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17 CFR Parts 1, 3, 4, 30, 43, and 75

RIN 3038-AF25

Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools Operated: 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: Final rule.

SUMMARY: The Commodity Futures Trading Commission (Commission or CFTC) is adopting amendments to certain provisions of its regulations (the Final Rule) that would update the Portfolio Requirement thresholds within the "Qualified Eligible Person" definition; include revisions that are consistent with long-standing Commission exemptive letters addressing the timing of certain pools' periodic financial reporting; and make several technical amendments related to the structure of the regulations that are the subject of this Final Rule.

DATES: *Effective date:* This rule is effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Compliance date: Commodity pool operators (CPOs) and commodity trading advisors (CTAs) must comply with the increased Portfolio Requirement thresholds in Commission regulation §4.7(a) by **March 26, 2025**. The optional monthly account statement reporting schedule for certain §4.7 pools in Commission regulation §4.7(b)(3)(iv) is available to CPOs as of the effective date, and compliance is required upon election of that schedule by the CPO.

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I. Introduction and 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

[1] Pub. L. 111-203, 124 Stat. 1376 (2010).
[2] 7 U.S.C. 1a(11).

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 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 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 establish registration exemptions and definitional exclusions for CPOs and CTAs,[10] and contain detailed regulations that establish the ongoing compliance obligations applicable to registered CPOs and CTAs, which implement the statutory authority granted to the Commission by the CEA with

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[3] 7 U.S.C. 1a(10).
[4] 7 U.S.C. 1a(12).
[5] 7 U.S.C. 6m(1) (It shall be unlawful for any CTA or CPO, unless registered under this 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.

respect to such registrants.[11] Specifically, the regulatory compliance requirements facilitate the Commission's oversight of their activities in the commodity interest markets and promote customer protection through operational requirements,[12] disclosures,[13] and regular reporting[14] to a registrant's pool participants or advisory clients. Commission 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 clients are restricted to individuals and entities considered "Qualified Eligible Persons," and who claim the desired exemptions, pursuant to paragraph (d) of that section.[15] Since its adoption over thirty years ago, the Commission has occasionally amended Commission regulation §4.7 to enhance its usability and ensure that it remains fit for purpose.[16]

After a careful review of the existing language and structure of Commission regulation §4.7, and considering the public and regulatory interest of maintaining and modernizing older, but still widely utilized provisions, the Commission approved and published in the *Federal Register* a notice of proposed rulemaking (NPRM or Proposal) comprised of targeted amendments to update the regulation in several ways.[17] The Commission noted in the NPRM that, as of the end of FY 2022, 837 registered CPOs operated approximately 4,304 commodity pools pursuant to claimed Commission regulation §4.7 exemptions (§4.7 pools, and together with CTA programs operated under Commission regulation §4.7, the §4.7 pools and trading programs).[18] Relatedly,

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[11] *See, generally,* 17 CFR 4.20 through 4.26, 4.30 through 4.36.
[12] *See, e.g.*, 17 CFR 4.20(c), 4.30(a) (prohibiting the commingling of pool funds with those of any other person and prohibiting CTAs from accepting funds from advisory clients in the CTA's name, respectively).
[13] 17 CFR 4.24, 4.25, 4.34, 4.35.
[14] 17 CFR 4.22.
[15] 17 CFR 4.7.
[16] *See, e.g.*, 77 FR 11252 (Feb. 24, 2012) (rescinding the relief from the audit requirement for pool annual reports previously provided under Commission regulation §4.7(b)(4)); 84 FR 67355 (Dec. 10, 2019).
[17] 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, 88 FR 70852 (Oct 12. 2023) (NPRM or Proposal).
[18] These numbers were drawn from data in National Futures Association Form PQR filings for Q4 2022.

approximately 865 CTAs claim an exemption under Commission regulation §4.7 for their trading programs, which the Commission also estimates to number in the tens of thousands. The Commission further stated that, 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, predicted that this population of CPOs, CTAs, commodity pools, and trading programs operating pursuant to Commission regulation §4.7 will only continue to grow in the future.[19] More recent data on the usage of Commission regulation §4.7 shows this to be the case. As of June 2024, approximately 824 CPOs claim exemptions under Commission regulation §4.7, with respect to 4,763 §4.7 pools, and 822 CTAs claim exemptions under Commission regulation §4.7 with respect to at least 10,000 §4.7 trading programs.[20]

In particular, the Commission proposed amendments that sought: (1) to increase the financial thresholds in the Portfolio Requirement of the "Qualified Eligible Person" (QEP) definition in Commission regulation §4.7(a) to reflect inflation; (2) to require certain minimum disclosures for §4.7 pools and trading programs operated and offered by CPOs and CTAs; (3) to add a process under Commission 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;[21] and (4) to improve the

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[19] 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 Commission 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.

[20] With these updated figures, §4.7 CPOs continue to comprise approximately 69% of all CPOs registered with the Commission, and 4.7 CTAs 66% of all CTAs registered with the Commission, while approximately 86% of all commodity pools operated by a registered CPO are §4.7 pools.

[21] Such exemptive letters are routinely drafted by Commission staff in the Market Participants Division (MPD) and constitute an exercise of the authority in Commission regulation §§4.12(a) and 140.93. *See* 17 CFR 4.12(a) and 140.93.

structure and utility of Commission regulation §4.7 through several technical adjustments (for example, reorganizing the QEP definition, updating cross-references, etc.). After consideration of the public comments received in response to the NPRM, as well as several meetings with interested members of the public,[22] the Commission has determined to finalize portions of the Proposal, while continuing to consider the remaining proposed amendments and alternative approaches offered by commenters.

II. The Final Rule

A. General Overview of Comments Received

The Commission requested comment on all aspects of the NPRM and also solicited comment through specific, targeted questions about each of the individual proposed amendments.[23] The Commission received eight comment letters in response to the Proposal, including six from industry associations, one from NFA, and one from a law firm that frequently represents CPOs and CTAs utilizing Commission regulation §4.7 exemptions.[24] Overall, comments on the Proposal were mixed, depending on which amendment was being discussed. With respect to the Portfolio Requirement updates,

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[22] All comments on the NPRM, including notices of *ex parte* meetings discussing this rulemaking, are available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7443*.

[23] *See, e.g.*, Proposal, 88 FR 70855 (requesting comment on the proposed Portfolio Requirement increases, as well as posing specific questions for commenters to address).

[24] Comment Letter from the Securities Industry and Financial Markets Association Asset Management Group (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73190&SearchText=* (SIFMA AMG Letter); Comment Letter from the Investment Advisers Association (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73192&SearchText=* (IAA Letter); Comment Letter from the Alternative Investment Management Association Limited (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73193&SearchText=* (AIMA Letter); Comment Letter from the Managed Funds Association (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73194&SearchText=* (MFA Letter); Comment Letter from the Investment Company Institute (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73195&SearchText=* (ICI Letter); Comment Letter from the National Futures Association (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?73191&SearchText=* (NFA Letter); and Comment Letter from Dechert, LLP (Dec. 11, 2023), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?73196&SearchText=* (Dechert Letter). One commenter also submitted a supplemental comment letter after the closing of the NPRM's public comment period. *See* Supplemental Comment Letter from the Managed Funds Association (Jun. 26, 2024), *available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=73840&SearchText=* (MFA Comment Letter II). The NPRM's complete comment file is available at *https://comments.cftc.gov/PublicComments/CommentList.aspx?id=7443*.

commenters largely agreed with the necessity of the proposed increases to account for inflation and were, for the most part, supportive of that proposed amendment. With respect to adding minimum disclosure requirements to Commission regulation §4.7 for all QEP pool participants and advisory clients, commenters disagreed with the amendments as proposed and made several suggestions seeking to narrow or eliminate the proposed disclosures. The proposed amendment designed to align Commission regulation §4.7 with Commission exemptive letters that permit the distribution of monthly, rather than quarterly, account statements for certain §4.7 pools received unanimous support and will consequently be adopted as proposed by the Final Rule amendments. The following sections discuss the proposed amendments in more detail, the comments the Commission received from the public, as well as the terms of the Final Rule being adopted herein.

B. Minimum QEP Disclosure Requirements Under Commission Regulation §4.7

1. The Proposal

Currently, Commission regulation §4.7 provides exemptions from the broader part 4 compliance requirements for CPOs with respect to pools offered solely to QEPs, and for CTAs advising or managing the accounts of QEPs, including those regulations requiring disclosure of general and performance information about a pool or trading program. Specifically, Commission 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 Commission regulation §4.21; (2) the general disclosures required by Commission regulation §4.24; (3) the performance disclosures required by Commission regulation §4.25; and (4) the use and amendment requirements in Commission 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).[25] Similarly, Commission regulation §4.7(c)(1) provides an exemption for CTAs with respect to their trading programs offered to QEPs regarding: (1) the requirement to deliver a disclosure document in Commission regulation §4.31; (2) the general disclosures required by Commission regulation §4.34; (3) the performance disclosures required by Commission regulation §4.35; and (4) the use and amendment requirements in Commission 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).[26] CPOs and CTAs claiming these exemptions[27] are not required to deliver or disseminate any offering memoranda, brochures, or disclosure statements to their prospective QEP pool participants or advisory clients. Rather, these CPOs and CTAs are only required to ensure that any information or disclosures they elect to provide to QEPs (QEP Disclosures), include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading.[28]

Under the Proposal, the Commission proposed to amend the disclosure relief provided by current Commission regulation §4.7(b)(2)(i) and (ii) to require CPOs to deliver a set of disclosures to their §4.7 pools' prospective QEP participants.[29] The proposed disclosure requirements included descriptions of the §4.7 pool's: (i) principal

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[25] 17 CFR 4.7(b)(2) (providing an exemption from the specific requirements of Commission regulation §§4.21, 4.24, 4.25, and 4.26 with respect to each §4.7 pool). The prescribed "form statement" indicates that the CPO's offering 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.*

[26] 17 CFR 4.7(c)(1) (providing an exemption from the specific requirements of Commission regulation §§ 4.31, 4.34, 4.35, and 4.36 with respect to an offered §4.7 trading program). The prescribed "form statement" indicates 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.*

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

[28] 17 CFR 4.7(b)(2); 17 CFR 4.7(c)(1).

[29] Proposal, 88 FR 70859.

risk factors; (ii) investment program; (iii) use of proceeds; (iv) custodians; (v) fees and expenses; (vi) conflicts of interest; and (vii) targeted past performance information. Generally, the Commission proposed to establish these minimum disclosure requirements by rescinding or narrowing certain of the existing exemptions in Commission regulation §4.7, including those from Commission regulation §§4.21, 4.24, and 4.25.[30] Proposed Commission regulation §4.7(b)(2)(i)(F) included 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 Commission regulation §4.7(b)(2)(i)(G) continued to require a form disclaimer like that currently required by Commission regulation §4.7(b)(2)(i).

As a consequence of requiring these minimum disclosures for §4.7 pools, the Commission also proposed to update corresponding recordkeeping, and use and amendment requirements. Specifically, the Commission proposed to amend Commission regulation §4.7(b)(5) to require that CPOs maintain such QEP Disclosures among the other books and records of their §4.7 pools, and make them available, upon request, to the Commission, NFA, and the U.S. Department of Justice, in accordance with Commission regulation §1.31.[31] Additionally, the Commission proposed to narrow the exemption from Commission regulation §4.26 in its entirety to only Commission regulation §4.26(d), such that compliance with Commission regulation §4.26(a) through (c), provisions that generally govern the use and amendment of this information, would be required, but filing with NFA prior to first use would not.

Consistent with the proposed amendments regarding QEP Disclosures for §4.7 pools, the Commission also proposed disclosure requirements for §4.7 trading programs under Commission regulation §4.7(c)(1). Specifically, the Commission proposed to

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[30] *Id.*
[31] 17 CFR 1.31.

amend Commission regulation §4.7(c)(1) to require CTAs to deliver certain disclosures to their §4.7 advisory clients. The proposed disclosure requirements included a description of: (i) the trading program; (ii) certain persons to be identified; (iii) principal risk factors for the CTA's trading program; (iv) fees; (v) conflicts of interest; and (vi) targeted past performance information. Similar to the proposed amendments to Commission regulation §4.7(b)(2)(i), the Commission proposed to establish these minimum disclosure requirements by rescinding or narrowing existing exemptions in Commission regulation §4.7(c)(1) from Commission regulation §§4.31, 4.34, and 4.35.[32] Proposed Commission regulation §4.7(c)(2)(i)(G) continued 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 Commission regulation §4.7(c)(2)(i)(H) continued to require a form statement like that currently required by Commission regulation §4.7(c)(1)(i).

Further, the Commission proposed to update corresponding recordkeeping, and use and amendment requirements for CTAs offering §4.7 trading programs. Specifically, the Commission proposed to amend Commission regulation §4.7(c)(2) to require CTAs to maintain QEP Disclosures among the other books and records for their §4.7 trading programs, and make them available to the Commission, NFA, and the U.S. Department of Justice, in accordance with Commission regulation §1.31. Additionally, the Commission proposed to narrow the exemption from Commission regulation §4.36 in its entirety to only Commission regulation §4.36(d), such that compliance with Commission regulation §4.36(a) through (c), provisions that generally govern the use and amendment of this information, would be required, but filing with NFA prior to first use would not.

In the Proposal, the Commission explained that "[t]he definition of QEP in Regulation 4.7 encompasses a broad spectrum of market participants from large fund

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[32] Proposal, 88 FR 70861.

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."[33] Moreover, the Commission stated its concern that "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," which, the Commission preliminarily expected, would result in their being more likely to rely upon whatever information the CPO or CTA chose to provide.[34] The Commission stated its preliminary belief that, "[t]his perceived disparity may increase the likelihood of 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,"[35] as institutional investors. As further support for the imposition of minimum disclosure requirements, the Commission also noted the "rapid and unrelenting pace"[36] of product innovation, for example in the digital asset space, increasing the possibility 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."[37] The Commission preliminarily concluded in the Proposal, based upon its analysis of the regulatory history behind this regulation, the prevalence of §4.7 offerings, and the myriad market and product developments since 1992, that "requiring the provision of specific minimum disclosures for CPOs and CTAs operating 4.7 pools and

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[33] Proposal, 88 FR 70856.
[34] *Id.*
[35] *Id.* (citing 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-2019206/*).
[36] Proposal, 88 FR 70857.
[37] *Id.*

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."[38] Further, in explaining the benefits of the proposed QEP Disclosure amendments, the Commission stated its belief that, these proposed amendments would mandate a minimum amount of transparency into §4.7 pools and trading programs, which 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.[39] Additionally, the Commission explained its expectation that "mandating QEP Disclosures and requiring that they be materially accurate and complete, rather than just optional and not materially misleading, [would] 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 … [and that the proposed amendments] would allow for improved oversight of the regulated activities of CPOs and CTAs" by the Commission.[40] For these reasons, among others articulated in the Proposal, the Commission proposed specific minimum disclosures to bridge the customer protection gap that has, in its view, developed since the adoption of Commission regulation §4.7 in 1992.

2. Feedback from Commenters

Generally, commenters were opposed to the proposed QEP Disclosures for §4.7 CPOs and CTAs, citing a number of concerns relating to cost, purpose, practicality in certain common structuring scenarios, and redundancy. All seven commenters provided

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[38] *Id.* at 70857-58.
[39] Proposal, 88 FR 70872.
[40] *Id.*

feedback on the proposed minimum disclosure requirements, including several that offered alternative approaches to the proposed method of adding minimum QEP Disclosures to Commission regulation §4.7 for the Commission to consider.

A majority of the commenters opposed or disagreed with the proposed minimum disclosure requirements because they believed the additional requirements were unnecessary.[41] One commenter opposed the proposed QEP Disclosures generally because they believe "imposing mandatory minimum disclosures would be premature," "would not provide any protections above and beyond current regulations," "could lead to the presentation of potentially misleading investor disclosures," and because "the costs to 4.7 CPOs and CTAs would be unduly burdensome."[42] This commenter disagreed that QEPs currently lack sufficient information to make informed decisions and stated that raising the Portfolio Requirement may mitigate the concerns the Commission expressed in the Proposal.[43] The commenter asserted further that the current standard in Commission regulation §4.7 that requires disclosures, if any are provided, to not be misleading is sufficient because disclosures provided in the §4.7 pool context have become market practice and are made to satisfy the preferences and demands of sophisticated investors.[44] Other commenters echoed this sentiment, with one suggesting that "private fund managers commonly include a description of the fund's investment objectives and strategy in marketing materials and offering documents,"[45] and another stating that it would "essentially render the entire 4.7 regime, and the exemptions provided thereunder, moot."[46] Another commenter described the minimum QEP disclosure requirements as "unnecessary to achieve the Commission's policy goals and

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[41] *See generally* MFA Letter, at 6; SIFMA AMG Letter at 4; AIMA Letter at 2; IAA Comment Letter at 5.
[42] MFA Letter, at 2.
[43] MFA Letter, at 6
[44] MFA Letter, at 11.
[45] SIFMA AMG Letter, at 5.
[46] AIMA Letter, at 2.

… unduly costly and even counterproductive,"[47] and further stated that they are "not aware that prospective or current QEP investors or clients in pools and trading accounts operated by these members, virtually all of which are qualified purchasers not subject to the Portfolio Requirement, have requested or otherwise indicated a need for such additional disclosure."[48] Finally, NFA cautioned against the proposed disclosure requirements, and stated that "over the years NFA has received few complaints from 4.7 exempt pool participants and managed account program clients that CPOs and CTAs have not provided them with information upon request."[49] Several of these commenters specifically recommended that the Commission adopt the proposed amendments to the Portfolio Requirement, and then evaluate the 4.7 population to determine whether the separately proposed minimum disclosure requirements are necessary.[50]

Among the general opposition to the minimum disclosure requirements, multiple commenters disputed the Commission's stated concern that some QEPs may lack the ability to demand the same level of transparency as those QEPs with significantly higher asset allocations, resulting in their being more likely to rely upon whatever information the CPO or CTA chose to provide. One commenter acknowledged that there could be a disparity in QEPs' ability to obtain information, by suggesting that the minimum disclosure requirements should be limited to natural person QEPs, and stating that, "if the CFTC's policy behind the Proposal is to ensure that investors who do not have leverage are provided minimum disclosures, then the focus should be on investors who have direct

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[47] IAA Letter, at 5.
[48] *Id.*
[49] NFA Letter, at 3.
[50] *See* Dechert Letter, at 14 ("If the alternative approaches we articulate in this comment letter in response to the Proposal do not persuade the Commission, we would strongly counsel the Commission to limit the first stage of rulemaking in this area to the amendment of CFTC Rule 4.7 to increase the Portfolio Requirement to reflect inflation, as proposed, and then to study the effect that this change has on the types of QEPs the Commission seems most concerned about protecting."); *see also* AIMA Letter, at 4-5 ("If the Portfolio Requirement thresholds are adjusted appropriately, then there is no reason why the Commission should also eliminate the disclosure exemptions under Regulation 4.7. The Commission should first evaluate whether the changes to the Portfolio Requirement thresholds address and/or mitigate the Commission's perceived concerns about unequal bargaining or negotiating power among those QEPs that satisfy the new, higher standard.").

privity with the CTA and do not have a large enough investment mandate to be able to negotiate disclosure."[51] A second commenter pointed to language within current Commission regulation §4.7, in which "[p]rospective QEP clients of CTAs already have the right, under existing regulations, to decline to have their accounts treated as exempt accounts under Regulation 4.7."[52] Other commenters challenged the Commission's concerns more generally.[53]

Aside from this general opposition, some commenters provided specific feedback on the potential negative impacts the proposed minimum disclosure requirements may have on dually-registered investment advisers and complex fund structures that rely on §4.7 exemptions.[54] One commenter stated that, "the proposed disclosure requirements create conflicts and duplicative burdens for CPOs and CTAs dually-registered as investment advisers with the SEC [Securities and Exchange Commission] when operating exempt pools or advising exempt accounts."[55] Another commenter provided background, from the perspective of CTAs, on the "critical" regulatory relief provided by Commission regulation §4.7 for registered and offshore funds requiring a registered CTA, explaining that CTAs registered as investment advisers are already subject to "extensive disclosure on Form ADV," and that "both registered and offshore funds are currently required to provide robust disclosure documents that describe the fund's investment objective, policies, and risks, and such disclosures necessarily describe the CTA's trading strategy

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[51] ICI Letter, at 9.
[52] IAA Letter, at 5.
[53] *See* MFA Letter, at 6 ("There is no evidence cited in the [NPRM] or elsewhere, however, that QEPs currently lack sufficient information to make informed decisions."); AIMA Letter, at 7 ("Second, the Commission concludes that the current exemption framework is insufficient because [it] fails to ensure that all QEPs (natural persons, specifically) can demand and receive the information necessary to make informed investment decisions and/or effectively monitor their investments. The Proposal, however, lacks a concrete example of any instance where this may be the case.").
[54] MFA Letter, at 8; Dechert Letter, at 10; IAA Letter at 5; ICI Letter, at 3-7.
[55] Dechert Letter, at 10 (stating further that "CTAs that are SEC-registered investment advisers, like CPOs that are SEC-registered investment advisers, already distribute regulatory disclosures to investors, such as Form ADV, making it unnecessary for these CTAs to create new disclosure documents"). This commenter further asserted that the Commission's concerns with respect "to natural person QEPs should also be sufficiently addressed by adjusting [the Portfolio Requirement]." *Id.*

and associated risks."[56] Multiple commenters also argued that the minimum disclosure requirements are either unnecessary or inappropriate when applied to common usage scenarios involving complex fund structures or scenarios in which the CPO or CTA relies upon Commission regulation §4.7 solely because no other appropriate exemption for their activity exists.[57] One commenter argued that "layering" the current performance and disclosure rules on complex multi-strategy mandates "would not provide clearer or more accurate disclosures to investors," and instead, "would potentially require any disclosures to attempt to compensate for the flexibility inherent in these products and potentially result in disclosures that are so generic as to be meaningless to investors."[58] Another commenter stated that, "many of [their] CTA members are also CPOs and offer separate accounts only to QEPs who seek to invest a substantial amount of capital through a separate account structure rather than pool participation," describing these account arrangements as "often heavily negotiated."[59] Another commenter provided background on the relief Commission regulation §4.7 provides to registered and offshore funds requiring a registered CTA, describing four common scenarios where investment advisers rely on Commission regulation §4.7 for CTA compliance relief with respect to a registered or offshore fund requiring a registered CPO and CTA.[60] With respect to these CTA-specific scenarios, the commenter argued that if the proposed disclosure requirements were implemented in these contexts, commonly controlled entities would likely be required to provide disclosures to entities or persons that either already receive them, or already have access to such information, or would result in the Commission

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[56] ICI Letter, at 8.
[57] SIFMA AMG Letter, at 5; IAA Letter, at 5, n.5; and, ICI Letter, at 4-7.
[58] MFA Letter, at 8.
[59] SIFMA AMG Letter, at 4 (arguing that "[t]hese investors have the power to request the information they require to make informed investment decisions and have little need for exhaustive mandated disclosures that were designed originally with retail clients in mind").
[60] ICI Letter, at 4-7. These scenarios included: (1) CPOs and CTAs in a master-feeder relationship; (2) advisers and sub-advisers to a registered fund requiring CPO and CTA registration; (3) U.S. investment advisers to offshore funds; and (4) offshore advisers to offshore funds that also advise U.S. funds. *Id.*

implementing regulatory authority over certain entities that the CFTC has traditionally sought not to oversee directly.[61]

Last, and perhaps most significantly, four commenters provided the Commission with potential alternatives to the minimum disclosure requirement framework proposed in the NPRM. One commenter suggested that the Commission instead amend Commission regulation §4.7 to require CPOs and CTAs to provide disclosures to QEP investors, the scope and substance of which, however, would be "determined at the discretion of the 4.7 CPO or CTA."[62] Another commenter suggested that the Commission instead consider limiting the required QEP Disclosures to "risk factors, the CTA's trading programs, fees and conflicts of interest to be provided to clients who are (a) natural persons and (b) legal organizations who are not eligible contract participants."[63] This commenter also requested that, "where such information is disclosed to clients or prospective clients through compliance with an existing regulatory regime (*e.g.*, via disclosure in the CTA's Form ADV Part 2 brochure), the Commission should permit satisfaction of the disclosure requirement by substituted compliance."[64] A third commenter asked the Commission to consider adopting the disclosure requirements such that they would "not apply where exempt pool participants and exempt account clients qualify as QEPs under CFTC Rule 4.7(a)(2)," referring to those QEPs that are not subject to the Portfolio Requirement discussed in further detail below.[65] Finally, a fourth commenter opined that the minimum

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[61] *See generally* ICI Letter, at 4-7.
[62] MFA Letter, at 12.
[63] SIFMA AMG Letter, at 5. The Commission notes that SIFMA AMG provided this specific recommendation only with respect to CTAs' §4.7 trading programs. SIFMA AMG did not provide a similar recommendation for CPOs and their §4.7 pools.
[64] *Id.*
[65] Dechert Letter, at 5. This approach was also acknowledged by other commenters in both comment letters and during *ex parte* meetings with Commission staff as a possible, acceptable alternative to the Proposal. *See, e.g.*, MFA Comment Letter II, at 2 (stating "if the CFTC decides to move forward with any proposed disclosure requirements, it is critical that the Commission exempt CPOs and CTAs with respect to 4.7(a)(2) investors from the disclosure requirements").

disclosure requirements "should only apply to Regulation 4.7 CTA clients that are natural persons who are residents of the United States."[66]

3. Further Consideration of Proposed Minimum QEP Disclosures

After considering the feedback received, the Commission has determined it appropriate to take additional time to consider the concerns articulated as well as the alternatives to the proposed QEP disclosure amendments put forward by commenters. Therefore, the Final Rule does not adopt minimum disclosure requirements to Commission regulation §4.7. Rather, the Commission is prioritizing in this Final Rule the adoption of amendments to Commission regulation §4.7 that incorporate the proposed Portfolio Requirement increases in the QEP definition and add the monthly account statement schedule for certain §4.7 pools, while it continues to evaluate regulatory alternatives and may adopt further changes in the future.

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

As explained briefly above, the Commission proposed to amend the definition of the "Portfolio Requirement," in Commission regulation §4.7 by updating its financial thresholds in a manner that accounts for the effects of inflation over the thirty-two years since their initial adoption with the intention of continuing to align the Portfolio Requirement with the Commission's original regulatory intent.[67] Commission regulation §4.7 bifurcates the definition of QEP into two different groups of persons that may qualify: (1) those persons[68] who do not need to satisfy an additional Portfolio Requirement to be considered a QEP; and (2) those persons who must satisfy the

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[66] ICI Letter, at 9.
[67] Proposal, 88 FR 70853-55.
[68] *See* 17 CFR 1.3 (defining "person" as including individuals, associations, partnerships, corporations, and trusts).

Portfolio Requirement to be considered a QEP.[69] The Commission further explained that the current Portfolio Requirement contains two thresholds whereby a person can be deemed a QEP: (1) owning securities (including pool participations) of issuers not affiliated with such person and other investments with an aggregate market value of at least $2,000,000[70] (Securities Portfolio Test); or (2) having on deposit with a futures commission merchant (FCM), 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 §4.7 pool or the date the person opens an account with the CTA for a §4.7 trading program, at least $200,000 in exchange-specified initial margin and option premiums, together with required minimum security deposits for retail forex transactions, for commodity interest transactions[71] (Initial Margin and Premium Test). Commission regulation §4.7 also provides that persons may satisfy the Portfolio Requirement by 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%.[72] Therefore, if a person required to satisfy the Portfolio Requirement meets one of the tests (or some combination of the two), as described above, the CPO or CTA may consider such person qualified as a QEP and accept them as a §4.7 pool participant or advisory client, respectively.

In the Proposal, the Commission explained its preliminary conclusions that updating the dollar thresholds within the Securities Portfolio Test and the Initial Margin and Premium Test would be appropriate because the thresholds had not been updated

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[69] Proposal, 88 FR 70853, n. 17-18 (describing these two different types of QEPs in further detail).
[70] 17 CFR 4.7(a)(1)(v)(A), or as amended by the Final Rule, 17 CFR 4.7(a)(5)(i). The Commission explains further below that the Final Rule adopts several technical amendments reorganizing and renumbering portions of Commission regulation §4.7, including the paragraph containing definitions. As a result of the Final Rule, the new citations for the Portfolio Requirement thresholds will be 17 CFR 4.7(a)(5)(i) through (iii).
[71] 17 CFR 4.7(a)(1)(v)(B), or as amended by the Final Rule, 17 CFR 4.7(a)(5)(ii).
[72] 17 CFR 4.7(a)(1)(v)(C), or as amended by the Final Rule, 17 CFR 4.7(a)(5)(iii).

since their adoption in 1992.[73] The Commission further explained its belief that the Consumer Price Index for All Urban Consumers (CPI-U) and the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) would be suitable benchmarks for determining the general impact of inflationary pressures on the existing Portfolio Requirement thresholds; employing those indexes, the Commission ultimately proposed doubling the Securities Portfolio Test to $4,000,000, and the Initial Margin and Premium Test to $400,000, while also retaining the existing option to meet the Portfolio Requirement through a combination of the two tests adding up to 100%.[74] Although the Commission acknowledged that the proposed update to the dollar thresholds were not an exact reflection of the impact of inflation,[75] the Commission reasoned that approximating these thresholds to the nearest million and hundred thousand provided clear and fair thresholds that would better facilitate compliance.[76] After careful consideration of the comments received, as well as additional analysis of the benchmarks the Commission initially used to determine the impact of inflation on the existing Portfolio Requirement thresholds, the Commission is adopting the amendments to the Portfolio Requirement as proposed.

Commenters generally supported the Commission's proposed amendments to the Portfolio Requirement. Of the eight responses the Commission received on the Proposal as a whole, five commenters responded directly to the Commission's proposal to update the Portfolio Requirement.[77] MFA, SIFMA AMG, AIMA, IAA, and Dechert supported the Commission's proposal to update the Portfolio Requirement,[78] although some

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[73] Proposal, 88 FR 70854.
[74] *Id.*
[75] Using the indexes, as of February 2023, the Commission explained in the NPRM that $2,000,000 had the same buying power as $4,270,000, and $200,000 had the same buying power as approximately $427,000. *Id.*
[76] *Id.*
[77] *See* SIFMA AMG Letter, at 11; AIMA Letter, at 4; IAA Letter, at 2; Dechert Letter, at 14.
[78] *See* MFA Letter, at 3 (explaining that "an increase in the investor qualification thresholds for QEPs could modernize CFTC Regulation 4.7 to meet contemporary expectations regarding sophisticated investors," and

commenters further stated that the adoption of these threshold increases should not be coupled with the addition of minimum disclosure requirements in Commission regulation §4.7. In particular, several commenters expressed their view that appropriately updating the Portfolio Requirement thresholds should alleviate the concerns raised by the Commission in the NPRM by providing additional customer protection for natural persons (and other QEPs subject to the Portfolio Requirement) and modernizing Commission regulation §4.7, which would thereby render any additional disclosure requirements unnecessary.[79] The Commission agrees that increasing the thresholds brings Commission regulation §4.7 back into alignment with the Commission's original intention in 1992 for the purpose of differentiating between retail investors and more sophisticated market participants. The increases to the Portfolio Requirement thresholds ensure that persons unable to meet those metrics receive the full panoply of disclosures and other customer protections required for non-QEP pool participants and advisory clients.

Although the Commission is not finalizing the proposed amendments that would add minimum disclosure requirements to Commission regulation §4.7 in this Final Rule, the Commission notes that commenters asserted that raising the Portfolio Requirement thresholds would also address the Commission's concerns regarding the informational

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that the proposed increases "would bring the Portfolio Requirement monetary threshold into closer alignment with the qualified purchaser … standard, consistent with the investor base for many 4.7 pools"); SIFMA AMG Letter, at 11 ("[W]e think it makes sense to update the Portfolio Requirement to ensure that QEPs remain limited to those investors who are truly sophisticated."); AIMA Letter, at 4 ("We broadly support the proposed changes to the Portfolio Requirement Thresholds."); IAA Letter, at 2 ("We do not object to the Commission's proposal to update the Portfolio Requirement thresholds for QEPs to adjust for inflation."); Dechert Letter, at 14 ("[W]e do not have an issue with CFTC's proposal to increase the two thresholds in the Portfolio Requirement.").

[79] *See, e.g.*, MFA Letter, at 5 ("Doubling the QEP dollar thresholds is sufficient to address the Commission's current investor protection and modernization goals, without conditioning the increase on the adoption of a prescriptive, retail orientated disclosure regime contained in the Disclosure and Performance Rules."); SIFMA AMG Letter, at 11 ("In our view, this update should address the Commission's concerns articulated in the Proposal at large regarding investor sophistication and access to information, thus obviating the need to impose mandatory disclosure requirements in addition."); AIMA Letter, at 4 ("If the Portfolio Requirement thresholds are adjusted appropriately, then there is no reason why the Commission should also eliminate the disclosure exemptions under Regulation 4.7."); IAA Letter, at 2 ("We believe that raising [the Portfolio Requirement thresholds] should be sufficient to address the Commission's concerns, and that the additional proposed disclosures are not necessary.").

discrepancy between CPOs' and CTAs' prospective and actual pool participants and advisory clients. The Commission proposed the increases to the thresholds in the Portfolio Requirement to ensure that it continued to serve as "objective criteria" to distinguish between retail participants in the commodity interest markets and those persons "with a high degree of sophistication with regard to investments as well as financial resources to withstand the risk of their investments."[80] Essentially, increasing the Portfolio Requirement thresholds in the manner proposed in the NPRM effectively bridges the financial gap that has developed between the amounts the Commission adopted in 1992 and the actual buying power of those amounts in 2024, due to inflationary effects experienced in that time period.

In addition to general support from commenters, the Commission believes that updated information from the indexes used to benchmark the proposed thresholds within the Portfolio Requirement continues to support the proposed increases. In developing this Final Rule, the Commission revisited the two inflation indexes published by the United States Bureau of Labor Statistics (BLS) used to devise the proposed amendments to the Portfolio Requirement. As explained in the Proposal, the Commission consulted the CPI-U and CPI-W to understand the approximate effect of inflation on the dollar value thresholds within the Portfolio Requirement and the current buying power of those thresholds.[81] The purpose of consulting these benchmarks was to determine whether the dollar thresholds within the Portfolio Requirement still reflect the heightened standard of

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[80] Proposal, 88 FR 70854 (citing the 1992 Proposed Rule, 57 FR 3152).

[81] *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.

investor activity and sophistication that the Commission considered sufficient for certain persons to qualify as a QEP in adopting the Portfolio Requirement in 1992. At the time of the Proposal, the Commission preliminarily concluded that the thresholds within the Portfolio Requirement were significantly devalued by over three decades of inflationary effects, such that the thresholds no longer served as the investor protection guardrails that the Commission originally intended.[82] If left unaddressed, the Commission believes that the gap between the actual buying power of the original Portfolio Requirement thresholds and the Commission's original intent of limiting QEPs to financially sophisticated persons with significant commodity interest trading experience will only widen. In the Proposal, the Commission specifically requested feedback from commenters on whether the CPI-U and CPI-W indexes were "the most appropriate for considering inflation on the thresholds within the Portfolio Requirement," and if not, the Commission also requested feedback on any other indexes or methods it should use in assessing the effect of inflation.[83] The Commission did not receive any feedback in response to this question, and therefore, will continue to use the CPI-U and CPI-W indexes as benchmarks for its analysis. Using the same example, the Commission used in the Proposal, based on analysis using CPI-U data, as of July 2024, the $2,000,000 threshold in the Securities Portfolio Test has the same buying power as approximately $4,464,726, and the $200,000 threshold in the Initial Margin and Premiums Test has the same buying power as

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[82] *See* Proposal, 88 FR 70854 The indexes show that inflation has had an appreciable effect on the monetary thresholds promulgated in the 1992 Final Rule. The CPI-U and CPI-W data expose that the current thresholds may no longer be indicative of a high level of investor sophistication, acumen, and resources that the Commission anticipated when the Portfolio Requirement was promulgated. Based on analysis using CPI-U data, for example, as of February 2023, the Securities Portfolio Test's $2,000,000 threshold has equal purchasing power as approximately $4,270,000, and the $200,000 specification in the Initial Margin and Premiums Test has equal purchasing power as approximately $427,000. *See also id.* at 70854, n. 30.

[83] *Id.* at 70855.

approximately $446,472.[84] As shown by the example, the disparity in buying power will continue to be exacerbated over time.

Although the Commission believes the updated information from the inflation indexes justifies updating the Portfolio Requirement thresholds, some commenters raised concerns that an increased Portfolio Requirement would have wider consequences. One commenter raised a concern that, if the Commission significantly raised the Portfolio Requirement's financial standards, it "may move certain persons that may desire to participate in a 4.7 pool or managed account program further away from the SEC's current accredited investor qualification standards for private offerings," and recommended that the Commission work with the SEC to review the accredited investor definition and determine if any changes are appropriate, rather than update the Portfolio Requirement thresholds on its own.[85] The Commission agrees with the commenter that it is desirable to harmonize overlapping regulatory regimes where possible and appropriate, and recognizes that it is perhaps particularly relevant to Commission regulation §4.7, where the Commission specifically identified and utilized the SEC's accredited investor definition as a "foundation" for developing the exemption.[86] Despite that acknowledgement, the Commission is not persuaded that increasing the financial thresholds within the Portfolio Requirement would create a large enough gap between the two frameworks, so as to render them unworkable in tandem. The Portfolio Requirement is a unique feature of Commission regulation §4.7 that has never appeared as a

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[84] The actual calculator for CPI–U can be found at https://www.bls.gov/data/inflation_calculator.htm. Similar to the Proposal, the Commission is choosing to include the July 2024 CPI–U data above because it provides a clear example of today's buying power of the Portfolio Requirement, as it was established in August 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 Final Rule.

[85] NFA Letter, at 3. NFA also stated that the Commission, in its 1992 Proposal, acknowledged that the SEC's accredited investor definition under SEC Regulation D was used as the "foundation" to define categories of QEPs. *See also* 57 FR 3148, 3151-3152 (Jan. 28, 1992) (1992 Proposal).

[86] 1992 Proposal, 57 FR 3151.

qualification in the SEC's accredited investor definition. In 1992, as part of the Commission's discussion of the SEC's accredited investor definition serving as a "foundation" for Commission regulation §4.7, the Commission stated that it "[proposed] a definition of QEP that is designed generally to include persons who qualify as accredited investors under Regulation D [17 CFR 230.500 through 230.508] *and who meet certain additional qualifications*."[87] The Commission was clear in 1992 that the Portfolio Requirement was intended to be an "additional qualification" on top of meeting the accredited investor definition, and that its consideration of aspects of the accredited investor definition in developing Commission regulation §4.7 were with respect to the categories of QEPs and not the Portfolio Requirement. The Portfolio Requirement is a CFTC-only component of Commission regulation §4.7 that was developed intentionally to impose a heightened standard for QEPs as opposed to simply relying on the provisions of the securities laws. It is entirely plausible that, under the existing frameworks, a person may qualify as an accredited investor, but also not be a QEP. For example, § 230.501(a)(6) of Regulation D defines an accredited investor as any natural person who had an individual income in excess of $200,000 in each of the two most recent years, or joint income with that person's spouse in excess of $300,000 in each of those years.[88] If a natural person narrowly meets that accredited investor income test, it is entirely possible that they do not have sufficient assets to meet the Securities Portfolio Test, or sufficient commodity interest trading to meet the Initial Margin and Premiums Test under the current Portfolio Requirement in Commission regulation §4.7. To put it simply, in the context of natural persons, the accredited investor definition attempts to measure financial sophistication by annual income or net worth, whereas the Portfolio Requirement is focused on a person's experience trading and managing a portfolio of

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[87] *Id.* (emphasis added).
[88] 17 CFR 230.501(a)(6).

sufficient size to demonstrate an understanding of the risks in the securities and commodity interest markets; the latter being arguably more relevant to assessing a person's sophistication and investment acumen given the complexity and unique risks associated with the commodity interest markets.[89]

Moreover, not all persons are required to meet the Portfolio Requirement to be QEPs. The Portfolio Requirement only applies to persons listed under current Commission regulation §4.7(a)(3),[90] whereas those categories of persons listed under current Commission regulation §4.7(a)(2) do not have to meet its terms to be QEPs.[91] In creating and adopting the QEP definition and Commission regulation §4.7, the Commission viewed these two categories as separate "classes" and intentionally provided an additional eligibility condition, in the form of the Portfolio Requirement, for those persons listed in current Commission regulation §4.7(a)(3).[92] The amendments to the

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[89] *See* 1992 Final Rule, 57 FR 34854, quoting 1992 Proposal, 57 FR 3151 (explaining that the Commission intended to define QEP status by means of objective criteria that such persons possess either the investment expertise and experience necessary to understand the risks involved, as evidenced by the registered status of certain investment professionals, or have an investment portfolio of sufficient size 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).

[90] This list includes, but is not limited to: (1) certain investment companies registered under the Investment Company Act of 1940 (ICA) or business development companies 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 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 organizations described in section 501(c)(3) of the Internal Revenue Code (IRC) with total assets in excess of $5,000,000; (8) certain corporations, Massachusetts or similar business trusts, or partnerships, limited liability companies or similar business ventures; (9) natural persons meeting the individual net worth or joint net worth tests within the "accredited investor" definition; (10) natural persons who would otherwise be considered accredited investors; (11) certain pools, trusts, insurance company separate accounts, or bank collective trusts; and (12) certain government entities.

[91] This list includes, but is not limited to: (1) registered 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 (active for two or more years, and $5,000,000 in total aggregate commodity pool assets); (4) certain registered CTAs, and principals thereof (active for two or more years, and advising commodity accounts, in the aggregate, of $5,000,000 or more); (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 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; (9) certain trusts; (10) organizations described in section 501(c)(3) of the IRC, where the trustee, founder, or person making investment decisions is also a QEP; (11) non-United States persons; and (12) exempt pools.

[92] 1992 Proposal, 57 FR 3152.

financial thresholds being adopted today do not expand the Portfolio Requirement to the other persons enumerated under current Commission regulation §4.7(a)(2) or otherwise alter these two original categories of QEPs. The establishment of the Portfolio Requirement was an intentional, alternative mechanism for qualification as a QEP, functioning independent of the SEC's accredited investor definition, and has been part of the terms of Commission regulation §4.7 since its inception in 1992. As such, the Commission is not persuaded that updating the Portfolio Requirement by adjusting its thresholds would meaningfully disrupt existing harmonization between CFTC and SEC regulatory regimes, as the two standards were never identical and were not intended to be. Nor does the Commission believe that it should delay increasing the Portfolio Requirement until the accredited investor definition is otherwise amended.

Another commenter expressed concern that the increases to the financial thresholds within the Portfolio Requirement could have negative effects on persons who currently qualify as QEPs, but would no longer be considered QEPs under the updated Portfolio Requirement.[93] Specifically, the commenter advocated for the grandfathering of investors who are currently QEPs, but would no longer qualify as such under the increased Portfolio Requirement, and encouraged the Commission to "clarify and explain its expectations with respect to 4.7 offerings with pool participants that are both QEPs, and former QEPs that no longer satisfy the [increased] Portfolio Requirement."[94] In the Proposal, the Commission specifically requested any data or information from CPOs or CTAs that utilize Commission regulation §4.7 on the number of advisory clients and pool participants that would be directly affected by the increase.[95] Despite raising this concern and the Commission's specific request, neither this commenter nor any other provided

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[93] MFA Letter, at 4.

[94] *Id.*

[95] *See* Proposal, 88 FR 70855, Request #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.").

information or data on the number of advisory clients or pool participants that currently qualify as QEPs via the existing Portfolio Requirement, but would not so qualify if the increased thresholds are adopted. Notwithstanding the lack of specific information to assess the magnitude of the class of persons affected, the Commission acknowledges that some persons will fall within this "gap" population that would no longer be considered QEPs under the updated Portfolio Requirement.[96] Because of that reality, the Commission preliminarily addressed its position with respect to such former QEPs within the Proposal.[97] For the sake of clarity, however, the Commission today restates its position below on how it expects CPOs and CTAs to comply with the updated Portfolio Requirement for its advisory clients or pool participants that previously qualified as QEPs, but would not so qualify under the updated Portfolio Requirement.

The Commission intends to retain, and will apply, the provision which requires that, for persons that must satisfy the Portfolio Requirement, a CPO or CTA must have the reasonable belief, at the time of sale of a pool participation in an exempt pool, or at the time that a person opens an exempt account, that such person satisfies the Portfolio Requirement. In effect, if a CPO or CTA has previously sold a pool participation or opened an exempt account for a person that qualified as a QEP under the previous Portfolio Requirement, but who does not meet the updated Portfolio Requirement, the CPO or CTA would not be required to redeem such person's pool participations, or to

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[96] The only mechanism available for the Commission to confirm the existence of this population would be to review all documents required to be kept by §4.7 CPOs and CTAs that validate their advisory clients' or pool participants' status as QEPs and assess how many would fall within the "gap" population.

[97] Proposal, 88 FR 70854-55 ("Acknowledging that the Portfolio Requirement will likely result in a certain portion of currently-qualifying QEPs no longer meeting the thresholds, the Commission noted that current Regulation 4.7(a)(3) provides that CPOs must assess a person's QEP status at the time of sale of any pool participation units including satisfying the Portfolio Requirement. Likewise, CTAs must make a similar assessment at the time that a person opens an exempt account. As opposed to requiring mandatory redemptions or terminations of advisory relationships for those current QEPs who may not meet the proposed heightened thresholds, the Commission expects that continuing this requirement 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 proposal was for the retaining the requirements of Regulation 4.7(a)(3) in Proposed Regulation 4.7(a)(6)(ii). Additionally the Commission sought comment on this issue in the proposal.).

terminate the advisory relationship with that person. However, a CPO or CTA would not be permitted to sell any additional pool participations or open any additional exempt accounts for any person that does not meet the updated Portfolio Requirement. The avoidance of required redemption or account closure should limit any potential disruptions or negative consequences either to the §4.7 pool or trading program, or the pool participant or advisory client.

The Commission believes, however, that it would run counter to the intent of the updated Portfolio Requirement to permit a wholesale grandfathering of any persons who had previously been considered QEPs prior to the update. Additionally, the Commission is concerned that doing so may lead to an influx of persons into §4.7 pools and trading programs prior to the implementation date of the updated Portfolio Requirement, solely to evade the increased financial thresholds. The Commission notes that, pursuant to current Commission regulation §4.7 requirements, CPOs and CTAs are responsible for determining the QEP status of their prospective pool participants or advisory clients, regardless of how such QEP meets that definition, and must retain evidence of such determinations as part of their books and records.[98]

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

As the Commission explained in the Proposal, Commission regulation §4.7(b)(3) provides an exemption from the requirement in Commission regulation §4.22(a) and (b) that CPOs provide monthly account statements containing specific information to participants in their commodity pools.[99] With respect to §4.7 pools, CPOs are permitted to distribute account statements no less frequently than quarterly within 30 days after the

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[98] *See* 17 CFR 4.7(b)(5) and (c)(2) (requiring CPOs and CTAs to maintain books and records including, without limitation, records relating to the qualifications of qualified eligible persons).
[99] Proposal, 88 FR 70863 (citing 17 CFR 4.7(b)(3), 4.22(a) and (b)).

end of the reporting period.[100] The Commission noted, however, that CPOs of §4.7 pools that are "Funds of Funds"[101] have reported to Commission staff that they often have difficulty complying with the quarterly account statement schedule required by Commission regulation §4.7(b)(3). The Commission stated further that such CPOs regularly request exemptive letters from the Commission to permit them to follow an alternate account statement schedule, explaining that because they cannot control the timing of when they receive financial information from underlying investee collective investment vehicles, investor Fund of Funds CPOs often do not receive the requisite information for their own §4.7 pool periodic reporting until the 30-day period for distribution is nearly expired. The Commission explained that, over the years, it has routinely granted these exemptive letter requests, permitting requesting CPOs to distribute monthly, rather than quarterly, account statements for their §4.7 Fund of Funds pools within 45 days of the month-end,[102] and that this approach allowed the requesting CPOs additional time to receive and gather the information required for their account statements, while also ensuring that QEP pool participants receive both more accurate and more frequent reporting.

Consistent with its past efforts to memorialize routinely granted Commission letter relief via regulatory amendments, the Commission proposed to add paragraph (b)(3)(iv) to Commission regulation §4.7, noting that the amendment was intended to streamline availability, provide consistency, and eliminate the need for Commission staff to process and respond to requests individually.[103] Proposed Commission regulation §4.7(b)(3)(iv) stated, 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

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[100] 17 CFR 4.7(b)(3)(i).
[101] In the Proposal, the Commission defined "Funds of Funds" as pools that invest in unrelated funds, pools, or other collective investment vehicles. Proposal, 88 FR 70856, n. 42.
[102] Proposal, 88 FR 70863 (citing CFTC Letters 18-29, 19-01, 19-03, 20-11, 21-16, and 23-04).
[103] *Id.*

prepare and distribute to its pool participants statements on a monthly basis within 45 days of the month-end, provided that such account statements otherwise meet the requirements of Commission regulation §4.7(b)(3), and that the CPO notifies its §4.7 pool participants of this alternate distribution schedule either in the pool's offering memorandum, or upon adoption of this reporting schedule.[104] The Commission requested comment on the proposed amendment, in particular whether it 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.[105]

In response to this aspect of the NPRM, the Commission received positive feedback from multiple commenters, with one commenter noting specifically that "seeking and receiving the exemptive relief has come with a time and cost burden for CPOs" operating §4.7 Fund of Fund pools and indicating that the proposed amendment would be a welcome alternative to that process.[106] Given the positive public comments, the lack of any suggested changes to this amendment, as well as its continued belief that considering and adopting regulatory amendments consistent with staff letter relief provides clarity, consistency, and streamlines availability, the Commission is adopting Proposed Commission regulation §4.7(b)(3)(iv) as proposed.

E. Other Technical Amendments

The Proposal also included a number of technical amendments to Commission regulation §4.7 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.[107] For example, the Commission proposed to delete the introductory

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[104] Proposal, 88 FR 70878.
[105] *Id.* at 70863.
[106] SIFMA AMG Letter, at 11; IAA Letter, at 7; NFA Letter, at 5; Dechert Letter, at 11.
[107] Proposal, 88 FR 70863.

paragraph to Commission regulation §4.7 and to generally restructure the definitions section in Commission regulation §4.7(a), eliminating what it viewed as unnecessary subparagraph levels in the QEP definition and alphabetizing the definitions for ease of reference. The Commission also proposed additional amendments to ensure that cross-references within Commission regulation §4.7 and in other part 4 regulations were accurate.

The Commission sought comment on those technical amendments and requested commenters detail any other technical amendments it should consider for ease of use, as well as whether there were any other cross-references within Commission regulation §4.7 not addressed by the Proposal that should be corrected. The Commission received no comments on these technical amendments, and no commenters identified additional technical amendments or corrections that it should consider. Nevertheless, as a result of the reorganization of the definitions in Commission regulation §4.7 accomplished by this Final Rule, the Commission has identified several regulations outside of 17 CFR part 4 that now require technical corrections because they refer to certain definitions in Commission regulation §4.7. Specifically, the Commission is correcting references to defined terms in Commission regulation §4.7 found in Commission regulation §§1.35, 3.10, 30.6, 43.6, and 75.10. Therefore, the Commission is adopting the technical amendments in the NPRM largely as proposed, along with technical corrections to the regulatory cross-references outside of part 4 that are listed herein.

F. Effective and Compliance Dates for the Final Rule

In the Proposal, the Commission requested feedback from commenters on the time needed to comply with the proposed Portfolio Requirement update and the proposed minimum disclosure requirements.[108] The Commission only received one comment in

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[108] Proposal, 88 FR 70855 ("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

response, requesting an 18-month implementation timeline for the proposed minimum disclosure requirements.[109] As discussed above, the Final Rule is not adopting minimum disclosure requirements in Commission regulation §4.7 at this time. Nonetheless, the Commission is adopting distinct compliance dates for each remaining component of the Final Rule.

The compliance date for the increased Portfolio Requirement thresholds shall be six months from publication of the Final Rule in the *Federal Register*. As discussed in section II.C above, the updated Portfolio Requirement will require §4.7 CPOs and CTAs to adjust their processes for assessing the QEP status for both new and existing pool participants and advisory clients. However, given that the Portfolio Requirement update would not require §4.7 CPOs and CTAs to redeem pool participations or otherwise end advisory relationships with those QEPs who no longer meet the Portfolio Requirement, as amended by the Final Rule, and that §4.7 CPOs and CTAs only need to update their QEP evaluation processes with the new thresholds on a forward-looking basis, the Commission believes a 6-month implementation period is appropriate.[110]

Finally, the component of the Final Rule permitting alternative monthly account statement schedule for certain §4.7 pools that are Funds of Funds, *i.e.*, new Commission regulation §4.7(b)(3)(iv), shall be effective as of the Final Rule's effective date, as described above, and following the effective date, compliance will be required when a CPO elects to utilize this schedule for a qualifying §4.7 pool.

III. Related Matters

Initial Margin and Premium Tests, if adopted as proposed?"); *see also* Proposal, 88 FR 70859 ("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?").

[109] SIFMA Letter, at 11 ("If, however, the Commission declines to do so, we ask that the Commission allow for at least an 18-month compliance period to allow CPOs and CTAs adequate time to develop the necessary compliance programs.").

[110] *See* discussion in section II.C above for more detail on the implementation and applicability of the amended Portfolio Requirement to existing QEP pool participants and advisory clients.

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.[111] If the rules are determined to have a significant economic impact, such agencies must provide a regulatory flexibility analysis regarding such economic impact. Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking. The Final Rule amendments adopted by the Commission today would affect only persons registered or required to be registered as CPOs and CTAs and those commodity pools and trading programs operated under Commission regulation §4.7 and offered solely to QEPs.

1. 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 accordance with the requirements of the RFA.[112] 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 Commission regulation §4.13(a)(2).[113] The regulations adopted in this Final Rule 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

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[111] 5 U.S.C. 601, *et seq*.

[112] *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).

[113] *Id.* at 18619-20. Commission 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).

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 Final Rule will not have a significant economic impact on a substantial number of small entities, with respect to CPOs.

2. 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.[114] Because certain of these registered CTAs may be small entities for the purposes of the RFA, the Commission considered in the NPRM whether the proposed amendments would have a significant economic impact on such registrants.[115] The Commission received no comments on the initial regulatory flexibility analysis conducted in the Proposal.

The portions of the Final Rule directly impacting CTAs would affect only CTAs registered or required to register with the Commission that offer and operate trading programs designed for QEPs. Given that the Commission has determined to finalize only the Portfolio Requirement increases in this Final Rule, the Commission believes that the Final Rule amendments will have almost no economic impact on registered CTAs offering §4.7 trading programs because, beyond increasing the thresholds in the Portfolio Requirement, the Final Rule does not add any other compliance burdens for CTAs.

As stated above, the amendments adopted today primarily impact registered CTAs offering §4.7 trading programs to QEP advisory clients and claiming the compliance exemptions currently offered by Commission regulation §4.7. As explained in the NPRM, data on the specific size of registered CTAs offering §4.7 trading programs is limited, but it has been the Commission's experience that such CTAs claiming

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[114] *Id.* at 18620.
[115] Proposal, 88 FR 70863-66.

compliance exemptions in Commission regulation §4.7 for the purposes of soliciting and serving QEP advisory clients are often large financial institutions with substantial financial assets and advisory experience, or affiliates thereof. Although the Chairman, on behalf of the Commission, certifies under the RFA that the Final Rule will not have a significant impact on a substantial number of small entities, and hereby provides notice of that certification to the Small Business Administration, the Commission nonetheless has determined that publishing a final regulatory flexibility analysis is appropriate to ensure that the impact of the Final Rule is fully addressed. Therefore, the Commission has prepared the following final regulatory flexibility analysis:

i. A Statement of the Need for, and Objectives of, the Rule.

As the Commission stated in the Proposal, and as reiterated above in this Final Rule, since the 1992 Final Rule adopting Commission 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 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. 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.[116] The Commission has determined to adopt the proposed increases to the Portfolio Requirement in the QEP definition, which will require CTAs to adjust their methods of evaluating prospective advisory clients' QEP status.

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[116] 7 U.S.C. 6m, 6n.

ii. A Statement of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Statement of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments.

The Commission received no comments specifically addressing the initial regulatory flexibility analysis published in the Proposal.[117] However, the Commission did receive several comments, discussed above, stating that the proposed amendments, if adopted, would prove costly to intermediaries, with such costs being passed down to QEP pool participants and advisory clients, without necessarily resulting in the customer protection benefits the Commission intended. Commenters asserted that the proposed amendments, as applied to common usage scenarios in complex fund structures, may require CTAs to provide QEP Disclosures to entities or persons under common control who likely already receive or have access to such information; that, in other contexts, CTAs have relationships with highly sophisticated and well-resourced QEPs, whose disclosures and access to information are carefully negotiated; and finally, that the proposed amendments would be duplicative of requirements in the securities laws dictating the content and disclosures in Form ADV, which is commonly filed by investment advisers dually registered as CTAs, or of disclosures already being made as a matter of common market practice.

After considering these comments, as well as potential alternatives raised by commenters, the Final Rule does not adopt any minimum disclosure requirements in Commission regulation §4.7. The Commission will continue evaluating the regulatory alternatives and may adopt further changes in the future. The Commission has determined to adopt the proposed increases to the Portfolio Requirement in the QEP

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[117] Proposal, 88 FR 70863-66.

definition as part of this Final Rule, which will require CTAs to adjust their methods of evaluating prospective advisory clients' QEP status. Therefore, the only impact this Final Rule will have on CTAs is with respect to the adoption of the Portfolio Requirement increases that may have a small effect on how CTAs evaluate prospective advisory clients' QEP status.

iii. A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Rule Will Apply.

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 may be considered small entities for RFA purposes. The Commission sought comment on this issue in its initial regulatory flexibility analysis, but received no comments addressing this issue or providing relevant data. It is the Commission's experience that registered CTAs[118] claiming Commission 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 some percentage or portion of the population of CTAs affected by this Final Rule, *i.e.*, those registered or required to register with the Commission and utilizing the exemptions in Commission regulation §4.7, may be considered small entities as defined by the RFA, though the Commission lacks the information or data necessary to determine or estimate how many.

iv. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities Which Will Be Subject to

[118] As of June 2024, there were approximately 1,241 CTAs registered with the Commission.

the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record.

The Commission is not adopting the minimum disclosure requirements, or the corresponding proposed recordkeeping, use and amendment requirements, in Commission regulation §4.7, but is adopting adjustments to the Portfolio Requirement in the QEP definition of that provision. The Commission anticipates that the Final Rule will affect CTAs claiming Commission 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 accurately evaluate the QEP status of prospective advisory clients, which is a baseline requirement for CTAs operating under claimed exemptions in Commission regulation §4.7, and that the Final Rule will require only minor adjustments to CTAs' existing processes.

v. A Description of the Steps the Agency has Taken to Minimize the Significant Economic Impact on Small Entities Consistent with the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected.

The Commission did not propose any specific small entity exemption, but in the initial regulatory flexibility analysis, the Commission identified potential alternatives to the proposed amendments: (1) to not amend Commission regulation §4.7 to add disclosure requirements for §4.7 trading programs; (2) to amend Commission 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; or (3) limiting the application of the proposed amendments to registered CTAs claiming Commission regulation §4.7 and offering §4.7 trading programs to those CTAs who are not small entities for RFA purposes.

Although the Commission did not receive any comments directly on the initial regulatory flexibility analysis, multiple commenters made suggestions regarding how the Commission might limit the scope of the proposed disclosure requirements, while still accomplishing its customer protection goals with respect to QEPs most in need of regulatory support. In this Final Rule, the Commission has determined to adopt the proposed increases to the Portfolio Requirement in the QEP definition as part of this Final Rule, but is not adopting the proposed minimum disclosure requirements. Nonetheless, the Commission will continue to evaluate regulatory alternatives relating to minimum disclosure requirements and may adopt further changes, in the future, as appropriate.

B. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) imposes certain requirements on Federal agencies, including the Commission, in connection with conducting or sponsoring any "collection of information" as defined by the PRA.[119] Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The 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. The PRA applies to all information,

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[119] 44 U.S.C. 3501, *et seq*.

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.

The Final Rule modifies an existing collection of information previously approved by OMB and for which the Commission has received an OMB control number. 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 by Futures Commission Merchants" (Collection 3038-0005). 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.*, Commission regulation §4.7. In the Proposal, the Commission performed a PRA burden analysis of the proposed amendments and invited the public and other interested parties to comment on any aspect of the information collection requirements discussed therein. The Commission did not receive any such comments. The Commission is revising Collection 3038-0005 to reflect the adoption of the Final Rule amendments to Commission regulation §4.7, as discussed in further detail below.

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. In the NPRM, the Commission proposed new information collection obligations including minimum disclosure requirements and an alternative reporting schedule for required account

statements. As discussed above, the Commission is not adopting the minimum disclosure requirements proposed in the NPRM in this Final Rule. The Commission is, however, adopting the amendment addressing the reporting schedule for distribution of account statements by CPOs of §4.7 pools that are Funds of Funds.

As discussed above, the Commission is adopting an amendment to Commission regulation §4.7(b)(3) that, consistent with routinely issued Commission exemptive letters, permits CPOs of §4.7 pools that are Funds of Funds to distribute monthly account statements within 45 days of the month-end, provided that such account statements otherwise meet the requirements of Commission regulation §4.7(b)(3), and that the CPO notifies its §4.7 pool participants of this alternate distribution schedule either in the pool's offering memorandum, or upon adoption of this reporting schedule. Collection 3038-0005 currently includes a reporting burden associated with Commission 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 revising the collection to include an additional reporting burden associated with Commission regulation §4.7(b)(3)(iv), adopted as part of this Final Rule, to account for the burden associated with monthly reporting as an option for §4.7 pools that are Funds of Funds. As it stated in the NPRM, the Commission believes that "a smaller subset of CPOs and 4.7 pools [will] 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."[120]

Accordingly, the aggregate annual estimate for the reporting burden associated with Commission regulation §4.7(b)(3)(iv), as added by this Final Rule, is as follows:

Estimated number of respondents: 100.

Estimated frequency/timing of responses: Monthly.

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[120] *Id.*

Estimated number of annual responses per respondent: 36.

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.

C. Cost-Benefit Considerations

1. Statutory and Regulatory Background

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its discretionary 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 may, in its discretion, give greater weight to any of the five enumerated areas of concern, and may, in its discretion, determine that, notwithstanding its costs, a particular rule is necessary or appropriate to protect the public interest, or to effectuate any of the provisions, or to accomplish any of the purposes, of the CEA. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

The Commission invited public comment on the cost-benefit consideration in the Proposal. There were several general comments that it was "inadequate."[121] One commenter stated that they believed the Commission failed to engage in an adequate cost-benefit analysis sufficient to justify a burdensome and costly disclosure regime.[122] Similarly, another commenter stated that they believed the cost-benefit analysis in the

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[121] MFA Letter, at 12; SIFMA AMG Letter, at 10; and AIMA Letter, at 8.

[122] MFA Letter, at 12. However, in their comment letter, MFA did not provide any specific cost considerations or analysis for the Commission to consider.

Proposal was insufficient.[123] This commenter further encouraged the Commission to "carefully evaluate the increased operational costs associated with requiring CPOs and CTAs offering 4.7 pools and managed account programs to provide the proposed additional disclosures," as they "will almost certainly be passed on to the pools' participants and managed account programs' clients."[124] Despite these general objections to the Commission's Proposal, commenters provided no additional detail regarding how or why the Commission's preliminary cost-benefit analysis was "inadequate," nor did commenters respond to the Commission's specific requests for comment associated with the Proposal's cost-benefit considerations discussion,[125] both of which impede the Commission's ability to remediate the deficiencies commenters perceived in the Proposal's cost-benefit analysis. Regardless, as detailed below, the Commission has considered the broad criticism asserted by commenters, as well as the adjustments made from the proposed amendments to those in this Final Rule.

As discussed above, the Commission is adopting amendments to Commission regulation §4.7 that will result in additional costs for CPOs and CTAs operating §4.7 pools and trading programs. In response to certain comments, however, the Commission is declining to finalize the proposed minimum disclosure requirements and believes it appropriate to spend additional time considering the alternative proposals put forward by commenters. The Commission believes this approach will significantly reduce the costs and burdens to §4.7 CPOs and CTAs arising from this Final Rule, as compared to those outlined in the NPRM. The Final Rule will, however, finalize the proposed amendments that will (1) increase the Portfolio Requirement in Commission regulation §4.7 such that persons required to meet it to be a QEP may satisfy it by either: (a) owning securities and

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[123] SIFMA AMG Letter, at 10.

[124] *Id.*

[125] *See, e.g.,* Proposal, 88 FR 70872 (inquiring as to "the costs of gathering and disseminating the other types of information required to be included in the QEP Disclosures," and "how … fees and expenses charged by CPOs and CTAs … [would] be affected by the proposed disclosure requirements").

other assets worth at least $4,000,000; (b) having on deposit with an FCM for their own account at least $400,000 in initial margin, option premiums, or minimum security deposits; or (c) 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%; and (2) add a provision to Commission regulation §4.7(b)(3) codifying routinely issued exemptive letters 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. These regulatory amendments adopted by the Final Rule will likely generate minimal costs to §4.7 CPOs and CTAs, but are expected to result in several benefits to intermediaries and pool participants and advisory clients. The baseline against which these costs and benefits are compared is the regulatory status quo set forth in current Commission regulation §4.7. The Commission has endeavored to enumerate material costs and benefits and, when reasonably feasible, assign a quantitative value to them. Where it is not reasonably feasible to quantify costs and benefits of the proposed amendments, those costs and benefits are discussed qualitatively.

The consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with some leading industry members typically conducting operations both within and outside the United States; and with industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the discussion of costs and benefits below refers to the effects of this Final Rule on all activity subject to the amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i). Some CPOs and CTAs are located outside of the United States.

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

The Final Rule increases the Portfolio Requirement in Commission regulation §4.7 such that persons required to meet the Portfolio Requirement to be considered QEPs can do so 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%. The Commission did not receive any specific comments regarding whether any costs associated with the Portfolio Requirement financial thresholds would change as a result of the proposed increases. As stated in the Proposal and herein, the Portfolio Requirement was adopted to identify prospective pool participants and advisory clients that possess sufficient financial experience and sophistication to withstand the risks associated with their participation in the commodity interest markets without the full panoply of protections afforded under part 4 of the Commission's regulations. As stated previously in this release and in the Proposal, the Commission believes that increasing such thresholds appropriately restores the alignment of Commission regulation §4.7 with the Commission's original intention when it was adopted in 1992 to differentiate between retail investors and more sophisticated market participants, *i.e.*, QEPs.

The Commission recognizes, as it did in the Proposal, that increasing the thresholds in the Portfolio Requirement will result in some subset of QEPs no longer qualifying as such, which, should such newly designated non-QEPs still desire to participate in the commodity interest markets, could result in market forces supporting the development and offering of additional non-§4.7 pools and trading strategies. This would result in more diverse offerings to retail commodity interest market participants,

thereby enhancing the variety and vibrancy of the non-QEP marketplace. As stated in the Proposal, the Commission believes that this development would result in more non-QEPs having the opportunity to participate in the commodity interest markets through commodity pools and trading programs better aligned with their particular risk tolerances and investment goals.

As noted in the Proposal, due to the increases in the Portfolio Requirement thresholds, §4.7 CPOs will likely no longer be able to offer pool participation units to certain QEPs who will no longer qualify under the new thresholds adopted herein. Such CPOs, as well as some §4.7 CTAs, may decide to offer commodity pools and trading programs that are subject to the full suite of requirements under part 4 of the Commission's regulations, which necessarily would result in increased costs associated with compliance. Conversely, it is possible that some CPOs and CTAs may continue to find the compliance relief provided by Commission regulation §4.7 to outweigh possible gains to be had by accessing the non-QEP market, which would mitigate the potential benefit to non-QEPs. Additionally, the Commission expects there to be certain ministerial costs associated with system updates required for §4.7 CPOs and CTAs to implement the increased thresholds, but given that the general requirements associated with the Portfolio Requirement are not changing in a substantive way beyond the actual numerical value of the thresholds, the Commission does not expect such costs to be significant.

Section 15(a) Factors:

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of the amendments to Commission 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 Final Rule's amendments

increasing the financial thresholds in the Portfolio Requirement will, in the Commission's opinion, more closely align the QEP definition with the original intent of the regulation, which is to assure that offerings operated pursuant to Commission regulation §4.7 compliance exemptions are only made to persons with "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."[126]

a. Protection of Market Participants and the Public

As stated above, the Commission believes that this amendment will 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 will 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, will 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 more financially sophisticated or resilient than those who no longer qualify, this 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 will potentially lead to greater transparency in their activities, which also protects persons investing in commodity interest products. Additionally, greater variety in the commodity

[126] 1992 Final Rule, 57 FR 34854 (citing and quoting 1992 Proposal, 57 FR 3151).

pools and trading programs available to non-QEPs will 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 Final Rule's 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. The 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.[127] Via this mechanism, the Final Rule's 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.

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 Commission regulation §4.7. An additional indirect effect of the Final Rule's amendments 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

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

discovery.[128] 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 Commission regulation §4.7. The Commission determined it appropriate to lessen the compliance burdens for registered CPOs and CTAs limiting their prospective participants and clients to financially sophisticated QEPs through the exemptions provided by Commission 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 possess the sophistication and resilience of other QEPs not subject to such thresholds. Updating these thresholds to account for inflation realigns the Portfolio Requirement with the original intent of the

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[128] *Id.*

QEP definition and modernizes its provisions consistent with today's economic circumstances.

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

Consistent with longstanding exemptive letter relief described herein, the Final Rule adds a provision to Commission 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 month-end, provided that such CPOs notify their pool participants. The Commission received no comments addressing any costs that §4.7 CPOs or CTAs may incur as a result of adopting this amendment.

As discussed in the Proposal, the primary benefit of this amendment is to facilitate §4.7 pools' investment in other pools or collective investment vehicles without potentially violating the periodic reporting requirements in Commission regulation §4.7. The Commission expects that this would 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 requiring an exemptive letter to ensure they can meet their periodic reporting requirements, or otherwise risking chronic compliance violations. The Commission also continues to believe there is significant benefit to be gained by adopting this amendment because CPOs of §4.7 Fund of Funds pools will be 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 to potentially delay operational decisions or changes until such letter is received. Moreover, the Final Rule also ensures 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.

Under the alternative schedule, as described above, qualifying CPOs would be required to prepare and distribute periodic account statements on a monthly basis, which is more frequent than the baseline of quarterly. This will result in increased administrative costs to CPOs that elect this alternative schedule associated with the monthly account statements, which may be passed on to their pool participants. Under the terms of the Final Rule, qualifying CPOs are also required to disclose to their pool participants their election to use the alternative account statement schedule, and this disclosure must be provided to their prospective and existing pool participants. The notification requirement will also result in costs to the CPO, and potentially the pool participants, which will vary in amount depending on whether the CPO chooses to incorporate the notice in an existing communication to pool participants or to create a new standalone disclosure. Similarly, the costs associated with dissemination will vary depending on whether the offered pool is still accepting new participants, or if it is closed, as the Commission does not expect §4.7 CPOs to prepare disclosures for pool participants with respect to pool participation units purchased prior to the effective date of this Final Rule. The Commission notes that this alternative reporting schedule is voluntary, and therefore, should a CPO determine that the costs associated with more frequent statements outweighs the benefits associated with adopting the alternative schedule, it is not required to do so and can continue to provide quarterly account statements within 30 days of the quarter-end, as currently required under Commission regulation §4.7 (and which will remain unchanged by this Final Rule).

The Commission expects that CPOs will use the services of an accountant to prepare the monthly account statements permitted by the Final Rule amendments. The BLS states that the mean wage for accountants as of May 2023, the most recent

information available, is $43.65 per hour.[129] The Commission has estimated that the time burden associated with complying with the alternate schedule for periodic account statements required under the Final Rule is 36 hours per CPO. If the CPO solely uses the services of an accountant to complete these tasks, the total cost associated with the alternative account statement provisions adopted herein is $1,571.40 per CPO.

Section 15(a) Factors:

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of the amendment to Commission 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 Commission regulation §4.7(b)(3) of a permissible monthly account statement schedule will 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, due to the baseline applicable quarterly reporting requirements in Commission regulation §4.7.

a. Protection of Market Participants and the Public.

As discussed above, the Final Rule will permit CPOs of §4.7 Fund of Funds pools to adopt an alternative monthly account statement schedule, provided such statements are distributed 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 this amendment encourages 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 the

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[129] Bureau of Labor Statistics, United States Department of Labor, Occupational Employment and Wage Statistics, Accountants and Auditors, May 2023 (published April 2024), available at https://www.bls.gov/oes/current/oes132011.htm.

Commission believes, based on its past observation of the implementation of staff letters that have been issued addressing this issue, that this amendment will likely provide such QEPs with more complete and accurate account statements on a more frequent basis. Additionally, the Final Rule 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 Commission 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 will 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 Final Rule amending Commission regulation §4.7(b)(3) may indirectly affect the functioning of commodity interest markets. To the extent that the Final Rule 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.[130] 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, this

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

Final Rule 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 Final Rule amending Commission 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.[131] 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,[132] 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, the Final Rule amending Commission 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 positively

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[131] *Id.*

[132] 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.

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 Commission 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 will 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.[133] The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. In the Proposal, the Commission requested comment on whether the NPRM implicated any other specific public interest to be protected by the antitrust laws, but received no comments.

The Commission has considered the amendments in this Final Rule to determine whether they are anticompetitive and has not identified any anticompetitive effects. Because the Commission has not determined that the Final Rule is anticompetitive or has

[133] 7 U.S.C 19(b).

anticompetitive effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects

17 CFR Part 1

Brokers, Commodity futures, Consumer protection, Reporting and recordkeeping requirements.

17 CFR Part 3

Administrative practice and procedure, Commodity futures, Consumer protection, Definitions, Foreign futures, Foreign options, Registration requirements.

17 CFR Part 4

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

17 CFR Part 30

Consumer protection, Fraud.

17 CFR Part 43

Consumer protection, Reporting and recordkeeping requirements, Swaps.

17 CFR Part 75

Banks, Banking, Compensation, Credit, Derivatives, Federal branches and agencies, Federal savings associations, Government securities, Hedge funds, Insurance, Investments, National banks, Penalties, Proprietary trading, Reporting and recordkeeping requirements, Risk, Risk retention, Securities, Swap dealers, Trusts and trustees, Volcker rule.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR chapter I as follows:

PART 1 – GENERAL REGULATIONS UNDER THE COMMODITY EXCHANGE ACT

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6a, 6b, 6c, 6d, 6e, 6f, 6g, 6h, 6i, 6k, 6l, 6m, 6n, 6o, 6p, 6r, 6s, 7, 7a-1, 7a-2, 7b, 7b-3, 8, 9, 10a, 12, 12a, 12c, 13a, 13a-1, 16, 16a, 19, 21, 23, and 24 (2012).

2. In § 1.35, revise paragraph (b)(5)(i)(D) to read as follows:

§ 1.35 Records of commodity interest and related cash or forward transactions.

* * * * *

(b) * * *

(5) * * *

(i) * * *

(D) A foreign adviser that exercises discretionary trading authority solely over the accounts of non-U.S. persons, as defined in § 4.7(a)(4) of this chapter;

* * * * *

PART 3 – REGISTRATION

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

Authority: 5 U.S.C. 552, 552b; 7 U.S.C. 1a, 2, 6a, 6b, 6b-1, 6c, 6d, 6e, 6f, 6g, 6h, 6*i*, 6k, 6m, 6n, 6*o*, 6p, 6s, 8, 9, 9a, 12, 12a, 13b, 13c, 16a, 18, 19, 21, and 23.

4. In § 3.10, revise the introductory text of paragraph (c)(5)(ii) to read as follows:

§ 3.10 Registration of futures commission merchants, retail foreign exchange dealers, introducing brokers, commodity trading advisors, commodity pool operators, swap dealers, major swap participants and leverage transaction merchants.

* * * * *

(c) * * *

(5) * * *

(ii) With respect to paragraph (c)(5)(i) of this section, initial capital contributed to a commodity pool by an affiliate, as defined by § 4.7(a)(1) of this chapter, of the pool's commodity pool operator shall not be considered for purposes of determining whether such commodity pool operator is executing commodity interest transactions on behalf of a commodity pool, the participants of which are all foreign located persons; *provided*, that:

* * * * *

PART 4 – COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

5. 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.

6. In § 4.7:

a. Revise paragraph (a);

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

c. Revise paragraph (b)(5).

The revisions and addition read as follows:

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

* * * * *

(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)) and $200,000 in initial margin, option premiums, and minimum security deposits (50% of paragraph (a)(5)(ii)).

(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 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) 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 (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 (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;

(*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; or

(*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 paragraphs (a)(6)(ii)(A) through (L) of this section, 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) * * *

(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) and (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)(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.

* * * * *

7. 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)(4), 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;

* * * * *

8. 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 in this part, 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.

* * * * *

9. In § 4.22:

a. Revise paragraph (a)(4), the introductory text of paragraph (c)(7), paragraph (c)(8), the introductory text of paragraph (d)(1), the introductory text of paragraph (d)(2)(i), the introductory text of paragraph (f)(2), and paragraph (f)(2)(iv)(B); 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 in this part, 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 this paragraph (c) or § 4.7(b)(4):

* * * * *

(8) For the purpose of the Annual Report distribution requirement in this part, 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 contains 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 § 1.16 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

* * * * *

PART 30 – FOREIGN FUTURES AND FOREIGN OPTIONS TRANSACTIONS

10. The authority citation for part 30 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6c, and 12a, unless otherwise noted.

11. In § 30.6, revise paragraph (b)(1)(i) to read as follows:

§ 30.6 Disclosure.

* * * * *

(b) * * *

(1) * * *

(i) A commodity pool operator registered or required to be registered under this part, or exempt from registration pursuant to § 30.5, may not, directly or indirectly, engage in any of the activities described in § 30.4(c) unless the pool operator, at or before the time it engages in such activities, first provides each prospective qualified eligible person with the Risk Disclosure Statement set forth in § 4.24(b)(2) of this chapter and the statement in § 4.7(b)(2)(i) of this chapter;

* * * * *

PART 43 – REAL-TIME PUBLIC REPORTING

12. The authority citation for part 43 continues to read as follows:

Authority: 7 U.S.C. 2(a), 12a(5) and 24a, as amended by Pub. L. 111-203, 124 Stat. 1376 (2010).

13. In § 43.6, revise paragraphs (i)(6)(i)(B) and (j)(1)(ii) to read as follows:

§ 43.6 Block trades and large notional off-facility swaps.

* * * * *

(i) * * *

(6) * * *

(i) * * *

(B) Is an investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(6)(i)(G) of this chapter; or

* * * * *

(j) * * *

(1) * * *

(ii) An investment adviser who has discretionary trading authority or directs client accounts and satisfies the criteria of § 4.7(a)(6)(i)(G) of this chapter, or

* * * * *

PART 75 – PROPRIETARY TRADING AND CERTAIN INTEREST IN AND RELATIONSHIPS WITH COVERED FUNDS

14. The authority citation for part 75 continues to read as follows:

Authority: 12 U.S.C. 1851.

15. In § 75.10, revise paragraphs (b)(1)(ii)(B)(*2*) and (*3*) to read as follows:

§ 75.10 Prohibition on acquiring or retaining an ownership interest in and having certain relationships with a covered fund.

* * * * *

(b) * * *

(1) * * *

(ii) * * *

(B) * * *

(*2*) Substantially all participation units of the commodity pool are owned by qualified eligible persons defined under § 4.7(a)(6)(i) and (ii) of this chapter; and

(*3*) Participation units of the commodity pool have not been publicly offered to persons who are not qualified eligible persons defined under § 4.7(a)(6)(i) and (ii) of this chapter; or

* * * * *

Issued in Washington, D.C., on September 18, 2024, by the Commission.

Robert Sidman,

Deputy 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 Operated: 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, Commissioners Johnson, Goldsmith Romero, Mersinger, and Pham voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Supporting Statement of Commissioner Summer K. Mersinger

Today, the Commission[1] achieved balance in adopting the amendments to Regulation 4.7 and for that reason I can support this final rule. I would like to thank the staff in the Market Participants Division for their hard work on this rulemaking effort and for their consideration of my suggestions and comments throughout this process.

But the balance achieved in this final rule was sorely missing in the original amendment proposal, as well as in recent drafts of this final rule presented to the Commission. As I identified in my prior dissent, the proposed amendment to Regulation 4.7 was flawed in applying a new minimum disclosure regime on sophisticated investors who had always been exempt from such disclosures.[2]

This flawed proposal led to a unanimous comment file, without a single commenter supporting the Commission's new minimum disclosure regime. The proposal was a textbook example of overregulation. Thankfully, the Commission avoided the temptation to overregulate under this rule, dropping the minimum disclosure regime from the final rule adopted today.

I am pleased that I can support this final rule. However, we should always remember that we do not regulate in a vacuum. We must work with market participants

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[1] This statement will refer to the Commodity Futures Trading Commission as the "Commission", "CFTC", or "Agency." All web pages cited herein were last visited on September 11, 2024.

[2] Dissenting Statement of Commissioner Summer K. Mersinger On Proposal to Narrow Historical Exemptions for Qualified Eligible Persons in Rule 4.7, Oct. 2, 2023, available at: *https://www.cftc.gov/PressRoom/SpeechesTestimony/mersingerstatement100223*.

to carefully calibrate all rulemaking efforts. Additionally, we must harmonize our regulations, not only with the interests of our market participants, but with other regulators, including self-regulatory organizations.

While I am relieved that the final rule reflects a balanced approach and aims to achieve the overarching goal without overregulation, I remain concerned about the adopting release's mention of possible future efforts to expand Regulation 4.7 after this amendment.[3] I urge the Commission to avoid such future expansions, unless the Commission finds concrete evidence establishing a need for modifications and only after robust discussions with industry.

Additionally, I must caution the Commission from making the same mistake on other pending rulemaking proposals where feedback from commenters reflects a similar imbalance in the Agency's approach. We must seek balance and compromise in our regulations, not only because we are legally obligated to do so, but also because it is the right thing to do.

Appendix 3—Statement of Commissioner Caroline D. Pham

I am pleased that the Commission is taking additional time to understand how to best protect market participants and to consider the various disclosure proposals submitted by the public in connection with the amendments to Regulation 4.7. As a market regulator with material impact on the risk management of the savings of millions of Americans, it is imperative that the Commission takes its time when considering new requirements to ensure that we get it right.

This is especially the case when the unintended consequences of our rules could create new obstacles to market participation that draw a distinction between the "have-a-lot's" and the "have-not-enough's". Ultimately, using regulation to pick winners and losers that increases the wealth gap not only betrays the American public's expectation of

[3] *See* Final Rule, Section II. B. 3.

Washington to create and maintain fair markets, but it also undermines financial inclusion. The government must keep the people's trust that we will help every American achieve economic mobility for them and their families—not construct artificial barriers to the American Dream.

For those reasons, I applaud the Commission taking the time for careful consideration of the public comments and further study including data. I thank Chairman Behnam and the Market Participants Division for working with me on this important rulemaking.

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