool participations) of issuers not affiliated with such person and other investments with an aggregate market value of at least $4,000,000;

(ii) Has had on deposit with a futures commission merchant, for its own account at any time during the six-month period preceding either the date of sale to that person of a pool participation in the exempt pool or the date that the person opens an exempt account with the commodity trading advisor, at least $400,000 in exchange-specified initial margin and option premiums, together with any required minimum security deposits for retail forex transactions (defined in § 5.1(m) of this chapter), for commodity interest transactions; or

(iii) Owns a portfolio comprised of a combination of the funds or property specified in paragraphs (a)(5)(i) and (ii) of this section, in which the sum of the funds or property includable under paragraph (a)(5)(i) of this section, expressed as a percentage of the minimum amount required thereunder, and the amount of initial margin, option premiums, and minimum security deposits includable under paragraph (a)(5)(ii) of this section, expressed as a percentage of the minimum amount required thereunder, equals at least one hundred percent. An example of a composite portfolio acceptable under this paragraph (a)(5)(iii) would consist of $2,000,000 in securities and other property (50% of paragraph (a)(5)(i) of this section) and $200,000 in initial margin, option premiums, and minimum security deposits (50% of paragraph (a)(5)(ii) of this section).

(6) *Qualified eligible person* means any person, acting for its own account or for the account of a qualified eligible person, who the commodity pool operator reasonably

believes, at the time of the sale to that person of a pool participation in the exempt pool, or who the commodity trading advisor reasonably believes, at the time that person opens an exempt account, is eligible to invest in the exempt pool or open the exempt account and is included in the following list of persons that is divided into two categories: Persons who are not required to satisfy the Portfolio Requirement defined in paragraph (a)(5) of this section to be qualified eligible persons, and those persons who must satisfy the Portfolio Requirement in paragraph (a)(5) of this section to be qualified eligible persons.

(i) *Persons who need not satisfy the Portfolio Requirement to be qualified eligible persons.* (A) A futures commission merchant registered pursuant to section 4d of the Act, or a principal thereof;

(B) A retail foreign exchange dealer registered pursuant to section 2(c)(2)(B)(i)(II)(gg) of the Act, or a principal thereof;

(C) A swap dealer registered pursuant to section 4s(a)(1) of the Act, or a principal thereof;

(D) A broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, or a principal thereof;

(E) A commodity pool operator registered pursuant to section 4m of the Act, or a principal thereof; *Provided*, that the pool operator:

(*1*) Has been registered and active as such for two years; or

(*2*) Operates pools which, in the aggregate, have total assets in excess of $5,000,000;

(F) A commodity trading advisor registered pursuant to section 4m of the Act, or a principal thereof; *Provided*, that the trading advisor:

(*1*) Has been registered and active as such for two years; or

(*2*) Provides commodity interest trading advice to commodity accounts which, in the aggregate, have total assets in excess of $5,000,000 deposited at one or more futures commission merchants;

(G) An investment adviser registered pursuant to section 203 of the Investment Advisers Act of 1940 ("Investment Advisers Act") or pursuant to the laws of any state, or a principal thereof; *Provided*, that the investment adviser:

(*1*) Has been registered and active as such for two years; or

(*2*) Provides securities investment advice to securities accounts which, in the aggregate, have total assets in excess of $5,000,000 deposited at one or more registered securities brokers;

(H) A "qualified purchaser" as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 ("Investment Company Act");

(I) A "knowledgeable employee" as defined in § 270.3c-5 of this title;

(J) With respect to an exempt pool:

(*1*) The commodity pool operator, commodity trading advisor or investment adviser of the exempt pool offered or sold, or an affiliate of any of the foregoing;

(*2*) A principal of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or an affiliate of any of the foregoing;

(*3*) An employee of the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or of an affiliate of any of the foregoing (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the exempt pool, other commodity pools operated by the pool operator of the exempt pool or other accounts advised by the trading advisor or the investment adviser of

the exempt pool, or by the affiliate; *Provided*, that such employee has been performing such functions and duties for or on behalf of the exempt pool, pool operator, trading advisor, investment adviser or affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(*4*) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the exempt pool or the commodity pool operator, commodity trading advisor or investment adviser of the exempt pool, or any other employee of, or agent so engaged by, an affiliate of any of the foregoing (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); *Provided*, that such employee or agent:

(*i*) Is an accredited investor as defined in § 230.501(a)(5) or (a)(6) of this title; and

(*ii*) Has been employed or engaged by the exempt pool, commodity pool operator, commodity trading advisor, investment adviser or affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months;

(*5*) The spouse, child, sibling or parent of a person who satisfies the criteria of paragraph (a)(6)(i)(J)(*1*), (*2*), (*3*) or (*4*) of this section; *Provided*, that:

(*i*) An investment in the exempt pool by any such family member is made with the knowledge and at the direction of the person; and

(*ii*) The family member is not a qualified eligible person for the purposes of paragraph (a)(6)(ii)(K) of this section;

(*6*) Any person who acquires a participation in the exempt pool by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(6)(i)(J)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section;

(*7*) The estate of any person listed in paragraph (a)(6)(i)(J)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section; or

(*8*) A company established by any person listed in paragraph (a)(6)(i)(J)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(6)(i)(J)(*6*) or (*7*) of this section;

(K) With respect to an exempt account:

(*1*) An affiliate of the commodity trading advisor of the exempt account;

(*2*) A principal of the commodity trading advisor of the exempt account or of an affiliate of the commodity trading advisor;

(*3*) An employee of the commodity trading advisor of the exempt account or of an affiliate of the trading advisor (other than an employee performing solely clerical, secretarial or administrative functions with regard to such person or its investments) who, in connection with his or her regular functions or duties, participates in the investment activities of the trading advisor or the affiliate; *Provided*, that such employee has been performing such functions and duties for or on behalf of the trading advisor or the affiliate, or substantially similar functions or duties for or on behalf of another person engaged in providing commodity interest, securities or other financial services, for at least 12 months;

(*4*) Any other employee of, or an agent engaged to perform legal, accounting, auditing or other financial services for, the commodity trading advisor of the exempt account or any other employee of, or agent so engaged by, an affiliate of the trading advisor (other than an employee or agent performing solely clerical, secretarial or administrative functions with regard to such person or its investments); *Provided*, that such employee or agent:

(*i*) Is an accredited investor as defined in § 230.501(a)(5) or (a)(6) of this title; and

(*ii*) Has been employed or engaged by the commodity trading advisor or the affiliate, or by another person engaged in providing commodity interest, securities or other financial services, for at least 24 months; or

(*5*) The spouse, child, sibling or parent of the commodity trading advisor of the exempt account or of a person who satisfies the criteria of paragraph (a)(6)(i)(K)(*1*), (*2*), (*3*) or (*4*) of this section; *Provided*, that:

(*i*) The establishment of an exempt account by any such family member is made with the knowledge and at the direction of the person; and

(*ii*) The family member is not a qualified eligible person for the purposes of paragraph (a)(6)(ii)(K) of this section;

(*6*) Any person who acquires an interest in an exempt account by gift, bequest or pursuant to an agreement relating to a legal separation or divorce from a person listed in paragraph (a)(6)(i)(K)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section;

(*7*) The estate of any person listed in paragraph (a)(6)(i)(K)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section;

(*8*) A company established by any person listed in paragraph (a)(6)(i)(K)(*1*), (*2*), (*3*), (*4*) or (*5*) of this section exclusively for the benefit of (or owned exclusively by) that person and any person listed in paragraph (a)(6)(i)(K)(*6*) or (*7*) of this section;

(L) A trust; *Provided*, that:

(*1*) The trust was not formed for the specific purpose of either participating in the exempt pool or opening an exempt account; and

(*2*) The trustee or other person authorized to make investment decisions with respect to the trust, and each settlor or other person who has contributed assets to the trust, is a qualified eligible person;

(M) An organization described in section 501(c)(3) of the Internal Revenue Code (the "IRC"); *Provided*, that the trustee or other person authorized to make investment

decisions with respect to the organization, and the person who has established the organization, is a qualified eligible person;

(N) A Non-United States person;

(O) An entity in which all of the unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons;

(P) An exempt pool; or

(Q) Notwithstanding paragraph (a)(6)(ii) of this section, an entity as to which a notice of eligibility has been filed pursuant to § 4.5 which is operated in accordance with such rule and in which all unit owners or participants, other than the commodity trading advisor claiming relief under this section, are qualified eligible persons.

(ii) *Persons who must satisfy the Portfolio Requirement to be qualified eligible persons.* With respect to the persons listed in this paragraph (a)(6)(ii), the commodity pool operator must reasonably believe, at the time of the sale to such person of a participation in the exempt pool, or the commodity trading advisor must reasonably believe, at the time such person opens an exempt account, that such person satisfies the Portfolio Requirement in paragraph (a)(5) of this section.

(A) An investment company registered under the Investment Company Act or a business development company as defined in section 2(a)(48) of such Act not formed for the specific purpose of either investing in the exempt pool or opening an exempt account;

(B) A bank as defined in section 3(a)(2) of the Securities Act of 1933 (the "Securities Act") or any savings and loan association or other institution as defined in section 3(a)(5)(A) of the Securities Act acting for its own account or for the account of a qualified eligible person;

(C) An insurance company as defined in section 2(13) of the Securities Act acting for its own account or for the account of a qualified eligible person;

(D) A plan established and maintained by a state, its political subdivisions, or any agency or instrumentality of a state or its political subdivisions, for the benefit of its employees, if such plan has total assets in excess of $5,000,000;

(E) An employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974; *Provided*, that the investment decision is made by a plan fiduciary, as defined in section 3(21) of such Act, which is a bank, savings and loan association, insurance company, or registered investment adviser; or that the employee benefit plan has total assets in excess of $5,000,000; or if the plan is self-directed, that investment decisions are made solely by persons that are qualified eligible persons;

(F) A private business development company as defined in section 202(a)(22) of the Investment Advisers Act;

(G) An organization described in section 501(c)(3) of the IRC, with total assets in excess of $5,000,000;

(H) A corporation, Massachusetts or similar business trust, or partnership, limited liability company or similar business venture, other than a pool, which has total assets in excess of $5,000,000, and is not formed for the specific purpose of either participating in the exempt pool or opening an exempt account;

(I) A natural person whose individual net worth, or joint net worth with that person's spouse, at the time of either his purchase in the exempt pool or his opening of an exempt account would qualify him as an accredited investor as defined in § 230.501(a)(5) of this title;

(J) A natural person who would qualify as an accredited investor as defined in § 230.501(a)(6) of this title;

(K) A pool, trust, insurance company separate account or bank collective trust, with total assets in excess of $5,000,000, not formed for the specific purpose of either participating in the exempt pool or opening an exempt account, and whose participation

in the exempt pool or investment in the exempt account is directed by a qualified eligible person; or

(L) Except as provided for the governmental entities referenced in paragraph (a)(6)(ii)(D) of this section, if otherwise authorized by law to engage in such transactions, a governmental entity (including the United States, a state, or a foreign government) or political subdivision thereof, or a multinational or supranational entity or an instrumentality, agency, or department of any of the foregoing.

(7) *United States* means the United States, its states, territories or possessions, or an enclave of the United States government, its agencies or instrumentalities.

(b) * * *

(2) * * *

(i) Exemption from the specific requirements in §§ 4.24 and 4.26(d) with respect to each pool; *Provided*, that any offering memorandum distributed in connection with soliciting prospective participants in the exempt pool be distributed consistent with the requirements of § 4.21 and include:

(A) A description of principal risk factors for the exempt pool, as required by § 4.24(g);

(B) A description of the exempt pool's investment program and use of proceeds, as required by § 4.24(h);

(C) A description of fees and expenses, as required by § 4.24(i);

(D) A description of conflicts of interest, as required by § 4.24(j);

(E) Performance disclosures, as required by § 4.25, with the exception of information required by paragraphs (a)(3) and (c)(2) of § 4.25;

(F) All other disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and

(G) The following statement, prominently disclosed on the cover page of the offering memorandum:

"PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH POOLS WHOSE PARTICIPANTS ARE LIMITED TO QUALIFIED ELIGIBLE PERSONS, AN OFFERING MEMORANDUM FOR THIS POOL IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A POOL OR UPON THE ADEQUACY OR ACCURACY OF AN OFFERING MEMORANDUM. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS OFFERING OR ANY OFFERING MEMORANDUM FOR THIS POOL PRIOR TO FIRST USE."

(3) * * *

(iv) Where the exempt pool is invested in one or more other pools or funds operated by third parties, the commodity pool operator may choose instead to prepare and distribute to its pool participants statements signed and affirmed in accordance with § 4.22(h) on a monthly basis within 45 days of the month-end; *Provided*, that the statements otherwise meet the conditions of paragraphs (b)(3)(i) through (ii) of this section, and that the commodity pool operator notifies its pool participants of this alternate distribution schedule in the exempt pool's offering memorandum distributed prior to the initial investment, or upon its adoption of this reporting schedule, for then existing pool participants.

* * * * *

(5) *Recordkeeping relief.* Exemption from the specific requirements of § 4.23; *Provided*, that the commodity pool operator must maintain the offering memoranda and reports referred to in paragraphs (b)(2), (3), and (4) of this section, and all other books and records prepared in connection with its activities as the pool operator of the exempt pool (including, without limitation, records relating to the qualifications of qualified eligible persons and substantiating any performance representations). Books and records that are not maintained at the pool operator's main business office shall be maintained by one or more of the following: the pool's administrator, distributor, or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool. Such books and records must be made available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of § 1.31 of this chapter.

* * * * *

(c) * * *

(1) * * *

(i) Exemption from the specific requirements of §§ 4.34 and 4.36(d); *Provided*, that any brochure or other disclosure statement delivered by a commodity trading advisor to its prospective qualified eligible person clients be distributed consistent with the requirements of § 4.31 and include:

(A) A description of persons to be identified, as required by § 4.34(e);

(B) A description of principal risk factors, as required by § 4.34(g);

(C) A description of the exempt commodity trading advisor's trading program, as required by § 4.34(h);

(D) A description of fees, as required by § 4.34(i);

(E) A description of conflicts of interest, as required by § 4.34(j);

(F) Performance disclosures, as required by § 4.35;

(G) All additional disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading; and

(H) The following statement, prominently displayed on the cover page of the brochure or other disclosure statement:

"PURSUANT TO AN EXEMPTION FROM THE COMMODITY FUTURES TRADING COMMISSION IN CONNECTION WITH ACCOUNTS OF QUALIFIED ELIGIBLE PERSONS, THIS BROCHURE OR ACCOUNT DOCUMENT IS NOT REQUIRED TO BE, AND HAS NOT BEEN, FILED WITH THE COMMISSION. THE COMMODITY FUTURES TRADING COMMISSION DOES NOT PASS UPON THE MERITS OF PARTICIPATING IN A TRADING PROGRAM OR UPON THE ADEQUACY OR ACCURACY OF COMMODITY TRADING ADVISOR DISCLOSURE. CONSEQUENTLY, THE COMMODITY FUTURES TRADING COMMISSION HAS NOT REVIEWED OR APPROVED THIS TRADING PROGRAM OR THIS BROCHURE OR ACCOUNT DOCUMENT PRIOR TO FIRST USE."

* * * * *

(2) *Recordkeeping relief.* Exemption from the specific requirements of § 4.33; *Provided*, that the commodity trading advisor must maintain, at its main business office, the trading brochure or disclosure statement referred to in paragraph (c)(1) of this section, and all other books and records prepared in connection with its activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations). Such books and records must be made available to

any representative of the Commission, the National Futures Association, and the United States Department of Justice in accordance with the provisions of § 1.31 of this chapter.

(d) * * *

(4)(i) Any exemption from the requirements of §§ 4.22, 4.23, 4.24, 4.25, and 4.26 claimed hereunder with respect to a pool shall not affect the obligation of the commodity pool operator to comply with all other applicable provisions of this part, the Act and the Commission's rules and regulations, with respect to the pool and any other pool the pool operator operates or intends to operate.

(ii) Any exemption from the requirements of §§ 4.33, 4.34, and 4.36 claimed hereunder shall not affect the obligation of the commodity trading advisor to comply with all other applicable provisions of this part, the Act and the Commission's rules and regulations, with respect to any qualified eligible person and any other client to which the commodity trading advisor provides or intends to provide commodity interest trading advice.

* * * * *

3. In § 4.14, revise paragraph (a)(8)(i)(C)(*2*) to read as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

(a) * * *

(8) * * *

(i) * * *

(C) * * *

(*2*) With the exception of the pool's operator, advisor, and their principals, solely "Non-United States persons," as that term is defined in § 4.7(a)(7), will contribute funds or other capital to, and will own beneficial interests in, the pool; *Provided*, that units of participation in the pool held by persons who do not qualify as Non-United States persons

or otherwise qualified eligible persons represent in the aggregate less than 10 percent of the beneficial interest of the pool;

* * * * *

4. In § 4.21, revise paragraph (a)(2) to read as follows:

§ 4.21 Required delivery of pool Disclosure Document.

(a) * * *

(2) For the purpose of the Disclosure Document delivery requirement, including any offering memorandum delivered pursuant to § 4.7(b)(2)(i) or § 4.12(b)(2)(i), the term "prospective pool participant" does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of the offered pool.

* * * * *

5. In § 4.22:

a. Revise paragraphs (a)(4), (c)(7) introductory text, (c)(8), (d)(1) introductory text, (d)(2)(i) introductory text, (f)(2) introductory text, and (f)(2)(iv)(B) and (C); and

b. Remove paragraph (f)(2)(iv)(D).

The revisions read as follows:

§ 4.22 Reporting to pool participants.

(a) * * *

(4) For the purpose of the Account Statement delivery requirement, including any Account Statement distributed pursuant to § 4.7(b)(3) or § 4.12(b)(2)(ii), the term "participant" does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested.

* * * * *

(c) * * *

(7) For a pool that has ceased operation prior to, or as of, the end of the fiscal year, the commodity pool operator may provide the following, within 90 days of the permanent cessation of trading, in lieu of the annual report that would otherwise be required by § 4.22(c) or § 4.7(b)(4):

* * * * *

(8) For the purpose of the Annual Report distribution requirement, including any annual report distributed pursuant to § 4.7(b)(4) or § 4.12(b)(2)(iii), the term "participant" does not include a commodity pool operated by a pool operator that is the same as, or that controls, is controlled by, or is under common control with, the pool operator of a pool in which the commodity pool has invested; *Provided*, that the Annual Report of such investing pool contain financial statements that include such information as the Commission may specify concerning the operations of the pool in which the commodity pool has invested.

(d)(1) Subject to the provisions of paragraphs (d)(2) and (g)(2) of this section, the financial statements in the Annual Report required by this section or by § 4.7(b)(4) must be presented and computed in accordance with United States generally accepted accounting principles consistently applied and must be audited by an independent public accountant; *Provided, however*, and subject to the exception in paragraph (c)(7)(iii)(B) of this section, that the requirement that the Annual Report be audited by an independent public accountant does not apply for any fiscal year during which the only participants in the pool are one or more of the pool operator, the pool's commodity trading advisor, any person controlling, controlled by, or under common control with the pool operator or trading advisor, and any principal of the foregoing; and *Provided further*, that the commodity pool operator obtains a written waiver from each such pool participant of their right to receive an audited Annual Report for such fiscal year, maintains such waivers in accordance with § 4.23, and makes such waivers available to the Commission

or National Futures Association upon request. The requirements of § 1.16(g) of this chapter shall apply with respect to the engagement of such independent public accountants, except that any related notifications to be made may be made solely to the National Futures Association, and the certification must be in accordance with § 1.16 of this chapter, except that the following requirements of that section shall not apply:

* * * * *

(2)(i) Where a pool is organized in a jurisdiction other than the United States, the financial statements in the Annual Report required by this section or by § 4.7(b)(4) may be presented and computed in accordance with the generally accepted accounting principles, standards or practices followed in such other jurisdiction; *Provided*, that:

* * * * *

(f) * * *

(2) In the event a commodity pool operator finds that it cannot obtain information necessary to prepare annual financial statements for a pool that it operates within the time specified in paragraph (c) of this section or § 4.7(b)(4)(i), as a result of the pool investing in another collective investment vehicle, it may claim an extension of time under the following conditions:

* * * * *

(iv) * * *

(B) For all reports prepared under paragraph (c) of this section and for reports prepared under § 4.7(b)(4)(i) that are audited by an independent public accountant, the commodity pool operator has been informed by the independent public accountant engaged to audit the commodity pool's financial statements that specified information required to complete the pool's Annual Report is necessary in order for the accountant to render an opinion on the commodity pool's financial statements. The notice must include

the name, main business address, main telephone number, and contact person of the accountant; and

(C) The information specified by the accountant cannot be obtained in sufficient time for the Annual Report to be prepared, audited, and distributed before the Extended Date.

* * * * *

Issued in Washington, DC, on October 3, 2023, by the Commission.

Christopher Kirkpatrick,

Secretary of the Commission.

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

Appendices to Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools: Updating the 'Qualified Eligible Person' Definition; Adding Minimum Disclosure Requirements for Pools and Trading Programs; Permitting Monthly Account Statements for Funds of Funds; Technical Amendments – Commission Voting Summary and Commissioners' Statements

Appendix 1 – Commission Voting Summary

On this matter, Chairman Behnam and Commissioners Johnson and Goldsmith Romero voted in the affirmative. Commissioner Pham concurred. Commissioner Mersinger voted in the negative.

Appendix 2 – Statement of Commissioner Kristin N. Johnson

History of Disclosure-Centered Regulation

Federal regulation expressly establishes that customer protection is a core principle of and central to the oversight mission of the Commodity Futures Trading Commission (CFTC or Commission). For almost a century, mandatory disclosure has played a critical role in market regulation, directly shaping the development of the U.S.

capital and derivatives markets.[1] Requiring disclosure of material information mitigates inherent asymmetries of information.

The Commission allocates resources among registration and supervision responsibilities and enforcement actions to foster effective oversight of market participants and transactions. This approach not only enhances the integrity of markets, but effectively protects customers from material misrepresentations and fraud.

Congress has judiciously introduced Federal markets legislation, often in response to nationwide or global market-wide crises, and has carefully balanced Federal regulation with the role and significance of state regulatory oversight.

One hundred years ago, Congress passed the Grain Futures Act—the statute that was superseded by the Commodity Exchange Act (CEA) and that established the Grain Futures Administration (GFA, the predecessor of the CFTC)—authorizing the GFA to regulate certain commodity futures. A decade later, in the wake of the stock market crash of 1929 and the conclusion of the roaring '20s—a period characterized by a surging economy and intense market speculation accompanied by pervasive fraud in retail securities markets[2]—Congress adopted the Securities Act of 1933 (the Securities Act). The stock market crash of 1929 triggered staggering losses by retail investors and

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[1] Mandatory disclosure serves as a theoretical and practical linchpin in capital markets regulation. Unless an offering is otherwise exempt from registration, Section 5 of the Securities Act requires issuers who seek to raise capital to register the offering with the Securities and Exchange Commission (SEC) prior to offering the securities to investors for sale. *See* 15 U.S.C. 77a-77mm. To complete the registration process, issuers must compile and distribute extensive disclosures describing, among other matters, the nature of the issuer's business; the educational and professional profiles of executives appointed to senior management positions and individuals selected to serve on the board of directors; tangible and intangible property; risk factors; and the financial health—current and forecasted earnings and revenues—of the firm.

[2] Investigative Congressional hearings revealed that more than half of the $25 billion in securities distributed between the end of World War I and the stock market crash of 1929 were worthless. H.R. REP. NO. 73-85, at 2 (1933); s*ee also* U.S. Senate Hist. Off., Subcommittee on Senate Resolutions 84 and 239, *https://www.senate.gov/about/powers-procedures/investigations/pecora.htm.* Detailed accounts of issuers' intentional dissemination of false and misleading information punctuated evidence of fraud and stunning acts of avarice. During this period, securities listed on the New York Stock Exchange declined from a pre-crash high of $89 billion to $15 billion in 1932. One critical investigative report suggested that "had there been full disclosure," issuers' schemes "could not long have survived the fierce light of publicity and criticism." Ferdinand Pecora, Wall Street Under Oath: The Story of Our Modern Money Changers (1939).

initiated a long period of industrial decline and widespread unemployment, ultimately leading to deeply depressed macroeconomic conditions.

Consistent with an adage made popular by U.S. Supreme Court Justice Louis Brandeis—"[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman"[3]—Congress adopted a disclosure-centric approach.

Disclosure increases transparency, reduces asymmetries of information, and mitigates fraud and manipulation as well as other misconduct in our financial markets. In the absence of mandatory disclosures, investors may have limited access to the material information needed to make a reasonable investment decision. Mandatory disclosure neutralizes incentives to misrepresent material information.

It is incumbent upon the Commission to continue to carry out this mandate reflected in the principles of Federal markets regulation and firmly established in the CEA.

Novel Financial Products and Evolving Derivatives Markets

Novel financial products, such as digital assets and innovative technologies like distributed digital ledger or blockchain technology and generative artificial intelligence, increasingly dominate regulatory discourse and popular discussions. The derivatives markets offer futures on digital assets, which are priced on a volatile spot market, employ technology that is highly complex and rapidly changing, and offer novel market structures including market structures designed to permit retail customers direct access to trading and clearing platforms. In some contexts, trading structures eliminate intermediaries such as a futures commission merchants (FCM), raising important questions regarding the best approach for preserving important customer protections such as segregation of customer assets.

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[3] Louis D. Brandeis, Other People's Money And How The Bankers Use It, 92 (1914).

As our markets are evolving, more and more vulnerable customers increasingly engage in complex derivatives activities. It is important that these customers have an opportunity to consider critical, material information when making an investment decision. Disclosure serves a valuable role in protecting customers.

Consequently, regulators must continuously revisit regulation to ensure that it remains fit for purpose. Our regulations must keep pace with innovation in our evolving markets. In particular, we must refresh our understanding of which customers may benefit from disclosure when investing, directly or indirectly, in derivatives markets.

***

I support the notice of proposed rulemaking (NPRM) regarding commodity pool operators (CPOs), commodity trading advisors (CTAs), and commodity pools operated under CFTC Regulation 4.7. The NPRM addresses regulatory gaps that have arisen due to, at least in part, the changing dynamics in the derivatives markets. The proposed amendments adapt the CFTC's existing regulations to reinforce, preserve, and promote customer protection safeguards. CFTC Regulation 4.7 dictates the disclosure obligations of CPOs and CTAs by establishing the test for classifying a natural person as a retail investor to whom extensive disclosures and financial reports must be delivered or a financially sophisticated investor with respect to whom a more streamlined process may be warranted.

Updating Our Understanding of The Legal Standard for "Financial Sophistication"

Adopted in 1979, part 4 of the CFTC's regulations requires CPOs and CTAs to deliver disclosures and regular financial reports to pool participants or advisory clients.[4] This framework acts as an important layer of protection for customers, by providing customers with material information about the commodity pool or trading platform,

[4] 17 CFR 4.7. On January 2, 1979, the CFTC adopted rules for the regulation of CPOs and CTAs. *See* Commodity Pool Operators and Commodity Trading Advisors; Final Rules, 44 FR 1918 (Jan. 8, 1979). These rules became effective April 1, 1979.

which may include investment objectives, past performance record, conflicts of interest, risk disclosures, or other prescribed information.

CFTC Regulation 4.7, adopted in 1992, creates an exemption from certain part 4 requirements for CPOs and CTAs that privately offer or sell pool participations solely to qualified eligible persons (QEPs) pursuant to an exemption under the Securities Act or direct or guide the commodity trading accounts of QEPs. As a result, QEPs or wealthy individuals do not receive any of the specific disclosures otherwise provided to non-QEPs or retail investors (*e.g.*, offering memoranda, brochures, or disclosure statements) and receive streamlined financial reporting.

A natural person, investing capital in a commodity pool or whose trading account invests in derivatives, would be a QEP if the individual is an "accredited investor," as defined by the SEC in Regulation D under the Securities Act, and also meets the CFTC's portfolio requirement.[5] The portfolio requirement is designed to ensure that a person's investments reach a specified threshold related to the person's securities portfolio and derivatives account. This functions as a proxy for identifying individuals who, based on the size of their investments, have "substantial investment experience and thus a high degree of sophistication with regard to investments as well as financial resources to withstand the risk of their investments."[6]

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[5] 17 CFR 4.7(a)(3)(ix) and (x). The portfolio test applies to certain legal entities and natural persons. Generally, the portfolio test is satisfied if the natural person owns securities of unaffiliated issuers and other investments with a market value of at least $2,000,000 (Securities Portfolio Test); has on deposit with an FCM for such person's account at least $200,000 in initial margin, option premiums, or minimum security deposits (Initial Margin and Premium Test); or owns a portfolio of funds and assets that, when expressed as percentages of the first two thresholds, meet or exceed 100%. 17 CFR 4.7(a)(1)(v).

[6] Exemption for Commodity Pool Operators With Respect to Offerings to Qualified Eligible Participants; Exemption for Commodity Trading Advisors With Respect to Qualified Eligible Clients, 57 FR 34853, 34854 (Aug. 7, 1992). To clarify, in respect of natural persons, the portfolio requirement does not facilitate the concurrent use of an exemption from registration under the Securities Act and the CFTC Regulation 4.7 exemption because the QEP status is not completely harmonized with the accredited investor status of the SEC.

Recognizing that classifying individuals as QEPs may result in reduced regulatory protections, it is therefore critical that the Commission is careful in setting out the standard for determining that an individual is a QEP.

An individual customer may experience substantial losses if the market moves against the customer's positions. This concern is heightened by the fact that the participation interests acquired in an exempt pool offering are not registered offerings subject to the SEC's robust public offering disclosure regime outlined in public offering registration obligation.

Commodity pools are commonly hedge funds that may use leverage to magnify returns, engage in speculation, and take directional positions. These types of structured investment strategies may result in amplified losses for customers.

While our markets are undergoing unprecedented changes, robust customer protections must remain consistent and effective. Natural persons who currently meet the outdated thresholds in the portfolio requirement test introduced in 1992 are not necessarily sophisticated investors in today's markets. What's worse, under the existing regulation, individuals that meet the QEP test may not be receiving disclosures to be fully apprised of the risks associated with investing in novel derivatives instruments, whether directly or through a commodity pool, and our evolving markets.

Two-Part Recalibration of Customer Protection Measures

This NPRM has two important objectives.[7]

First, it doubles the financial thresholds of the portfolio requirement test to account for inflation since the exemption was adopted in 1992, thereby recalibrating the

[7] The NPRM also revises the timing of certain pools' periodic financial reporting, based on long-standing no-action letters, to permit funds of funds to provide account statements within 45 days of the month-end rather than 30 days of the quarter-end and makes technical adjustments to reorganize CFTC Regulation 4.7 to improve its structure and utility (*e.g.*, to fix cross-references).

standard for determining which pool investors or advisory clients are QEPs.[8] If this proposed amendment is adopted, certain pool participants and advisory clients that do not receive disclosures or receive streamlined financial reporting under the existing regulation will benefit from the full range of customer protection measures in part 4 of the CFTC's regulations. The proposed thresholds are not even as high as those that were originally proposed in 1992, and so I do not find the amended portfolio requirement to be too restrictive or limiting today, more than 30 years later.[9] Perhaps the thresholds could be higher.

Second, the NPRM sets a new minimum standard of disclosure regarding pools and trading programs that must be provided to all QEPs or wealthy investors, while retaining the more robust disclosure and reporting requirements applicable to non-QEPs or retail investors.[10] The adoption of this amendment will result in heightened customer protections for QEPs that currently are entitled to none. I strongly believe that as a market regulator, we must, when warranted, carefully recalibrate how investors participate in our evolving markets to ensure that CPOs and CTAs provide a prospective or actual investor, whether such investor is a QEP or not, with information that is sufficient and adequate to enable the investor to assess the material risks and rewards of the commodity pool or trading program. Disclosure is key to remediating the dangers of information asymmetry.

I appreciate the staff's efforts in heightening disclosure and enhancing customer protections and their cooperation in implementing my comments to refine the preamble

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[8] The Commission is proposing to update the portfolio requirement's thresholds by doubling the Securities Portfolio Test to $4,000,000 and the Initial Margin and Premium Test to $400,000.

[9] As originally proposed in 1992, the portfolio requirement had two components: (1) $5,000,000 in securities or (2) $1,000,000 deposited as initial margin and options premiums with an FCM for commodity interest trading. 57 FR at 34855.

[10] The new minimum standards will require the disclosure of principal risk factors, investment programs, use of proceeds, custodians, conflicts of interest, fees and expenses, and past performance, and the retention of disclosures as business records.

and regulatory text concerning the specific disclosures that will be required under the proposed rule.

I am looking forward to thoughtful comments and responses from market participants. In particular, I welcome perspectives on the potential impact of the proposed rule changes on natural persons who are investing in exempt pools operated by a CPO, or are advisory clients of a CTA, that is relying on the exemptions under CFTC Regulation 4.7 and navigating our complex and evolving derivatives markets.

Appendix 3 – Dissenting Statement of Commissioner Summer K. Mersinger

I regrettably dissent from the Commission's[1] proposed rulemaking to amend Rule 4.7,[2] which for the past 30 years has provided exemptions to registered commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") that operate commodity pools or trading programs for Qualified Eligible Persons ("QEPs"). I say "regrettably" because there are two aspects of this proposal that are consistent with views I have expressed before, and which I support.

First, I agree that it is time for the Commission to consider increasing the monetary thresholds in the "Portfolio Requirement" in the definition of a QEP in Rule 4.7(a) to account for inflation. As I previously have stated, "I believe that it is incumbent upon the CFTC, like any regulatory agency, to continually review its rule set to evaluate whether rules . . . need to be updated because they have simply failed to keep up with the times."[3]

Second, I support proposing a process in our rules that would permit CPOs relying on Rule 4.7 to elect an alternate account statement schedule that is consistent with

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[1] This Statement will refer to the Commodity Futures Trading Commission as the "CFTC" or the "Commission."

[2] CFTC Rule 4.7, 17 CFR 4.7.

[3] Opening Statement of Commissioner Summer Mersinger Regarding CFTC Open Meeting on June 7, 2023, section regarding Amendments to part 17 Large Trader Reporting Requirements Proposed Rule (June 7, 2023), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement060723*.

exemptive letters issued regularly by the Commission. This schedule would address the fact that our current rule is not workable in the context of funds-of-funds, and also would generate more frequent reporting. As I previously have stated, "when one of our rules needs to be fixed because it is unworkable, ambiguous, or inefficient, corrective action by notice-and-comment rulemaking is the gold standard because it allows the Commission to hear from stakeholders and develop regulatory solutions that provide certainty."[4]

However, I cannot support the proposal to narrow the scope of the historical exemptions in Rule 4.7 by imposing universal disclosure requirements to QEPs. It represents a "mandate first, evaluate later" approach based on assumptions, speculation, and poor sourcing. It also fails to fulfill certain fundamental functions of sound notice-and-comment rulemaking.

Rule 4.7 in Brief

Rule 4.7 provides exemptions for registered CPOs and CTAs operating commodity pools and trading programs restricted to QEPs ("4.7 CPOs and CTAs") from, among other things, disclosure, recordkeeping, and use-and-filing requirements that otherwise would apply pursuant to the CFTC's rules. The rationale for the exemptions is that QEPs are sufficiently financially sophisticated, and have sufficient leverage and resources, to protect their own interests when participating in such pools and trading programs.

As explained in the Proposing Release, the definition of a QEP is bifurcated into two categories: 1) those pool participants or advisory clients that need to satisfy a "Portfolio Requirement" to be considered a QEP; and 2) those that do not. The Portfolio

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[4] Dissenting Statement of Commissioner Summer K. Mersinger Regarding CFTC's Regulatory Agenda, section entitled "'Kicking the Can Down the Road' Rather than Working on Rulemaking Solutions" (January 9, 2023), available at *https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement010923*.

Requirement, in turn, can be met by satisfying either a Securities Portfolio Test of $2 million or an Initial Margin and Premium Test of $200,000, or a combination of the two.[5]

The Commission is proposing to double the monetary thresholds of the Portfolio Requirement in the QEP definition to $4 million for the Securities Portfolio Test and $400,000 for the Initial Margin and Premium Test. This proposal is intended to account for inflation since Rule 4.7 was adopted in 1992.

The "Mandate First, Evaluate Later" Approach to Disclosures to QEPs is Not Good Government

At the same time, the Commission also is proposing to narrow the scope of Rule 4.7 by eliminating a significant portion of the current disclosure exemptions available to 4.7 CPOs and CTAs, thereby imposing universal disclosure requirements to QEPs. This is a "mandate first, evaluate later" approach to regulation that I strongly oppose.

1. We May Already be Taking Care of the Stated Concern

The Proposing Release begins by observing that the number of 4.7 CPOs and CTAs, and the number of commodity pools and trading programs relying on Rule 4.7, have ballooned over the years.[6] It then states its primary justification for significantly narrowing the scope of the 4.7 exemptions by imposing universal disclosure requirements to QEPs as follows:

The definition of QEP in Regulation 4.7 encompasses a broad spectrum of market participants from large fund complexes and other institutional investors with significant assets under management to individuals with varying backgrounds and experience, each of which has vastly different resources available to insist upon the disclosure of

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[5] *See* Proposing Release at 7-9.

[6] *See id.* at 5-6.

information regarding the offered 4.7 pool or trading program and then to analyze whatever information is provided.[7]

Yet, this justification fails to consider that the increasing numbers of pools and trading programs relying on Rule 4.7, and of QEPs that may not have the wherewithal to protect their interests, may result from the erosion in the Portfolio Requirement's monetary thresholds due to inflation – which the Commission is now proposing to address. If the Commission appropriately adjusts the Portfolio Requirement thresholds for becoming a QEP to return them to levels comparable to when the Commission adopted the disclosure exemptions in Rule 4.7, then there is no logical reason why it should also eliminate those disclosure exemptions with respect to QEPs that still satisfy the new (higher) thresholds and are entirely capable of protecting their interests.[8]

In short: Before imposing universal disclosure requirements that many QEPs do not need, the Commission should evaluate whether adjusting the Portfolio Requirement, as it is proposing to do, will address its stated concern about differences between QEPs. As regulators, we should always evaluate first, and then, if appropriate, adopt regulations based on the results of that evaluation. This proposal's "mandate first, evaluate later" approach has it exactly backwards.

2. We Should Not Act Based on Speculation and Assumptions

Another rationale the Proposing Release offers for imposing universal disclosure requirements to QEPs is that "the Commission has . . . witnessed a significant expansion and growth in the complexity and diversity of commodity interest products offered to

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[7] *Id.* at 16.

[8] The analysis of costs and benefits in the Proposing Release suggests that there is reason to believe the proposal to increase the Portfolio Requirement's monetary thresholds may take care of the stated concern based on differences in QEPs' ability to protect their interests. It states: "To the extent persons who meet the higher Portfolio Requirement thresholds are (on average) more financially sophisticated or resilient than those who no longer qualify, this proposed amendment [to increase the Portfolio Requirement thresholds] should result in individuals and entities, both QEPs and non-QEPs, being offered pools and trading programs that are regulated in a manner commensurate with their respective needs for customer protection." Proposing Release at 66-67.

QEPs via 4.7 pools and trading programs," and "product innovation in the commodity interest markets has continued at a rapid and unrelenting pace."[9] The primary examples cited are swaps and digital assets.

Yet, the Proposing Release offers no evidence to support its paternalistic conjecture that QEPs may not appreciate the nature of the risk associated with trading swaps in commodity pools and trading programs that rely on the exemptions in Rule 4.7. And there is no logical reason why such swap trading should now require a significant narrowing of the exemptions in Rule 4.7 more than a decade after Congress enacted a full regulatory regime for swaps in the Dodd-Frank Act[10] – which the Commission has fully implemented. The Proposing Release does not cite to any provision of the Dodd-Frank Act or its legislative history suggesting Congress felt that the development of swap trading warranted a reconsideration of the scope of the exemptions provided by Rule 4.7 in general – or universal disclosure requirements to QEPs in particular.

As for digital assets and technological innovation, the Proposing Release recognizes that it is relying on mere speculation. It candidly acknowledges that: 1) "Given the relatively recent development of digital assets, *it remains unclear* as to whether the underlying markets . . . are subject to market fundamentals similar to those of the traditional commodities"; and 2) "As the financial system continues to experience a period of rapid evolution in the era of artificial intelligence and other technological advancements, the Commission expects to see continued development of novel investment products that . . . *may* in fact deviate from the typical operations of markets now subject to the Commission's oversight."[11]

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[9] *Id.* at 19, 20.

[10] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act").

[11] Proposing Release at 21 (emphases added).

Throughout the 30 years since Rule 4.7 was adopted, there has been a steady expansion of the number, complexity, and diversity of available derivatives products, and derivatives markets have undergone transformational changes resulting from technological innovation (none greater than the migration from open-outcry pit trading to all-electronic trading). Yet, through it all, there has never been any suggestion that the exemptions under Rule 4.7 needed to be significantly narrowed as a result.

We should not act based on what we don't know. More specifically, we should not impose universal disclosure requirements to QEPs based on speculation about hypothetical future developments. As markets continue to evolve and innovate as they always have done, we as regulators should evaluate first and then adopt regulations only as appropriate based on the results of that evaluation. Once again, this proposal has it exactly backwards.

3. The Justifications for Acting Now are Poorly Sourced

Certainly, regulators must often act quickly when confronted with urgent circumstances. But that is hardly the case here.

The Proposing Release contains no indication that QEPs are clamoring for the Commission to require disclosures by 4.7 CPOs and CTAs. Indeed, one of the principal sources cited in support of the assertion that there is a problem that needs to be addressed is a roundtable – on CPO risk management practices – convened by CFTC staff way back in 2014.[12]

Other support for the claim that the Commission needs to act consists of footnote citations to individual cases of alleged wrongdoing by 4.7 CPOs and CTAs. These footnotes cite news clippings reporting on allegations in deposition testimony, statements of litigation counsel, and litigation documents – with no indication whether these

[12] *See id.* at 16-17.

allegations were proved to be true.[13] And in some of the cases, it appears that the 4.7 CPO or CTA was alleged to have committed fraud, or violated the Commission's existing requirement "to provide all disclosures necessary to make information provided, in the context in which it is furnished, not misleading."[14]

Overall, the sourcing in the Proposing Release is woefully insufficient to support a proposal to impose universal disclosure requirements to QEPs on 4.7 CPOs and CTAs. There is no reason the Commission cannot undertake a proper evaluation of whether there really is a problem that needs to be addressed and, if so, the appropriate means to address it.

The Commission has a variety of tools at its disposal to undertake such an evaluation. For starters, our staff could convene a roundtable specifically devoted to this issue, so that the Commission would not have to look to comments at a roundtable in another context that occurred nine years ago. The Commission or staff also could issue a Request for Comment or an Advance Notice of Proposed Rulemaking – both tools that have been utilized recently[15] – in order to evaluate the necessity of taking action (and what action might be appropriate to take).

In sum: Given its poor sourcing, the proposal to impose universal disclosure requirements to QEPs is a solution in search of a problem. The Proposing Release fails to justify its "mandate first, evaluate later" approach. The Commission should evaluate first, and act later based on that evaluation, if appropriate, consistent with established principles of good government.

The Proposal Fails to Fulfill Fundamental Functions of Sound Rulemaking

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[13] *See id.* at 17-18 n.46-47. Footnote no. 46 also cites to a CFTC reparations case from 2018 that resulted in a default judgment and thus was not litigated.

[14] CFTC Rules 4.7(b)(2) (CPOs) and 4.7(c)(1) (CTAs), 17 CFR 4.7(b)(2), 4.7(c)(1).

[15] *See* Request for Comment on the Impact of Affiliations on Certain CFTC-Regulated Entities (June 28, 2023), available at *https://www.cftc.gov/PressRoom/PressReleases/8734-23*, and Risk Management Programs for Swap Dealers, Major Swap Participants, and Futures Commission Merchants, 88 FR 45826 (July 18, 2023), respectively.

A sound notice of proposed rulemaking is characterized by, among other things: 1) transparency as to the agency's plans; and 2) requests for comment on key issues. This Proposing Release is deficient on both counts.

1. *The Commission Should be Fully Transparent About its Plans*

The Proposing Release is not fully transparent about the Commission's plans on two key issues.[16] First, it says little about how the proposed amendments to Rule 4.7 would be implemented. This is especially critical with respect to the proposed increases to the Portfolio Requirement monetary thresholds, which would create a class of pool participants and advisory clients that qualify as QEPs under existing Rule 4.7, but would no longer qualify as QEPs under amended Rule 4.7.

Would these "former QEPs" be permitted to make additional investments in commodity pools and trading programs that are exempt under Rule 4.7 and in which they currently are investing? The Proposing Release explains that it would continue the requirement of existing Rule 4.7(a)(3)[17] that a CPO must assess QEP status at the time of sale of a pool participation, and that a CTA must do so at the time the person opens an exempt account.[18] But it does not explain that, as a result, "former QEPs" would not be able to make additional investments in exempt commodity pools they are currently participating in (although they could make additional investments to trading programs in these circumstances).

I appreciate the rationale of existing Rule 4.7(a)(3) with respect to a participant in an exempt commodity pool whose financial resources drop below QEP thresholds. But I am not sure that same rationale should apply where a participant drops below QEP

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[16] One of the Commission's Core Values is "Clarity," *i.e.,* "Providing transparency to market participants about our rules and processes." *See* The Commission, CFTC Core Values, Clarity, available at *https://www.cftc.gov/About/AboutTheCommission*.

[17] CFTC Rule 4.7(a)(3), 17 CFR 4.7(a)(3).

[18] Proposing Release at 12.

thresholds because the Commission is "moving the goalposts" by increasing those thresholds. I imagine there may be QEPs that are comfortable with their 4.7 CPOs, pleased by the performance of the 4.7 exempt pools in which they are participating, and satisfied with the information disclosures they have received – and that would like to be able to contribute additional funds to those investments.

The Commission should be forthright that the proposal would deny them this opportunity if they fall on the wrong side of the increased thresholds being proposed, and seek comment from potentially affected QEPs specifically on that issue. To shroud the issue in mystery in the Proposing Release is inconsistent with sound notice-and-comment rulemaking.

Second, the Proposing Release does transparently reveal that the CFTC would use universal disclosure requirements to QEPs imposed on 4.7 CPOs and CTAs as "an additional level of oversight" by "incorporating the review of [the new mandatory disclosures] into existing examination processes used by the Commission . . ."[19] What it does not reveal, however, is where the Commission plans to find the resources for "an additional level of oversight" by reviewing the disclosures that would be required of the approximately 1700 CPOs and CTAs that rely on Rule 4.7 with respect to thousands of commodity pools and trading programs.[20]

What Commission programs or functions will have to be cut or curtailed in order for it to perform this new task? The public is entitled to know whether the CFTC's review of required disclosures to QEPs that are capable of protecting their own interests may come at the expense of, say, reductions in enforcement resources to prosecute those who defraud retail customers, or the Commission's oversight of derivatives exchanges

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[19] *Id.* at 26 and 23, respectively.

[20] *See id.* at 5-6 (citing statistics).

and clearinghouses for which we are responsible by statute. But once again, the Proposing Release is silent.[21]

2. Putting the "Comment" back in "Notice-and-Comment" Rulemaking

It is somewhat startling how few questions the Proposing Release asks regarding its proposed amendments to Rule 4.7. Most notably, it does not even request comment on the foundational question of whether universal disclosure requirements to QEPs are needed. As discussed above, the Commission's justifications for the proposed requirements are poorly sourced and based largely on assumptions and allegations – but the Proposing Release does not ask the public if those assumptions and allegations are accurate.[22] It appears that the Commission has already made up its mind that universal disclosure requirements to QEPs are necessary, and is not interested in whether QEPs, other market participants, or the public agree with that.

Nor does the Proposing Release ask: 1) whether current QEPs that fall below the increased Portfolio Requirement monetary thresholds for QEP status should be permitted to make additional investments in a commodity pool exempt under Rule 4.7; or 2) whether reviewing mandatory disclosures to QEPs that are able to protect their own interests is an appropriate use of the Commission's limited resources.

Accordingly, since the Commission declines to ask these questions, I will. I invite comment – especially, but not exclusively, from QEPs – on the following questions regarding the amendments that the Commission is proposing to Rule 4.7:

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[21] The Commission also should be more transparent about the estimates in its analysis required by the Paperwork Reduction Act ("PRA"). The Proposing Release estimates the annual burden hours per response of the disclosures proposed to be required of 4.7 CPOs and CTAs to be 1.5 hours. *See* Proposing Release at 56 (CPOs) and 59 (CTAs). But the Proposing Release does not explain how it arrived at this estimate – which strikes me as very low.

[22] After presenting its justifications for imposing universal disclosure requirements to QEPs, the Proposing Release "requests comment on all aspects of the proposed amendments *outlined below* that would require certain information be disclosed to prospective QEP pool participants and advisory clients under Regulation 4.7 . . ." Proposing Release at 27 (emphasis added). That is, the Proposing Release requests comment on the disclosures to QEPs "outlined below" that it is proposing to require of 4.7 CPOs and CTAs – but not on the *preceding* discussion of whether universal disclosure requirements to QEPs are needed in the first place.

1. Do QEPs agree that the Commission should impose universal disclosure requirements on 4.7 CPOs and CTAs? Why or why not?
2. Is the Commission correct in its preliminary belief that universal disclosure requirements to QEPs are necessary to address unequal bargaining power of QEPs? Would they be necessary if the Commission's proposed increases to the Portfolio Requirement monetary thresholds in the QEP definition are adopted?
3. Is the Commission correct in its preliminary belief that universal disclosure requirements to QEPs are necessary in light of significant expansion and growth in the complexity and diversity of commodity interest products offered to QEPs via 4.7 pools and trading programs, and in light of the rapid pace of innovation in the commodity interest markets?
4. Is the Commission correct in its preliminary belief that the development of markets for swaps and digital assets necessitates universal disclosure requirements to QEPs?
5. Are there alternative, more tailored, means by which the Commission could achieve its policy objectives than the universal disclosure requirements to QEPs that it is proposing? If so, please describe.
6. Should QEPs under existing Rule 4.7 that would no longer qualify as QEPs under the proposed amendments to the Portfolio Requirement thresholds in Rule 4.7 be permitted to contribute additional funds to exempt commodity pools operated by 4.7 CPOs in which they currently are participating? Why or why not?
7. Should the Commission impose universal disclosure requirements to QEPs that are capable of protecting their own interests in order to incorporate the review of such disclosures into its existing examination processes if such review comes at the expense of other Commission responsibilities? Why or why not?

8. To what extent will the proposed universal disclosure requirements to QEPs impact the benefits that 4.7 CPOs and CTAs derive from relying on the exemptions in Rule 4.7? Is it likely that 4.7 CPOs and CTAs will decide to no longer rely on the remaining exemptions afforded by Rule 4.7 if the proposed universal disclosure requirements to QEPs are adopted?
9. If a 4.7 CPO or CTA is registered as an investment adviser with the SEC and not subject to an exemption regarding disclosures required by the SEC, should the CFTC accept compliance with disclosures required by the SEC as sufficient to satisfy the proposed universal disclosure requirements to QEPs under Rule 4.7, too?
10. Is the Commission's PRA estimate of 1.5 annual burden hours per response for the disclosures proposed to be required of 4.7 CPOs and CTAs appropriate? If not, what would be an appropriate estimate?

Conclusion

Given my support for certain aspects of this proposal, and given my support for obtaining public input on initiatives to improve our rulebook generally, I wish that I could support the issuance of the Proposing Release. Unfortunately, because of its "mandate first, evaluate later" approach to the issue of disclosures to QEPs by 4.7 CPOs and CTAs, and its serious omissions in transparency and requests for comment, I cannot do so. Accordingly, I respectfully dissent.

Appendix 4 – Concurring Statement of Commissioner Caroline D. Pham

I respectfully concur on the Notice of Proposed Rulemaking Regarding Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools Operated under Regulation 4.7: Updating the "Qualified Eligible Person" Definition; Adding Minimum Disclosure Requirements for Pools and Trading Programs; Permitting Monthly Account Statements for Funds of Funds; Technical Amendments (CPO/CTA

NPRM), because I am concerned that the proposed changes for commodity pool operators (CPOs) and commodity trading advisors (CTAs) offering to or advising sophisticated clients, or "qualified eligible persons" (QEPs), are burdensome and unnecessary for entities that are already subject to extensive CFTC regulation or banking, securities, insurance, or other financial services regulation.[1] I thank staff in the Market Participants Division for their engagement with my office on the CPO/CTA NPRM.

I reiterate the concerns in my prior dissent on the CFTC's proposed amendments to Form PF.[2] This CPO/CTA NPRM, like the CFTC's proposed amendments to Form PF, seem to impose overly broad obligations that would be burdensome and unnecessary for sophisticated clients, and would present operational challenges and costs without a persuasive cost-benefit analysis under the Commodity Exchange Act.

In a time of economic challenges, including rising inflation, we must be careful when considering proposals that could inhibit positive economic activity that supports American businesses and jobs. I look forward to hearing from commenters as to the proposed amendments, including practical implementation issues and the relative costs and benefits of the proposal.

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[1] *See* Exemption for Commodity Pool Operators with Respect to Offerings to Qualified Eligible Participants; Exemption for Commodity Trading Advisors with Respect to Qualified Eligible Clients, 57 FR 34853 (Aug. 7, 1992).

[2] *See* Dissenting Statement of Commissioner Caroline D. Pham Regarding the Proposed Amendments to Form PF, U.S. Commodity Futures Trading Commission (August 10, 2022), *https://www.cftc.gov/PressRoom/SpeechesTestimony/phamstatement081022*.