

## COMMODITY FUTURES TRADING COMMISSION

### 17 CFR Part 4

RIN 3038-AE76

#### Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Commodity Futures Trading Commission (CFTC or Commission) is proposing amendments to its regulations to permit commodity pool operators (CPOs) that only solicit and/or accept funds from non-U.S. persons for participation in offshore commodity pools to claim an exemption from CPO registration and compliance requirements with respect to such pools, while permitting the maintenance of registration with respect to commodity pools for which CPO registration is required. The Commission also is proposing to allow U.S.-based CPOs of offshore commodity pools with U.S. participants to maintain the commodity pool's original books and records in the offshore location of the pool, in lieu of the CPO's main U.S. business location. Additionally, the Commission is proposing to prohibit a person that would be statutorily disqualified from registering with the Commission as a CPO from claiming or affirming an exemption from CPO registration. The Commission also is proposing registration relief for the CPOs and CTAs of entities qualifying as "family offices" and investment advisers of "business development companies," as defined in the proposed regulations. The Commission is further proposing to permit qualifying CPOs to engage in general solicitation in their pool offerings, as contemplated by the Jumpstart Our Business Start-ups Act of 2012 (JOBS Act). Finally, the Commission is proposing to relieve certain CPOs and commodity trading advisors (CTAs) of the requirement to file Forms CPO-PQR and CTA-PR.

**DATES:** Comments must be received on or before December 17, 2018.

**ADDRESSES:** You may submit comments, identified by RIN number 3038-AE76, by any of the following methods:

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

- *Mail:* Send to Christopher Kirkpatrick, Secretary of the

Commission, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW, Washington, DC 20581.

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

Please submit your comments using only one of these methods. To avoid possible delays with mail or in-person deliveries, submissions through the CFTC Comments Portal are encouraged.

All comments must be submitted in English, or if not, accompanied by an English translation. Comments will be posted as received to <https://comments.cftc.gov>. You should submit only information that you wish to make available publicly. If you wish the Commission to consider information that you believe is exempt from disclosure under the Freedom of Information Act (FOIA), a petition for confidential treatment of the exempt information may be submitted according to the procedures established in § 145.9 of the Commission's regulations.<sup>1</sup>

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

**FOR FURTHER INFORMATION CONTACT:** For any of the proposed amendments: Amanda Olear, Associate Director, at 202-418-5283 or [aolear@cftc.gov](mailto:aolear@cftc.gov); for the proposed amendments to §§ 4.7 and 4.13: Elizabeth Groover, Special Counsel, at 202-418-5985, [egroover@cftc.gov](mailto:egroover@cftc.gov); for the proposed amendments related to family offices: Peter Sanchez, Special Counsel, at 202-418-5237, [psanchez@cftc.gov](mailto:psanchez@cftc.gov); for the proposed amendments to § 4.27: Michael Ehrstein, Special Counsel, at 202-418-5957, [mehrstein@cftc.gov](mailto:mehrstein@cftc.gov), Division of Swap Dealer and Intermediary Oversight, Commodity Futures Trading Commission, Three Lafayette Centre, 1151 21st Street NW, Washington, DC 20581.

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## I. Background

### A. Statutory and Regulatory Background

As amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),<sup>2</sup> section 1a(11) of the Commodity Exchange Act (CEA or Act) defines the term “commodity pool operator,” as any person<sup>3</sup> 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.<sup>4</sup> CEA section 1a(12) defines a

“commodity trading advisor” as any person who for compensation or profit engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in commodity interests.<sup>5</sup> CEA section 4m(1) generally requires each person who satisfies the CPO or CTA definitions to register as such with the Commission.<sup>6</sup> With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within, or exclude from, the term “commodity pool operator” any person engaged in the business of operating a commodity pool if the Commission determines that the rule or regulation will effectuate the purposes of the Act.<sup>7</sup> CEA section 1a(12)(B) provides multiple exclusions from the CTA definition, and similarly affords the Commission the authority to exclude such other persons not within the intent of that provision as the Commission may specify by rule, regulation, or order.<sup>8</sup>

The Commission also has the power 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.<sup>9</sup> Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.<sup>10</sup> Those regulations implement the statutory authority provided to the Commission by the CEA and establish multiple registration exemptions and exclusions for CPOs and CTAs. Part 4 also contains regulations that establish the ongoing compliance requirements applicable to CPOs and CTAs registered or required to be registered; these requirements pertain to the commodity pools and separate accounts that the CPOs and CTAs

operate and advise, and provide customer protection, disclosure, and reporting to a registrant's commodity pool participants or advisory clients.

In March of 2017, Commission staff initiated an agency-wide internal review of CFTC regulations and practices to identify those areas that could be simplified to make them less burdensome.<sup>11</sup> The Commission subsequently published in the **Federal Register** on May 9, 2017, a Request for Information soliciting suggestions from the public regarding how the Commission's existing rules, regulations, or practices could be applied in a simpler, less burdensome manner.<sup>12</sup>

The Investment Advisers Association (IAA) submitted suggested modifications for numerous rules in response to the Commission's Request for Information.<sup>13</sup> One area identified by the IAA that could result in the reduction of regulatory burden would be the incorporation into the Commission's regulations of registration and other types of relief to members of the asset management industry that meet the definitions of CPO and/or CTA that is currently provided in various staff letters.

In response to the information received as part of the Project KISS initiative, as well as CFTC staff's internal review of the Commission's regulatory regime, the Commission has today determined to propose several amendments to part 4 (the Proposal or NPRM). Specifically, the CFTC is proposing to amend § 4.13 to permit CPOs that solicit and/or accept funds from only non-U.S. persons for participation in offshore commodity pools to claim an exemption from CPO registration requirements with respect to such pools, while permitting the maintenance of registration with respect to commodity pools for which CPO registration is required. This proposed amendment would have the effect of expanding relief currently available

<sup>5</sup> 7 U.S.C. 1a(12)(A)(i). The CTA definition also includes any person who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning the value of or advisability of trading in commodity interests, and any person that is registered with the Commission as a CTA. 7 U.S.C. 1a(12)(A)(ii)–(iii).

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

<sup>7</sup> 7 U.S.C. 1a(11)(B).

<sup>8</sup> 7 U.S.C. 1a(12)(B)(vii). The Commission recently utilized the authority in this provision in issuing an Order excluding Farm Credit System institutions from that definition, due to their similarities to banks, a type of entity that is already excluded by CEA section 1a(12)(B)(i). See Order Excluding Farm Credit System Institutions From the Commodity Exchange Act's Definition of “Commodity Trading Advisor,” 81 FR 89447 (Dec. 12, 2016). CEA section 1a(12)(C) requires that the exclusions in the preceding paragraph only apply if the furnishing of such excluded CTA services is solely incidental to the conduct of their business or profession. 7 U.S.C. 1a(12)(C).

<sup>9</sup> 7 U.S.C. 12a(5).

<sup>10</sup> See 17 CFR part 4, generally.

<sup>11</sup> See Remarks of Acting Chairman J. Christopher Giancarlo before the 42nd Annual International Futures Industry Conference in Boca Raton, FL (Mar. 15, 2017), available at <https://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20> (last retrieved July 31, 2018).

<sup>12</sup> Project KISS, 82 FR 21494 (May 9, 2017); amended by 82 FR 23765 (May 24, 2017). The **Federal Register** Request for Information and the suggestion letters filed by the public are available at the Commission's website: <https://comments.cftc.gov/KISS/KissInitiative.aspx> (last retrieved July 31, 2018).

<sup>13</sup> See Letter from Monique Botkin, Associate General Counsel, Investment Advisers Association, (Sept. 29, 2017) (IAA Letter), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61480&SearchText> (last retrieved July 31, 2018).

<sup>2</sup> Public Law 111–203, H.R. 4173 (2010).

<sup>3</sup> Section 1.3 defines “person” as including individuals, associations, partnerships, corporations, and trusts. 17 CFR 1.3.

<sup>4</sup> 7 U.S.C. 1a(11). The CEA is found at 7 U.S.C. 1 *et seq.* (2017). The Commission's regulations are found at 17 CFR Ch. I (2017). Both the Act and the Commission's regulations are accessible through the Commission's website, <http://www.cftc.gov>.

under Staff Advisory 18–96 (the Advisory or Advisory 18–96),<sup>14</sup> and incorporate it into the Commission's existing regulatory framework in 17 CFR part 4. In conjunction with this NPRM, the Commission is also proposing to adopt a prohibition on statutory disqualifications applicable to most exemptions claimed under § 4.13, and to amend the *de minimis* exemption in § 4.13(a)(3) to explicitly permit persons located outside of the United States as exempt *de minimis* commodity pool participants without consideration of their financial sophistication. The Commission is further proposing to adopt under §§ 4.13 and 4.14 new CPO and CTA registration exemptions consistent with existing Commission staff no-action letter relief available to persons considered CPOs or CTAs in connection with the operation and advising of qualifying family offices. Similarly, through proposed revisions to the exclusion from the definition of CPO in § 4.5 applicable to registered investment companies (RICs), the Commission is proposing to provide relief to the investment advisers of business development companies (BDCs) in a manner also consistent with existing no-action letter relief.

Moreover, the Commission plans to continue its efforts to amend 17 CFR part 4 by proposing regulatory exemptions consistent with existing CFTC staff exemptive relief letters available to qualifying CPOs. These efforts include proposing to add exemptive relief consistent with that provided by CFTC Staff Letter 14–116, which permits the use of general solicitation by qualifying CPOs, as contemplated by the Jumpstart Our Business Start-ups Act of 2012 (as defined above, the JOBS Act), through targeted amendments to §§ 4.7 and 4.13(a)(3) in a manner consistent with that exemptive letter.<sup>15</sup> Additionally, in its Project KISS submission, the IAA recommended that the Commission adopt regulatory amendments to incorporate in part 4 exemptive relief from filing Form CPO–PQR, provided currently under CFTC Staff Letter 14–115 for CPOs that only operate commodity pools in accordance with §§ 4.5 and 4.13.<sup>16</sup> The IAA also

recommended that the Commission amend part 4 to adopt the commensurate relief under CFTC Staff Letter 15–47 for registered CTAs that do not direct trading of any commodity interest accounts.<sup>17</sup>

In response, the Commission is proposing to adopt amendments that would provide relief from filing Form CPO–PQR to registered CPOs that only operate commodity pools exempt or excluded under §§ 4.5 and 4.13, consistent with CFTC Staff Letter 14–115,<sup>18</sup> and from filing Form CTA–PR to registered CTAs that do not direct trading of any commodity interest accounts, consistent with CFTC Staff Letter 15–47.<sup>19</sup> Finally, the Commission further proposes to provide additional relief from filing Form CTA–PR to registered CTAs that only advise pools for which the CTA is also CPO. Although the Proposal includes several potential regulatory amendments in a single notice, the CFTC may, in the future, issue separate adopting releases for any aspect of today's proposed rulemaking that is finalized.<sup>20</sup>

#### B. Advisory 18–96

##### 1. Introduction

The Commission is aware that a number of CPOs only operate U.S.-based commodity pools soliciting and accepting funds from persons located in the U.S., whereas other CPOs solicit and accept funds from participants, whether U.S. or non-U.S., for investment in commodity pools in both domestic and international locales; still others solicit and accept funds solely from persons located outside the United States for investment in offshore pools. Based on communications with industry and Commission registrants, the Commission preliminarily believes that the variety of location in CPO business activities continues to grow, and that CPOs today frequently participate in the markets of, solicit and/or accept funds for investment from potential participants in, and operate commodity pools simultaneously in multiple jurisdictions.

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

<sup>18</sup> CFTC Staff Letter 14–115, available at <https://www.cftc.gov/idc/groups/public/%40lrlettergeneral/documents/letter/14-115.pdf> (last retrieved July 31, 2018).

<sup>19</sup> CFTC Staff Letter 15–47, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/lrlettergeneral/documents/letter/15-47.pdf> (last retrieved July 31, 2018).

<sup>20</sup> See *Inv. Co. Institute v. CFTC*, 720 F.3d 370, 379 (DC Cir. 2013) (“[A]s the Supreme Court has emphasized, ‘[n]othing prohibits federal agencies from moving in an incremental manner.’”) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 522 (2009)).

In promulgating relief from registration, through the adoption of § 3.10(c)(3),<sup>21</sup> for firms located outside the U.S. engaged in intermediating commodity interest transactions on U.S. designated contract markets only on behalf of persons located outside the U.S., the Commission cited its own historic statements regarding its jurisdictional scope: “[G]iven this agency’s limited resources, it is appropriate at this time to focus [the Commission’s] customer protection activities upon domestic firms and upon firms soliciting or accepting orders from domestic users of the futures markets and that the protection of foreign customers of firms confining their activities to areas outside this country, its territories, and possessions may best be for local authorities in such [jurisdictions].”<sup>22</sup> The Commission preliminarily believes that this rationale continues to be true with respect to CPOs and commodity pools, notwithstanding the expansion of CFTC jurisdiction after the passage of the Dodd-Frank Act.

The Commission also preliminarily believes that the operation of offshore pools by exempt CPOs, who may also register solely with respect to the pools they operate that solicit and/or accept funds from persons in the U.S., would pose limited risk to the participants in those pools requiring registration due to the application of § 4.20. Section 4.20(c), in particular, prohibits a CPO from commingling the property of any commodity pool that it operates, or that it intends to operate, with the property of any other person.<sup>23</sup> This provision thereby limits the potential for trading activity or losses experienced in exempt offshore pools to negatively impact U.S. customers invested in pools for which a CPO is so registered.

Consequently, the Commission preliminarily believes that providing CPO registration relief beyond that currently provided by § 3.10(c)(3)(i) and by the staff relief in Advisory 18–96 would be beneficial and consistent with the Commission’s past prioritization of agency resources for the regulation of intermediary activities affecting U.S. participants. The Commission is, therefore, proposing to adopt, among other amendments, an exemption from CPO registration in § 4.13 that would permit a CPO that solicits,<sup>24</sup> and/or

<sup>21</sup> 17 CFR 3.10(c)(3).

<sup>22</sup> Exemption From Registration for Certain Foreign Persons, Final Rule, 72 FR 63976, 63976–77 (Nov. 14, 2007) (citing 48 FR 35248, 35261 (Aug. 3, 1983)).

<sup>23</sup> 17 CFR 4.20(c).

<sup>24</sup> In adopting § 3.10(c)(3)(i), the Commission emphasized the significance of solicitation as a CPO

<sup>14</sup> Advisory 18–96, “Offshore Commodity Pools—Relief for Certain Registered CPOs From Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23,” available at <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm> (last retrieved July 31, 2018).

<sup>15</sup> CFTC Staff Letter 14–116, available at <https://www.cftc.gov/idc/groups/public/lrlettergeneral/documents/letter/14-116.pdf> (last retrieved July 31, 2018).

<sup>16</sup> IAA Letter at 16.

accepts funds from, solely persons located outside the U.S. for participation in an offshore commodity pool operated by it to claim a registration exemption with respect to such pool.<sup>25</sup> The proposed amendments are largely based upon the requirements of Advisory 18–96, the conditions of which are presented and explained below.

## 2. The History of Advisory 18–96 and the Commission’s Rationale for Proposing Superseding Part 4 Amendments

On April 11, 1996, staff from the Commission’s Division of Trading and Markets (T&M), a predecessor of today’s Division of Swap Dealer and Intermediary Oversight (DSIO or Division), issued Advisory 18–96,<sup>26</sup> under which two types of relief are currently available. Qualifying, registered CPOs operating offshore commodity pools may claim exemptive relief from the disclosure, reporting, and recordkeeping requirements of §§ 4.21, 4.22, and 4.23(a)(10) and (a)(11) with regard to their offshore commodity pools.<sup>27</sup> Alternatively, Advisory 18–96

activity, stating “[a]ny person seeking to act in accordance with any of the foregoing exemptions from registration should note that the prohibition on contact with U.S. customers applies to solicitation as well as acceptance of orders. If a person located outside the U.S. were to solicit prospective customers located in the U.S. as well as outside of the U.S., these exemptions would *not* be available, even if the only customers resulting from the efforts were located outside the U.S.” *Id.* at 63977–78 (emphasis in original) (footnote omitted).

<sup>25</sup> The Commission intends by the proposed amendments to permit CPOs to maintain registration with respect to the operation of commodity pools soliciting, accepting, or managing assets sourced from participants located in the U.S., while availing themselves of an exemption from registration with respect to pools located offshore for which participants located in the U.S. are solicited or permitted as participants.

<sup>26</sup> Advisory 18–96, “Offshore Commodity Pools—Relief for Certain Registered CPOs From Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23,” at p. 1, available at <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm> (last retrieved July 31, 2018).

<sup>27</sup> Section 4.21, subject to certain conditions, requires each CPO registered or required to be registered under the CEA to deliver or cause to be delivered to a prospective participant in a pool that it operates or intends to operate a Disclosure Document for the pool that complies with §§ 4.24 and 4.25 by no later than the time it delivers to the prospective participant a subscription agreement for the pool. 17 CFR 4.21; *see also* 17 CFR 4.24–4.25.

Section 4.22 governs the periodic reporting required for commodity pools and generally requires each CPO registered or required to be registered to periodically distribute to each participant in a pool it operates periodic Account Statements and Annual Reports, which also must be filed with the Commission through the National Futures Association. 17 CFR 4.22.

Section 4.23 requires each CPO registered or required to be registered to make and keep certain

also permits qualifying, registered onshore CPOs to claim exemptive relief from solely the books and records location requirement in § 4.23,<sup>28</sup> thereby allowing such CPOs to maintain their offshore pool’s original books and records at the pool’s offshore location, rather than at the CPO’s main business address in the U.S.

Generally, to qualify for the broadest relief available under Advisory 18–96, a CPO must meet the following requirements:

1. The CPO claiming the relief is registered as such with the Commission;
2. The commodity pool is, and will remain, organized and operated outside of the United States;
3. The commodity pool will not hold meetings or conduct administrative activities within the United States;
4. No shareholder of or other participant in the commodity pool is or will be a United States person;
5. The commodity pool will not receive, hold or invest any capital directly or indirectly contributed from sources within the United States; and
6. The CPO, the commodity pool and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably have the effect, of soliciting participation from United States persons.<sup>29</sup>

To qualify for the recordkeeping location relief under the Advisory, a registered CPO must represent the following:

1. The CPO will maintain the original books and records of the commodity pool at the main business office of the commodity pool located outside the United States;
2. The CPO desires to maintain such books and records outside the United States in furtherance of compliance with the Internal Revenue Service (IRS) requirements for relief from United States federal income taxation;
3. The CPO will maintain duplicate books and records of the commodity pool at a designated office in the United States; and
4. Within 72 hours after the request of a representative from the Commission,

books and records concerning both the commodity pool(s) it operates and the CPO itself; paragraphs (a)(10) and (a)(11) particularly require a CPO to make and keep with respect to a commodity pool it operates a Statement of Financial Condition on a monthly or quarterly basis dependent on the amount of the net assets of the commodity pool, as well as a corresponding Statement of Income (Loss). 17 CFR 4.23(a)(10) and (a)(11).

At the time of its adoption in 1996, Advisory 18–96 provided relief from the more robust compliance burdens then applicable to CPOs, *i.e.*, the disclosure and periodic reporting requirements.

<sup>28</sup> 17 CFR 4.23.

<sup>29</sup> Advisory 18–96, at 1.

the United States Department of Justice, or the National Futures Association (NFA), the original books and records will be provided to such representative at a place located in the United States that is specified by the representative.<sup>30</sup>

The Advisory additionally requires all claimants of either type of relief thereunder to represent that, “neither the CPO nor any of its principals is subject to any statutory disqualification under CEA section 8a(2) or 8a(3) unless such disqualification arises from a matter which (a) was previously disclosed in connection with a previous application for registration if such registration was granted, or (b) was disclosed to the Commission or the NFA more than thirty days prior to the filing of this notice.”<sup>31</sup> Notices claiming relief under Advisory 18–96 were originally required to be submitted in writing and filed with both Commission staff and NFA, to provide basic business location and contact information for the CPO, to specify which type of relief the CPO sought to claim for its commodity pool(s), and to be signed by a representative duly authorized to bind the CPO (“if a sole proprietorship, by the sole proprietor; if a partnership, by a general partner; and if a corporation, by the chief executive officer or chief financial officer”).<sup>32</sup>

Given the increase in the Commission’s jurisdiction resulting from the passage of the Dodd-Frank Act,<sup>33</sup> as well as the adoption of

<sup>30</sup> The Advisory states further, “[f]iling a notice of a claim for exemption under [this section] of the Advisory, however, does not eliminate the requirement to comply with the location of the CPO’s own books and records under Rule 4.23(b) or, in the case of a CPO of a Rule 4.7 exempt pool, the location requirement for the CPO’s own books and records under Rule 4.7(a)(2)(iv).” Advisory 18–96 at 2.

<sup>31</sup> Advisory 18–96, at 2; *see also* 7 U.S.C. 12a(2) and 12a(3).

<sup>32</sup> Advisory 18–96, at 3. In 1997, the Commission authorized the NFA to, among other things, accept and process Advisory 18–96 notices of claim for exemption from the part 4 requirements. *See* Performance of Certain Functions by National Futures Association with Respect to Commodity Pool Operators and Commodity Trading Advisors, 62 FR 52088 (Nov. 1, 1997). Notably, “[n]otwithstanding any notice of a claim of exemption filed under this Advisory, persons claiming such relief remain subject to all other applicable requirements contained in the Act and the Commission’s regulations issued thereunder, including, without limitation, the antifraud provisions of Sections 4b and 4o of the Act, the reporting requirements for traders set forth in Parts 15, 18, and 19 of the Commissions regulations, and all other provisions of [part 4.]” Advisory 18–96, at 3.

<sup>33</sup> For instance, the Dodd-Frank Act amended the CPO definition in CEA section 1a(11) to include any person engaged in a business that is of the nature of a commodity pool that trades in swap transactions. *See* 7 U.S.C. 1a(11), as amended by the

additional compliance requirements for which Advisory 18–96 currently provides no relief,<sup>34</sup> the Commission preliminarily believes that the adoption of a CPO registration exemption based on the conditions of Advisory 18–96 (18–96 Exemption) would benefit industry participants, prioritize the use of Commission resources on the customer protection of actual and potential commodity pool participants located in the U.S., and provide relief to persons with respect to their commodity pool operations that have a limited nexus with markets or participants within the Commission's jurisdiction. Importantly, a CPO claiming the 18–96 Exemption, as proposed, would still be subject to the anti-manipulation and anti-fraud provisions of the CEA, and by virtue of § 4.13(c), would be required to make and keep books and records for the exempt pool, and to submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the criteria of the 18–96 Exemption.<sup>35</sup>

The amendments proposed today would incorporate both types of relief provided by Advisory 18–96 in their entirety in the Commission's existing part 4 regulatory framework by providing registration and compliance exemptions for qualifying persons operating offshore pools, with respect to CPO registration and, in the case of those domestic, registered CPOs operating offshore pools, with respect to the books and records location requirement in § 4.23.<sup>36</sup> The

Dodd-Frank Act, Public Law 111–203, sec. 721(a)(2).

<sup>34</sup> See, e.g., 17 CFR 4.27 (imposing obligations on certain CPOs to periodically file detailed information regarding pools and other funds that the CPOs operate on Form CPO–PQR).

<sup>35</sup> 17 CFR 4.13(c).

<sup>36</sup> In 2006–2007, based on a rulemaking petition from NFA, the Commission previously considered and proposed to rescind Advisory 18–96, which was thought to be rendered superfluous or duplicative by the 2003 adoption of the CPO registration exemptions in § 4.13(a)(3) and (4). See Electronic Filing of Notices of Exemption and Exclusion Under Part 4 of the Commission's Regulations, 71 FR 60454 (Oct. 13, 2006) (Proposing Release), and 72 FR 1658 (Jan. 16, 2007) (Adopting Release) (declining to supersede Advisory 18–96, in light of the 2003 adoption of § 4.13(a)(4)). Section 4.13(a)(4), prior to its 2012 rescission, permitted a qualifying person to claim an exemption from registration with the Commission as a CPO, where the commodity pool it operates is exempt from registration under the Securities Act of 1933 and the natural and non-natural person participants meet certain levels of sophistication, e.g., qualified eligible persons or accredited investors. Although Advisory 18–96 and § 4.13(a)(4) overlapped significantly, the Commission declined to alter Advisory 18–96, in an effort to preserve the relief from the books and record location requirement in § 4.23 for any registered, onshore CPOs utilizing the Advisory 18–96 relief with respect to their

Commission intends that the 18–96 Exemption, if adopted as proposed, would replace the exemptive relief currently provided to registered CPOs relying upon Advisory 18–96 for their offshore pool operations. Similarly, the Commission also intends that the proposed amendments to § 4.23, which would provide a qualifying, registered onshore CPO an exemption from the requirement that the CPO maintain the original books and records of its offshore commodity pool(s) at its main business office in the U.S., would replace that aspect of the Advisory.<sup>37</sup> The Commission preliminarily believes that these proposed amendments, if adopted, would ultimately provide more comprehensive relief from CPO and pool regulation than the Advisory alone and more flexibility than the terms of § 3.10(c)(3)(i).

### 3. Expanding the Prohibition on Statutory Disqualifications on Exemptions Under § 4.13 and Permitting Non-U.S. Person Participants in *De Minimis* Commodity Pools

Currently, none of the CPO registration exemptions in § 4.13 prohibits statutory disqualifications as a condition of relief. In contrast, one of the requirements to obtain relief under Advisory 18–96 is that neither the registered CPO nor its principals is subject to any statutory disqualification under sections 8a(2) or 8a(3) of the Act,<sup>38</sup> unless such disqualification arises from a matter which was previously disclosed in connection with a previous application, if such registration was granted, or which was disclosed more than thirty days prior to the claim of this exemption. The Commission is considering, therefore, whether there could be a substantial number of CPOs that claimed a § 4.13 exemption and are subject to statutory disqualifications or that employ statutorily disqualified principals, and whether those statutorily disqualified individuals should be permitted to

qualifying offshore commodity pools. See 72 FR at 1661.

<sup>37</sup> The Commission simultaneously proposes certain structural amendments to § 4.23 to increase that regulation's readability and ease of application.

<sup>38</sup> 7 U.S.C. 12a(2) and 12a(3). Under CEA section 8a(2), for instance, the Commission may refuse to register a person who has been temporarily or permanently enjoined by order not to act as a Commission registrant, or to refrain from engaging in financially criminal activities, or who, within ten years preceding the application for registration with the Commission, has been convicted of a felony for criminal activities involving commodity interests or securities, or been found by the Commission or another governmental body or agency to have violated the CEA, Commission regulations, or securities laws. 7 U.S.C. 12a(2).

operate commodity pools as exempt CPOs.

The Commission is concerned that it poses undue risk from a customer protection standpoint for its regulations in their current form to permit statutorily disqualified persons or entities to legally operate exempt commodity pools, especially when those same persons would not be permitted to register with the Commission.<sup>39</sup> The Commission preliminarily believes that preserving the prohibition on statutory disqualifications from Advisory 18–96 and applying it to exemptions under § 4.13 would provide a substantial customer protection benefit by prohibiting statutorily disqualified persons from operating and soliciting participants for investment in exempt commodity pools.

Consequently, the Commission is proposing to require any person claiming a registration exemption under § 4.13(a)(1), (2), (3), or (5), or proposed § 4.13(a)(4),<sup>40</sup> to represent that neither the claimant nor any of its principals is subject to statutory disqualifications under sections 8a(2) or 8a(3) of the CEA. However, the Commission also proposes to incorporate certain limited exceptions already present in Advisory 18–96 that would permit statutory disqualifications that were previously disclosed in registration applications that were granted, or that were disclosed more than 30 days prior to the claim of exemption. The Commission preliminarily believes this approach addresses customer protection concerns regarding statutory disqualifications, while preserving flexibility in Commission regulations applicable to CPOs. As proposed, the prohibition would apply to current claimants under § 4.13 as they renew their claims on an annual basis—*i.e.*, existing claimants would be required to represent that

<sup>39</sup> Commission staff previously became aware of a number of statutorily disqualified CPOs operating commodity pools pursuant to the registration exemption available in former § 4.13(a)(4). Because that exemption was rescinded in 2012, those particular CPOs would have been required to modify their operations to comply with another exemption under § 4.13 that did not bar statutorily disqualified CPOs, to cease participating in the commodity interest markets, or to receive relief from the Commission to register and continue operating.

<sup>40</sup> The Commission is not proposing to extend the prohibition to the proposed exemption for qualifying family offices, discussed *infra* as proposed § 4.13(a)(8). By the terms of that proposed exemption, such CPOs would be prohibited from soliciting non-family members/clients to participate in their pool(s), necessarily limiting their contact with prospective participants drawn from the general public, and as a result, reducing the Commission's customer protection concerns in that context.

neither they nor their principals are subject to statutory disqualifications under CEA sections 8a(2) or 8a(3), when they annually affirm their continued reliance on a § 4.13 exemption next year. CPOs filing new claims of a § 4.13 exemption, however, would be required to comply with this prohibition upon filing, if and when the amendments are adopted as proposed, and become effective.

Additionally, the Commission is proposing to amend the *de minimis* commodity pool exemption in § 4.13(a)(3) to explicitly permit non-U.S. person participants, regardless of their financial sophistication.<sup>41</sup> The Commission understands that, relying on CFTC Staff Letter 04–13,<sup>42</sup> for purposes of determining whether a person qualifies for exemption from CPO registration under § 4.13(a)(3), market participants are generally not considering whether non-U.S. person participants meet one of the investor sophistication criteria listed in § 4.13(a)(3)(iii).<sup>43</sup>

The Commission preliminarily believes that permitting non-U.S. person participants, regardless of their financial sophistication, in § 4.13(a)(3) exempt

<sup>41</sup> 17 CFR 4.13(a)(3). Section 4.13(a)(3) provides an exemption from CPO registration for any person who offers a pool that: (1) Is exempt from registration under the Securities Act of 1933 and offered and sold without marketing to the public in the U.S., (2) at all times, is traded subject to *de minimis* trading thresholds, (3) is limited to certain types of investors that the person believes to be, at the time of investment or conversion to an exempt pool, accredited investors and/or qualified eligible persons, and (4) is not marketed as or in a vehicle for trading in commodity interests. *Id.*

<sup>42</sup> CFTC Staff Letter 04–13 (Apr. 14, 2004), available at <https://www.cftc.gov/sites/default/files/tm/letters/04letters/tm04-13.htm> (last retrieved July 31, 2018).

<sup>43</sup> In April 2004, the Division of Clearing and Intermediary Oversight (DCIO), the most recent predecessor to DSIO, responded to a request for clarification or interpretation of the *de minimis* exemption from CPO registration in § 4.13(a)(3). The requester asked DCIO staff for confirmation that “a [CPO] claiming exemption from registration under new Rule 4.13(a)(3) may permit Non-United States persons to participate in pools operated pursuant to such exemptive relief, regardless of whether such Non-United States persons meet the investor sophistication requirements of Rule 4.13(a)(3)(iii).” CFTC Staff Letter 04–13, at 1. DCIO staff concluded that because the exemption in § 4.13(a)(4) permitted non-U.S. person participants in pools exempt thereunder, regardless of their financial sophistication, by virtue of the “qualified eligible person” definition in § 4.7(a)(2), then it would be “consistent with the intent and purpose of Rule 4.13(a)(3)” to also generally permit non-U.S. person investors to participate in § 4.13(a)(3) pools. *Id.* at 2. In 2012, the Commission rescinded the exemption originally provided by § 4.13(a)(4), the features of which comprise the legal underpinnings for the analysis in CFTC Staff Letter 04–13. See Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 FR 11252 (Feb. 24, 2012); correction notice published at 77 FR 17328 (Mar. 26, 2012) (CPO CTA Final Rule).

pools would generally be consistent with the Commission’s policy approach in proposing to add the 18–96 Exemption to the 17 CFR part 4 regulatory framework. With limited participation in U.S. commodity interest markets subject to Commission jurisdiction, commodity pools exempt under § 4.13(a)(3) do not trigger the same level of regulatory interest for the Commission as commodity pools requiring CPO registration and compliance with all or part of the requirements in 17 CFR part 4. Additionally, § 4.7 already permits non-U.S. persons,<sup>44</sup> regardless of their “qualified eligible person” (QEP) status, to participate in commodity pools operated thereunder, which are not subject to *de minimis* commodity interest trading thresholds. The Commission also preliminarily believes that it would be consistent with the Commission’s other part 4 regulations, including those amendments proposed today, to generally permit non-U.S. person participants in § 4.13(a)(3) exempt pools. Therefore, the Commission proposes today to also amend § 4.13(a)(3)(iii) to specifically permit non-U.S. person participants.<sup>45</sup>

### C. Proposed CPO and CTA Registration Exemptions for Qualifying Family Offices

The Commission is also proposing today amendments consistent with two Commission staff no-action letters that currently provide relief from CPO<sup>46</sup> and CTA<sup>47</sup> registration to qualifying family offices (Family Offices) with respect to investment management and advisory activities conducted on behalf of their family clients (Family Clients).

#### 1. Defining Family Offices

A Family Office is generally understood to be a professional organization that is wholly-owned by clients in a family, including members of a family and/or entities controlled by a family or family member, *e.g.*, charitable trusts, and that is operated as a wealth management tool for their benefit.<sup>48</sup> In granting no-action relief

<sup>44</sup> 17 CFR 4.7(a)(1)(iv).

<sup>45</sup> If adopted, the proposed rule would supersede prior staff positions on this subject, including CFTC Staff Letter 04–13.

<sup>46</sup> CFTC Staff Letter 12–37 (Nov. 29, 2012), available at <https://www.cftc.gov/idc/groups/public/%40rlrlettergeneral/documents/letter/12-37.pdf> (last retrieved July 31, 2018) (CPO Family Office No-Action Letter).

<sup>47</sup> CFTC Staff Letter 14–143 (Nov. 5, 2014), available at <https://www.cftc.gov/idc/groups/public/%40rlrlettergeneral/documents/letter/14-143.pdf> (last retrieved July 31, 2018) (CTA Family Office No-Action Letter).

<sup>48</sup> See, *e.g.*, Letter from the Vlastic Investments, L.L.C., an entity formed to manage the wealth of the

from CPO registration to qualifying Family Offices, Commission staff has previously stated that, “[t]ypically, a family office structure is employed when one or more direct members of a family create substantial wealth, and share that wealth in whole or in part with other members of that family, either through direct transfer, inheritance, or similar means.”<sup>49</sup> The Division noted further that, “[t]he family office is then used to provide personalized services to that family, including advice regarding issues of tax, estate planning, investment, and charitable giving.”<sup>50</sup> According to the Private Investors Coalition, which frequently comments on regulatory efforts impacting Family Offices and which requested the relief from CTA registration granted by DSIO in 2014 via CFTC Staff Letter 14–143, “single family offices have existed for over 100 years . . . [and] were formed to implement very important and complex objectives, including investment management, corporate succession, estate, gift, and income tax planning and charitable giving issues that are important to members of the family.”<sup>51</sup>

#### 2. Family Offices as Commodity Pools and the Rescission of § 4.13(a)(4)

As discussed above, the operations of a Family Office frequently involve the collective management of pooled assets from a variety of sources, notwithstanding that those sources may all be members of a single family, or organizations, trusts, or foundations for the benefit of those family members. If such pooled assets are invested in commodity interests,<sup>52</sup> then it is highly likely that the managing member of the Family Office, or similarly situated persons providing services to the Family Office, is engaging in activities that would otherwise require registration with the Commission as a CPO or CTA. Consequently, absent an exemption,

Vlastic Family, to the Securities and Exchange Commission, at 1 (Nov. 17, 2010), available at <https://www.sec.gov/comments/s7-25-10/s72510-83.pdf> (last retrieved July 31, 2018), submitted as a comment to Family Offices, Investment Advisers Act Release No. 3098, 75 FR 63753 (Oct. 18, 2010).

<sup>49</sup> CPO Family Office No-Action Letter, at 1.

<sup>50</sup> *Id.*

<sup>51</sup> Letter from the Private Investors Coalition to the SEC, at 2 (Nov. 11, 2010), available at <https://www.sec.gov/comments/s7-25-10/s72510-11.pdf> (last retrieved July 31, 2018), submitted as a comment to Family Offices, Investment Advisers Act Release No. 3098, 75 FR 63753 (Oct. 18, 2010). The Private Investors Coalition also emphasized that although Family Offices may be formed by a single family member who created the wealth to be managed, they are also commonly formed by one or more lineal descendants of such family members. *Id.*

<sup>52</sup> 17 CFR 1.3.

exclusion, or other Commission staff letter relief, registration and compliance requirements under the CEA and Commission regulations would be triggered, requiring such Family Offices or members of their staff to register with the Commission as CPOs and/or CTAs with respect to those activities.

In the 1990s and early 2000s, Commission staff frequently responded to individual requests from Family Offices for relief from CPO and CTA regulation with one-off relief letters determining the Family Office not to be a commodity pool or providing no-action relief from such registration to certain family members or staff.<sup>53</sup> In 2003, the Commission adopted former § 4.13(a)(4), which provided an exemption from CPO registration for a person operating a commodity pool: (1) Whose interests are exempt from registration under the Securities Act of 1933,<sup>54</sup> and are offered and sold without marketing to the public in the U.S.; and (2) whose participants are reasonably believed, at the time of investment or conversion of the pool to an exempt pool, to be QEPs as defined in § 4.7(a)(2)<sup>55</sup> if natural persons, or QEPs or “accredited investors,” in the case of non-natural person participants.<sup>56</sup>

Prior to the exemption’s rescission in 2012, many Family Offices claimed former § 4.13(a)(4) to legally operate their investment vehicles, invest in commodity interests, and provide commodity trading advice to Family Clients, without being required to register with the Commission in any capacity.<sup>57</sup> In 2011, the Commission proposed to rescind § 4.13(a)(4)<sup>58</sup> and the potential impact on Family Offices

<sup>53</sup> See, e.g., CFTC Staff Letter 00–100 (Nov. 1, 2000) (finding that a limited partnership consisting of immediate family members that invests family assets in commodity futures is not a pool), available at <https://www.cftc.gov/idc/groups/public/%40rlrlettergeneral/documents/letter/00-100.pdf> (last retrieved July 31, 2018); CFTC Staff Letter 97–78 (Sept. 24, 1997) (finding that a partnership consisting of family members, former family members, and trusts for the benefit of family members is not a commodity pool within the meaning and intent of § 4.10(d)), available at <https://www.cftc.gov/idc/groups/public/%40rlrlettergeneral/documents/letter/97-78.pdf> (last retrieved July 31, 2018).

<sup>54</sup> 15 U.S.C. 77a et seq.

<sup>55</sup> 17 CFR 4.7(a)(2).

<sup>56</sup> 17 CFR 4.13(a)(4) (2010).

<sup>57</sup> Further, as CPOs exempt pursuant to § 4.13(a)(4), such Family Offices also routinely relied upon the self-executing exemption in § 4.14(a)(5), which provides an exemption from CTA registration to a person that is exempt from registration as a CPO and the person’s commodity trading advice is directed solely to, and for the sole use of, the pool or pools for which it is so exempt. See 17 CFR 4.14(a)(5).

<sup>58</sup> Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 FR 7976 (Feb. 11, 2011).

was immediately noted; the Commission received comments suggesting that the Commission allow Family Offices already in existence and then relying on the exemption in § 4.13(a)(4) to be grandfathered, such that they could continue to operate without registration even after the exemption’s rescission.<sup>59</sup> In declining to do so, the Commission stated in the 2012 Adopting Release:

The Commission does not believe that “grandfathering” is appropriate in this context. As the Commission stated in its Proposal, part of the purpose of rescinding § 4.13(a)(4) is to ensure that entities that are engaged in derivatives trading are subject to substantively identical registration and compliance obligations and oversight by the Commission. Grandfathering is not consistent with the stated goals of the Commission’s rescission and would result in disparate treatment of similarly situated entities. Therefore, the Commission will implement the rescission of § 4.13(a)(4) for all entities currently claiming exemptive relief thereunder.<sup>60</sup>

Alternatively, other commenters requested that “the Commission adopt an exemption from registration for family offices that is consistent with the exemption adopted by the [Securities and Exchange Commission (SEC)],” discussed *infra*.<sup>61</sup> The Commission declined, however, to adopt the SEC’s relief for Family Offices in 2012, because:

The Commission, therefore, believes that it is prudent to withhold consideration of a family offices exemption until the Commission has developed a comprehensive view regarding such firms to enable the Commission to better assess the universe of firms that may be appropriate to include within the exemption, should the Commission decide to adopt one. Therefore, the Commission is directing its staff to look into the possibility of adopting a family offices exemption in the future.<sup>62</sup>

Finally, the Commission stated that Family Offices would “continue to be permitted to write in on a firm by firm basis to request interpretative relief from the registration and compliance obligations under the Commission’s

<sup>59</sup> See comment letters from New York State Bar Association (Apr. 12, 2011); Alternative Investment Management Association, Ltd. (Apr. 12, 2011); Schulte Roth & Zabel LLP (Apr. 12, 2011); Fulbright & Jaworski L.L.P. (Apr. 12, 2011); Securities Industry and Financial Markets Association (Apr. 12, 2011); Seward & Kissel, LLP (Apr. 12, 2011); Katten, Muchin, Rosenman LLP (Apr. 12, 2011); all available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=973> (last retrieved July 31, 2018).

<sup>60</sup> See CPO CTA Final Rule, 77 FR at 11263.

<sup>61</sup> *Id.* (citing the SEC’s Family Office exclusion from the investment adviser definition at 17 CFR 250.202(a)(11)(G)–1).

<sup>62</sup> *Id.* (citing 17 CFR 140.99(a)(3) and a variety of historic Family Office relief letters).

rules and to rely on those interpretative letters already issued to the extent permissible under the Commission’s regulations.”<sup>63</sup> Thus, pursuant to the amendments to 17 CFR part 4 adopted in 2012, among which was the rescission of § 4.13(a)(4), many Family Offices were required to register with the Commission as CPOs, if they could not qualify for an alternative exemption or otherwise obtain relief from Commission staff.<sup>64</sup>

### 3. The SEC’s Exclusion for Family Offices and CFTC Staff Letters 12–37 and 14–143

In 2011, the SEC adopted an exclusion from the term “investment adviser,” (IA) as defined by the Investment Advisers Act of 1940, as amended (IA Act),<sup>65</sup> for Family Offices (SEC Family Office Exclusion), thus excluding Family Offices from regulation under the IA Act.<sup>66</sup> Specifically, § 275.202(a)(11)(G)–1(a) provides that a family office, as defined in that section, shall not be considered to be an investment adviser for purpose of the IA Act, and § 275.202(a)(11)(G)–1(b) defines “family office” as a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position or employment) that: Has no clients other than family clients, is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and does not hold itself out to the public as an investment adviser.<sup>67</sup>

Because Family Offices, as such term is commonly understood, are not intended to be marketed as an option for investing by the general public, Family Offices are restricted, by definition and in practice, to accepting assets for management from or providing services to solely “family clients.” As a result, the SEC Family Office Exclusion defines a Family Client as including family members, including non-blood relatives such as spouses and adopted children, former family members, key employees of the Family Office, former key employees (under certain conditions), as

<sup>63</sup> *Id.* (concluding that “an exemption for family offices is not necessary at this time”).

<sup>64</sup> The Commission noted then that “family offices previously relying on the exemption under Regulation § 4.13(a)(3) will not be affected by the rules adopted herein, as the Commission is not rescinding the § 4.13(a)(3) exemption and it will remain available to entities meeting its criteria.” CPO CTA Final Rule, 77 FR at 11263.

<sup>65</sup> 15 U.S.C. 80b–1, et seq.

<sup>66</sup> Family Offices; Final Rule, 76 FR 37983 (Jun. 29, 2011) (SEC Family Office Final Rule).

<sup>67</sup> 17 CFR 275.202(a)(11)(G)–1(a) and 275.202(a)(11)(G)–1(b).

well as certain organizations, like non-profit organizations, charitable foundations, charitable trusts or other charitable organizations for which all the funding of such foundation, trust or organization came exclusively from one or more other Family Clients.<sup>68</sup> Family Clients also may include the estate of a family member, former family member, key employee, or subject to certain conditions, former key employees.<sup>69</sup> Additionally, investment and estate planning vehicles, such as irrevocable trusts, in which one or more other Family Clients are the only current beneficiaries, are also permitted Family Clients.<sup>70</sup>

Pursuant to the Commission's instructions in the CPO CTA Final Rule, many Family Offices sought relief from DSIO staff following the 2012 rescission of § 4.13(a)(4). Certain representatives of the Family Office industry requested relief that would be available to Family Offices on a global basis and would be based upon the SEC Family Office Exclusion. In the request for relief, industry representatives asserted that Family Offices are not operations of the type and nature that warrant regulatory oversight by the Commission, because, by definition, a Family Office is not a vehicle in which non-Family Clients would be solicited or permitted to invest. Because a Family Office is comprised of participants with close relationships, and there is a direct relationship between the clients and the CPO or advisor, it was argued that such relationships greatly reduce the need for the customer protections available pursuant to the regulations in 17 CFR part 4.<sup>71</sup>

Having met with Family Office industry representatives and observed the SEC's experience after adopting the SEC Family Office Exclusion, Commission staff thoroughly considered the issue and ultimately determined to grant registration relief for Family Offices meeting the requirements of the SEC Family Office Exclusion. On November 29, 2012, DSIO issued CFTC Staff Letter 12-37, a no-action letter permitting Family Offices complying with the SEC Family Office Exclusion to operate and manage the assets of Family Clients without having to register with

the Commission as a CPO.<sup>72</sup> Subsequently, in responding to a request for relief from the Private Investors Coalition, DSIO issued another no-action letter permitting Family Offices to provide their Family Clients with commodity trading advice, without CTA registration, provided that the Family Office did not hold itself out to the public as a CTA and restricted any commodity trading advice given to the Family Office itself and/or Family Clients.<sup>73</sup>

In granting the no-action relief from CPO registration, DSIO staff considered the requesters' assertion that, "this issue has similarly been addressed by the [SEC], which resulted in an exclusion for family offices that would otherwise be required to register as an investment adviser[.]" and that "SEC staff ha[d] devoted substantial time and resources to addressing this issue."<sup>74</sup> In determining to issue relief, the Division reasoned that "the fundamental issue of the appropriate application of investor protection standards as required by each respective agency's regulations is substantially similar."<sup>75</sup> Further, the Division concluded that granting the relief would place "both agencies on equal footing with respect to the application of investor protections relevant to this issue [and] will facilitate compliance with both regulatory regimes."<sup>76</sup> Consequently, through CFTC Staff Letters 12-37 and 14-143, the Division provided no-action relief with respect to CPO registration for any person filing a claim that operates a Family Office, as that term is defined in 17 CFR 275.202(a)(11)(G)-1(b), and with respect to CTA registration, for any person filing a claim whose advisory services are limited to a Family Office and/or Family Clients, as defined in 17 CFR 275.202(a)(11)(G)-1(d)(4).<sup>77</sup> Under each letter, the claimant is required to remain in compliance with the SEC Family Office Exclusion, regardless of whether the Family Office actually seeks such exclusion.<sup>78</sup>

In the six years since the rescission of § 4.13(a)(4) and the issuance of the CPO Family Office No-Action Letter, Commission staff has gained additional familiarity with the Family Office industry. This experience was gained through the continued availability of the CPO Family Office No-Action Letter and the subsequent issuance and utilization

by industry of the CTA Family Office No-Action Letter, as well as through the consideration of and response to the few additional requests received by DSIO from Family Offices unable to meet the criteria of either of the global no-action letters.<sup>79</sup> The Commission notes that DSIO has received a total of more than 500 claims of the no-action relief provided by the CPO Family Office No-Action Letter and the CTA Family Office No-Action Letter.

Based on this experience, and pursuant to the Commission's instructions to its staff in 2012 to consider the future adoption of registration exemptions for Family Offices, the Commission is proposing to adopt for qualifying Family Offices CPO and CTA registration exemptions with terms similar to those in the CPO Family Office No-Action Letter and the CTA Family Office No-Action Letter by amending §§ 4.13 and 4.14. The Commission preliminarily believes that the familial relationships inherent in Family Offices provide a reasonable mechanism for protecting the interests of Family Clients and resolving disputes amongst them, and that the regulatory interest is lower than in typical, arms-length transactions where the CPO and the pool participants, or the CTA and its advisory clients, do not have close relationships and/or long-standing family history between them. The Commission also preliminarily believes that these characteristics are a reasonable substitute for the benefits and protections afforded by the Commission's regulatory regime for CPOs and CTAs.

Consistent with its statements in prior rulemakings impacting Family Offices, the Commission notes that Family Offices unable to meet the requirements of the exemptions proposed herein today may still avail themselves of the relief provided in § 4.13(a)(3), if they so qualify, or they may continue to seek relief on an individual, firm-by-firm basis through requests submitted to Commission staff.

#### *D. Proposed Amendments Permitting General Solicitation by CPOs Pursuant to the JOBS Act of 2012.*

1. The JOBS Act of 2012, Regulation D, and Rule 144A

On April 5, 2012, Congress enacted the JOBS Act for the stated purpose of increasing American job creation and

<sup>68</sup> 17 CFR 275.202(a)(11)(G)-1(d)(4) (extensively defining "Family Client").

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* See Staff Responses to Questions About the Family Office Rule, available at <https://www.sec.gov/divisions/investment/guidance/familyofficefaq.htm>.

<sup>71</sup> CPO Family Office No-Action Letter, at 1-2. This rationale is also noted in the adopting release of the SEC Family Office Exclusion. See also SEC Family Office Final Rule, 76 FR at 37984.

<sup>72</sup> CPO Family Office No-Action Letter.

<sup>73</sup> CTA Family Office No-Action Letter.

<sup>74</sup> CPO Family Office No-Action Letter, at 2.

<sup>75</sup> CPO Family Office No-Action Letter, at 2.

<sup>76</sup> *Id.*

<sup>77</sup> CPO Family Office No-Action Letter, at 2; CTA Family Office No-Action Letter, at 3.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., CFTC Staff Letter 14-104 (Jun. 20, 2014), available at <https://www.cftc.gov/idc/groups/public/%40rlettergeneral/documents/letter/14-104.pdf> (last retrieved July 31, 2018) (granting no-action relief to an entity providing advisory services to two families with longstanding and extensive financial and personal relationships).

economic growth by improving access to the public capital markets for emerging growth companies.<sup>80</sup> Among other things, the JOBS Act amended various sections of the Securities Act of 1933 (“33 Act”) and required the SEC to revise its regulations to implement certain of the new JOBS Act provisions. Certain provisions of the JOBS Act expanded the availability and marketability of privately offered securities by loosening restrictions otherwise applicable to such offerings.

Section 5 of the 33 Act requires the registration of securities offerings with the SEC and compliance with prospectus delivery requirements, unless an exemption is available.<sup>81</sup> Section 4(a)(2) (formerly section 4(2)) of the 33 Act provides a statutory exemption from these requirements for “transactions by an issuer not involving any public offering.”<sup>82</sup> Rule 506 of the SEC’s Regulation D, “Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act,” (Regulation D) was adopted to provide a regulatory analog to the statutory exemption.<sup>83</sup> Rule 506(b) of Regulation D<sup>84</sup> was originally adopted by the SEC as a non-exclusive safe harbor under the 33 Act section 4(a)(2) exemption for securities offerings by an issuer, without regard to dollar amount, to an unlimited number of “accredited investors,” as defined in § 230.501(a),<sup>85</sup> and to no more than 35 non-accredited investors who meet certain sophistication requirements.<sup>86</sup> Offerings under § 230.506(b) are subject to the terms and conditions of §§ 230.501 and 230.502, including § 230.502(c), which states that neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation (General Marketing Restriction).<sup>87</sup>

Through JOBS Act Section 201, Congress directed the SEC to amend 17 CFR 230.506 of Regulation D, to provide that the prohibition against general solicitation or general advertising in section 230.502(c) of title 17 shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers are

accredited investors.<sup>88</sup> In 2012–2013, the SEC proposed and adopted amendments to § 230.506 consistent with the congressional directives of the JOBS Act.<sup>89</sup> By adding § 230.506(c), the SEC adopted an exemption that permits issuers to engage in general solicitation or advertising to offer and sell securities under Regulation D, provided that the issuer meets the terms and conditions of §§ 230.501 and 230.502(a) and (d), that all purchasers of the offered securities are accredited investors, and that the issuer takes reasonable steps to verify the accredited investor status of each purchaser.<sup>90</sup> In other words, the General Marketing Restriction in § 230.502(c) is not applicable to securities offerings made pursuant to § 230.506(c).

The SEC explained that it was retaining the exemption for traditional Regulation D offerings in § 230.506(b), “for those issuers that either do not wish to engage in general solicitation in their Rule 506 offerings . . . or wish to sell privately to non-accredited investors who meet Rule 506(b)’s sophistication requirements.”<sup>91</sup> Further, the SEC emphasized that the “mandate [in JOBS Act Section 201(a)(1)] affects only [§ 230.506], and not Section 4(a)(2) offerings in general, which means that . . . an issuer relying on Section 4(a)(2) outside of the Rule 506(c) exemption will be restricted in its ability to make public communications to solicit investors for its offering because public advertising will continue to be incompatible with a claim of exemption under Section 4(a)(2).”<sup>92</sup> The SEC also adopted substantively similar amendments to Rule 144A<sup>93</sup> eliminating offering and marketing restrictions in the resale of certain

securities sold to qualified institutional buyers (QIBs).<sup>94</sup>

## 2. Impact of JOBS Act Amendments on CPOs and DSIO’s 2014 JOBS Act Relief Letter

Under certain circumstances, persons relying on the new exemption in § 230.506(c) (506(c) Issuers) or reselling securities pursuant to Rule 144A (144A Resellers) may also be issuing interests in a commodity pool, the CPOs of which are subject to Commission regulation. Certain of the Commission’s regulations applicable to CPOs currently contain restrictions on marketing and solicitation that conflict with the statutory and regulatory amendments effected and prompted by the passing of the JOBS Act. Specifically, certain persons who offer, market, or sell securities from 506(c) Issuers or 144A Resellers may be subject to Commission regulation under §§ 4.7 or 4.13(a)(3), both of which currently prohibit the general marketing and solicitation that is now permitted by the JOBS Act.

Section 4.7 provides relief from certain of the disclosure, periodic and annual reporting, and recordkeeping requirements in Part 4 of the Commission’s regulations to registrants who file claims pursuant to § 4.7(d).<sup>95</sup> The relief in § 4.7(b) is available to: (1) A registered CPO who offers or sells pool participations solely to QEPs in an offering that qualifies for an exemption from the registration requirements of the 33 Act pursuant to section 4(2) (now section 4(a)(2)) of that Act or pursuant to Regulation S, or (2) any bank registered as a CPO in connection with a pool that is a collective trust fund whose securities are exempt from registration under the 33 Act pursuant to section 3(a)(2) of that Act and are offered or sold, without marketing to the public, solely to QEPs.<sup>96</sup> Section 4.13(a)(3) provides a registration exemption for CPOs that operate pools meeting the conditions enumerated in that regulation. One of those conditions, § 4.13(a)(3)(i), requires that interests in

<sup>80</sup> JOBS Act, Public Law 112–206, sec. 201(a)(1), 126 Stat. 306, 313. Further, the JOBS Act amendments made clear that offers and sales exempt under Rule 506 (as revised pursuant to JOBS Act Section 201) shall not be deemed public offerings under the Federal securities laws as a result of general advertising or solicitation. *Id.* at 201(b) (adding 33 Act Section 4(b), 15 U.S.C. 77d(b)).

<sup>81</sup> Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 FR 54464 (Sept. 5, 2012) and 78 FR 44771 (Jul. 24, 2013) (JOBS Act Adopting Release).

<sup>82</sup> 17 CFR 230.506(c)(1)–(2). In the JOBS Act Adopting Release, the SEC stated that, “because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of the [33 Act], it will be important for issuers and their verification service providers to retain adequate records regarding the steps taken to verify that a purchaser was an accredited investor.” 78 FR at 44779.

<sup>83</sup> *Id.* at 44776.

<sup>84</sup> 78 FR at 44774.

<sup>85</sup> 17 CFR 230.144A.

<sup>94</sup> Rule 144A is a non-exclusive safe harbor exemption from the registration and prospectus delivery requirements under the 33 Act for resales of certain securities to QIBs, as defined in § 230.144A(a)(1), provided that certain conditions are met. Through the JOBS Act, Congress directed the SEC to also adopt amendments to § 230.144A in order to permit general solicitation. JOBS Act, Pub. L. 112–206, sec. 201(a)(2), 126 Stat. 306, 313. In the JOBS Act Adopting Release, the SEC eliminated references to “offer” and “offeree” in Rule 144A, such that, today, the provision only requires that such resold securities “be sold to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB.” 78 FR at 44786.

<sup>95</sup> 17 CFR 4.7; 17 CFR 4.7(d).

<sup>96</sup> 17 CFR 4.7(b).

<sup>80</sup> Public Law 112–206, 126 Stat. 306 (Apr. 5, 2012).

<sup>81</sup> 15 U.S.C. 77e.

<sup>82</sup> 15 U.S.C. 77d(a)(2).

<sup>83</sup> Proposed Revision of Certain Exemptions from the Registration Provisions of the Securities Act of 1933 for Transactions Involving Limited Offers and Sales, 33 Act Rel. No. 6339 (Aug. 7, 1981).

<sup>84</sup> 17 CFR 230.506(b).

<sup>85</sup> 17 CFR 230.501(a).

<sup>86</sup> 17 CFR 230.506(b).

<sup>87</sup> 17 CFR 230.501, 230.502; 230.502(c).

each pool for which the CPO claims the exemption be exempt from registration under the 33 Act and “offered and sold without marketing to the public.”<sup>97</sup> Additionally, § 4.13(a)(3)(iii) requires that the CPO reasonably believes, at the time of purchase, that each person who participates in the exempt pool is, among other things, an accredited investor or QEP.<sup>98</sup>

Generally, all commodity pools relying on the exemption in 33 Act section 4(a)(2), including pursuant to § 230.506(b), remain subject to prohibitions on general solicitation and general advertising, and such pools’ CPOs may continue to claim relief under §§ 4.7(b) or 4.13(a)(3) in their current states. However, as noted above, amendments to securities regulations prompted by the JOBS Act and the requirements for exemptive relief under §§ 4.7(b) or 4.13(a)(3) are incompatible. In response to the SEC’s amendments, the Division issued CFTC Staff Letter 14–116, an exemptive letter clarifying how securities issuers and resellers, and their CPOs, could avail themselves of relief both in the securities and commodity interest sectors.<sup>99</sup>

Subject to certain conditions, the JOBS Act Relief Letter provides exemptive relief to claimants from the specific provisions of §§ 4.7(b) or 4.13(a)(3) outlined above, to make the relief provided by those regulations compatible with amended Regulation D and Rule 144A. Specifically, the CPOs of 506(c) Issuers and 144A Resellers that filed a notice with DSIO staff received exemptive relief from the requirements in § 4.7(b) that an offering be exempt pursuant to section 4(a)(2) of the 33 Act and offered solely to QEPs, and from the requirement in § 4.13(a)(3)(i) that the securities “be offered and sold without marketing to the public.”<sup>100</sup>

In an effort to harmonize the impact of the JOBS Act on, and to provide legal certainty with respect to the transactions engaged in by, dually-regulated CFTC and SEC entities, the

Commission is proposing to adopt tailored amendments to §§ 4.7(b) and 4.13(a)(3) that would generally be consistent with the JOBS Act Relief Letter, as explained further below.

#### *E. Proposed Exclusionary Relief for BDCs*

##### 1. The CPO Exclusion in § 4.5

Section 4.5 provides an exclusion for certain otherwise regulated persons from the CPO definition with respect to the operation of a “qualifying entity” specified in that regulation.<sup>101</sup> Examples of excluded persons include insurance companies regulated by any State<sup>102</sup> with respect to the offering of a separate account;<sup>103</sup> a bank regulated by a State or the United States<sup>104</sup> with respect to the assets of any trust, custodial account, or other separate unit of investment for which it is acting as a fiduciary and for which it has investment authority;<sup>105</sup> the trustee of a plan subject to title I of the Employee Retirement Income Security Act of 1974 (ERISA)<sup>106</sup> with respect to the operations of that plan;<sup>107</sup> and most relevant to the discussion herein, the operator of an investment company registered as such under the Investment Company Act of 1940, as amended (ICA),<sup>108</sup> with respect to the operated RIC.<sup>109</sup>

##### 2. BDCs: Exempt Investment Companies Restricted in Their Use of Commodity Interests

BDCs are closed-end companies subject to regulation by the SEC under the ICA. Although BDCs meet the definition of an “investment company” under ICA section 3,<sup>110</sup> they are exempt from investment company registration by virtue of the filing of an election under section 54 of the ICA to be subject to various provisions of that act.<sup>111</sup> Despite not being registered as such, BDCs do operate in a manner similar to closed-end RICs and are subject to many

of the same operational requirements of the ICA.<sup>112</sup> Most BDCs have external advisers, which generally must be registered with the SEC as investment advisers under the IA Act.<sup>113</sup> BDCs, like RICs, are subject to periodic examination by the SEC. Further, BDCs must either have a class of equity securities that is registered under, or filed a registration statement for a class of equity securities pursuant to, the Securities Exchange Act of 1934, as amended,<sup>114</sup> which, in turn, requires filing with the SEC: Annual reports on Form 10–K,<sup>115</sup> quarterly reports on Form 10–Q,<sup>116</sup> current reports on Form 8–K,<sup>117</sup> and proxy solicitation statements in connection with annual stockholder meetings.<sup>118</sup> Additionally, almost all BDCs are listed for trading on national securities exchanges, and thus, are subject to exchange rules governing listed companies.<sup>119</sup> BDCs are also subject to certain regulations and corporate governance guidelines under the Sarbanes-Oxley Act of 2002.<sup>120</sup>

BDCs are primarily engaged in investing in, and providing managerial assistance to, operating companies.<sup>121</sup> Specifically, BDCs are required to invest at least 70% of their assets in “eligible portfolio companies,”<sup>122</sup> which are generally defined as small- or mid-sized U.S. companies that have no outstanding listed securities.<sup>123</sup> BDCs typically limit their use of commodity interests to interest rate and currency swaps, with some limited use of credit default swaps and other commodity interests.<sup>124</sup> Because BDCs primarily

<sup>112</sup> See, e.g., 15 U.S.C. 80a–18 (providing asset coverage requirements among others subject to certain limitations); 15 U.S.C. 80a–61 (making section 18 of the ICA applicable to BDCs with certain modifications).

<sup>113</sup> 15 U.S.C. 80b–1, *et seq.*

<sup>114</sup> 15 U.S.C. 78a *et seq.*

<sup>115</sup> 17 CFR 249.310.

<sup>116</sup> 17 CFR 249.308a.

<sup>117</sup> 17 CFR 249.308.

<sup>118</sup> 17 CFR 240.14a–4.

<sup>119</sup> See, e.g., NYSE Listed Company Manual, available at <http://wallstreet.cch.com/LCM/> (last retrieved Apr. 25, 2018).

<sup>120</sup> Public Law 107–204, 116 Stat. 745 (July 30, 2002) (codified in U.S.C. Titles 15, 18, 28, and 29).

<sup>121</sup> 15 U.S.C. 80a–2(a)(48).

<sup>122</sup> *Id.* See also 15 U.S.C. 80a–54(a).

<sup>123</sup> 15 U.S.C. 80a–2(a)(46) (defining “eligible portfolio company”). See 17 CFR 270.2a–46 (providing additional criteria regarding “eligible portfolio companies”).

<sup>124</sup> See Use of Derivatives by Registered Investment Companies, U.S. Securities and Exchange Commission, Division of Economic Risk and Analysis, available at <https://www.sec.gov/files/derivatives12-2015.pdf> (last retrieved July 31, 2018). Staff in the SEC’s Division of Economic Risk and Analysis pulled a random sample of investment companies, including BDCs, to examine the use of derivatives by such companies. Within the sampled BDCs, none used derivatives, which appears to be

Continued

<sup>101</sup> 17 CFR 4.5(a) and (b).

<sup>102</sup> 17 CFR 4.5(a)(2).

<sup>103</sup> 17 CFR 4.5(b)(2).

<sup>104</sup> 17 CFR 4.5(a)(3).

<sup>105</sup> 17 CFR 4.5(b)(3).

<sup>106</sup> 17 CFR 4.5(a)(4).

<sup>107</sup> 17 CFR 4.5(b)(4).

<sup>108</sup> 15 U.S.C. 80a–1, *et seq.*

<sup>109</sup> 17 CFR 4.5(a)(1) and (b)(1). As discussed, *infra*, § 4.5 lists the RIC as both the excluded person and the qualifying entity. Given that the Commission has previously determined that the RIC’s investment adviser is the appropriate person to serve as the CPO of a RIC for regulatory purposes, the Commission is proposing herein to amend § 4.5(a)(1) to designate the investment adviser as the excluded entity. See CPO CTA Final Rule, 77 FR at 11259.

<sup>110</sup> 15 U.S.C. 80a–3.

<sup>111</sup> *Id.* at 80a–53. See *id.* at 80a–6(f).

<sup>97</sup> 17 CFR 4.13(a)(3)(i).

<sup>98</sup> 17 CFR 4.13(a)(3)(iii).

<sup>99</sup> CFTC Staff Letter 14–116 (Sept. 9, 2014) (JOBS Act Relief Letter), available at <https://www.cftc.gov/idc/groups/public/%40rlettergeneral/documents/letter/14-116.pdf> (last retrieved July 31, 2018) (JOBS Act Relief Letter).

<sup>100</sup> JOBS Act Relief Letter, p. 6. The Commission notes that § 4.13(a)(3) requires only that interests in an exempt pool be “exempt from registration” under the 33 Act, whereas § 4.7(b) has a more restrictive requirement that the pools qualify for exemption specifically under 33 Act section 4(a)(2). As noted above, the SEC emphasized, while amending Regulation D, that issuers claiming a 33 Act section 4(a)(2) exemption or § 230.506(b) would still be restricted in marketing or advertising to the public, based on the format of the congressional directive in the JOBS Act. 78 FR at 44774.

invest in private companies to which they are required to offer managerial assistance, BDCs generally use commodity interests for purposes of hedging, reducing, or otherwise managing investment and commercial risks of the operating companies in which they invest. Section 61 of the ICA<sup>125</sup> applies, among other things, the limitations on the issuance of “senior securities” of section 18 of the ICA to BDCs,<sup>126</sup> subject to certain modifications to the limitation on multiple classes on senior security indebtedness and to the asset coverage requirements. BDCs, like registered closed-end funds, may issue senior securities that either represent indebtedness or stock (e.g., preferred stock), subject to the limitations of ICA section 61.<sup>127</sup>

### 3. CFTC Staff Letter 12–40 and the Proposed Amendments

In 2012, DSIO staff received correspondence requesting interpretative guidance from the Division regarding BDCs<sup>128</sup> and the availability of the exclusion from the CPO definition in § 4.5.<sup>129</sup> DSIO understood that the request was prompted generally by the inclusion of swaps within the jurisdiction of the Commission pursuant to the Dodd-Frank Act, as well as the specific addition of “swaps” to the list of commodity interests referenced within the CEA’s definitions of “commodity pool” and CPO.<sup>130</sup>

Following internal deliberations and further discussions with the requester, the Division determined to issue no-action relief, rather than interpretative guidance, which was accomplished on December 4, 2012, through the publication of CFTC Staff Letter 12–40 (BDC No-Action Letter).<sup>131</sup> In the BDC No-Action Letter, DSIO recited numerous ways in which BDCs are regulated in a manner similar to RICs under the ICA.<sup>132</sup> Pursuant to the terms of that letter, an entity claiming relief thereunder is subject to the following criteria: (1) The entity must have elected to be treated as a BDC under section 54

of the ICA<sup>133</sup> and will remain regulated as such, and (2) the entity has not marketed and will not market participations in the BDC to the public as investment in a commodity pool, or otherwise as an investment in a vehicle for the trading of commodity interests.<sup>134</sup> Additionally, the claimant must represent that it limits its use of commodity interests in the BDC consistent with the trading thresholds in § 4.5(c)(2)(iii)(A)–(B).<sup>135</sup> Finally, to claim the relief provided, an entity must file via email to DSIO the requisite notice, which is then electronically forwarded by CFTC staff to the NFA for inclusion in its public database, the Background Affiliation Status Information Center (BASIC).<sup>136</sup>

Since the issuance of CFTC Staff Letter 12–40, the Commission has received 55 claims of relief. Division staff issued the BDC No-Action Letter because BDCs are subject to oversight by

<sup>133</sup> 15 U.S.C. 80a–53.

<sup>134</sup> BDC No-Action Letter, at 3.

<sup>135</sup> Specifically, the BDC must represent that it uses commodity interests solely for bona fide hedging purposes within the meaning and intent of §§ 1.3(z)(1) and 151.5 (17 CFR 1.3 and 151.5 (2012)); provided, however, that in addition, with respect to positions in commodity futures or commodity option contracts, or swaps which do not come within the meaning and intent of §§ 1.3(z)(1) and 151.5, as those provisions existed in 2012, the aggregate initial margin and premiums required to establish such positions does not exceed five percent of the liquidation value of the BDC’s portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into; and, provided further, that in the case of an option that is in-the-money at the time of purchase, the in-the-money amount may be excluded in computing such five percent; or the aggregate net notional value of commodity futures, commodity options contracts, or swaps positions not used solely for bona fide hedging purposes within the meaning and intent of §§ 1.3 and 151.5 (17 CFR 1.3 and 151.5 (2012)), determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the BDC’s portfolio, after taking into account unrealized profits and losses on any such position it has entered into.

On September 28, 2012, the U.S. District Court for the District of Columbia vacated §§ 1.3(z)(1) and 151.5 as part of the total vacation of the Commission’s position limits rule. See *Int’l Swaps & Derivatives Ass’n v. CFTC*, 887 F.Supp.2d 259 (D.D.C. Sept. 28, 2012). This created some legal uncertainty as to the effect of the incorporation of those regulations in the CFTC’s amendments to § 4.5. On October 12, 2012, DSIO issued interpretative guidance providing that § 4.5(c)(2)(iii)(A) and (B) continue to incorporate the substance of vacated §§ 1.3(z)(1) and 151.5 for purposes of those provisions only. See CFTC Staff Letter 12–19 (Oct. 12, 2012), available at <https://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/12-19.pdf> (last retrieved July 31, 2018). The Commission is not proposing to remove the cross-references to §§ 1.3(z)(1) and 151.5 (2012) at this time, but instead, intends to consider amendments to the “bona fide hedging” definition in § 4.5, when it adopts final rules replacing the vacated regulatory provisions.

<sup>136</sup> NFA’s BASIC website can be accessed at <https://www.nfa.futures.org/basicnet>.

the SEC that is comparable to the regulation of RICs, and because BDCs use commodity interests primarily for bona fide hedging purposes. For these same reasons, the Commission has determined to exercise its authority to propose to amend § 4.5 to provide IAs of BDCs with comparable exclusionary relief.

### F. Relief From § 4.27

#### 1. History

The Commission adopted § 4.27 on November 16, 2011,<sup>137</sup> and subsequently amended it to implement Forms CPO–PQR and CTA–PR on February 24, 2012.<sup>138</sup> Section 4.27 generally requires each CPO that is registered or required to be registered as such to provide information regarding its operations as a CPO and each commodity pool that it operates.<sup>139</sup> It also requires each CTA that is registered or required to be registered as such to provide information, including financial information, regarding its operations and the pool assets that it directs.<sup>140</sup> The data collected is intended to, among other things, facilitate monitoring of systemically important impacts to the financial markets, as required by the Commission’s obligations as part of the Financial Stability Oversight Council (FSOC).<sup>141</sup>

#### 2. Reporting Person Definition

The entities required to file a Form CPO–PQR for CPOs, or a Form CTA–PR for CTAs, are identified by the “reporting person” definition (Reporting Person) contained in § 4.27(b).<sup>142</sup> Pursuant to that definition, Reporting Persons include CPOs and CTAs that are registered or required to be registered under the CEA and the Commission’s regulations thereunder.<sup>143</sup> After several filing cycles for both forms, the data revealed a substantial number of Reporting Persons that were filing Forms CPO–PQR and CTA–PR, but that had no other obligations under part 4 of the Commission’s regulations. Specifically, the CPOs were operating pursuant to an exclusion or exemption from registration for all pools and accounts that they operated and/or directed, and the CTAs did not direct any client accounts, yet these CPOs and CTAs elected to maintain an active

<sup>137</sup> Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF, 76 FR 71128 (Nov. 16, 2011).

<sup>138</sup> CPO CTA Final Rule, 77 FR at 11252.

<sup>139</sup> 17 CFR part 4, appendix A.

<sup>140</sup> 17 CFR part 4, appendix C.

<sup>141</sup> CPO CTA Final Rule, 77 FR at 11267.

<sup>142</sup> 17 CFR 4.27(b).

<sup>143</sup> *Id.*

consistent with assertions from members of industry that the usage of derivatives by BDCs is generally very limited. *Id.*

<sup>125</sup> 15 U.S.C. 80a–60.

<sup>126</sup> *Id.* at 80a–18.

<sup>127</sup> *Id.* at 80a–18(a)(2), 80a–60.

<sup>128</sup> BDCs are subject to regulation under the ICA, but are not RICs.

<sup>129</sup> 17 CFR 4.5.

<sup>130</sup> 7 U.S.C. 1a(10) and 1a(11).

<sup>131</sup> CFTC Staff Letter 12–40, available at <https://www.cftc.gov/idc/groups/public/@lrllettergeneral/documents/letter/12-40.pdf> (Dec. 4, 2012) (last retrieved July 31, 2018).

<sup>132</sup> *Id.*

registration with the Commission. This registration was sufficient to qualify the entity as a Reporting Person under § 4.27(b), and consequently, it required these entities to file either a Form CPO–PQR or Form CTA–PR, as applicable. However, because these Reporting Persons did not operate pools or direct any accounts, or operated only exempt pools that are not subject to reporting requirements under § 4.27, their Form CPO–PQR and Form CTA–PR filings did not contain meaningful information to assess systemic risk.

### 3. Current Commission Staff Letter Relief

To address this issue, DSIO issued several staff letters that provided exemptive relief from the requirement to file either a Form CPO–PQR or CTA–PR, for CPOs<sup>144</sup> and CTAs<sup>145</sup> that do not otherwise have reporting obligations under part 4 of the Commission's regulations. In so doing, DSIO believed that the data eliminated from the dataset "provide limited additional information . . . beyond that already available to the Commission as part of the registration process and the [person's] ongoing obligations as a registrant."<sup>146</sup>

### 4. Proposing Amendments Consistent With Current Staff Letter Relief

The Commission is proposing today to amend § 4.27 in a manner consistent with the exemptive relief currently made available in CFTC Staff Letters 14–115 and 15–47, such that CPOs that operate only pools for which they are otherwise excluded from the CPO definition or exempt from CPO registration are not required to file a Form CPO–PQR, and CTAs that do not direct client accounts are not required to file a Form CTA–PR.<sup>147</sup> As such, the

<sup>144</sup> CFTC Staff Letter 14–115 (Sept. 8, 2014), available at <https://www.cftc.gov/idc/groups/public/%40rlettergeneral/documents/letter/14-115.pdf> (last retrieved July 31, 2018) (providing relief from filing a Form CPO–PQR to CPOs that optionally registered as such with the Commission, but operated only pools for which they were excluded from the definition of "commodity pool operator," and/or pursuant to a claim of exemption for registration with respect to the operated pools).

<sup>145</sup> CFTC Staff Letter 15–47 (July 21, 2015), available at <https://www.cftc.gov/idc/groups/public/%40rlettergeneral/documents/letter/15-47.pdf> (last retrieved July 31, 2018) (providing similar relief from filing a Form CTA–PR to CTAs who are registered as such with the Commission, but do not direct trading for any commodity interest accounts).

<sup>146</sup> CFTC Staff Letter 14–115 at 2. See also CFTC Staff Letter 15–47 at 2 ("The same rationale applies in the instant scenario—requiring a registered CTA that does not direct any trading of commodity interest accounts to file a Form CTA–PR would similarly provide limited additional information regarding that CTA.").

<sup>147</sup> It should be noted that similar to a discussion in CFTC Staff Letter 14–115, where a CPO is

Commission proposes to exclude these CPOs and CTAs from the Reporting Person definition in § 4.27(b).

### 5. Expanding Relief From § 4.27 to Additional Categories of CTAs

Section 4.14(a)(4) provides that a person is exempt from registering as a CTA, if that person is registered under the CEA and the Commission's regulations as a CPO, and the person's commodity trading advice is directed solely to the commodity pool or pools for which it is registered as a CPO.<sup>148</sup> Under § 4.14(a)(4), the person in question is registered as the CPO of a pool, and therefore, already has an obligation to file a Form CPO–PQR with respect to that pool, which requires the reporting of more information when compared to Form CTA–PR.<sup>149</sup> As such, the value of any data that would be collected by requiring that same Reporting Person to also file a Form CTA–PR is significantly outweighed by the burden to that entity of an extra filing, as well as any inefficiency resulting from the collecting and processing of duplicative data by NFA and Commission staff. As such, the Commission today also proposes to exclude from the Reporting Person definition under § 4.27(b) those CTAs who comply with the terms of the exemption from registration set forth in § 4.14(a)(4), and who limit their activities to those described by that exemption, but nevertheless elect to register as CTAs.

Further, consistent with the foregoing, the Commission also proposes to exclude from the Reporting Person definition any CTA that directs only the accounts of a pool that it operates as an exempt CPO. Specifically, § 4.14(a)(5) exempts from CTA registration any person that is exempt from CPO registration, if that person's commodity trading advice is directed solely to the pool for which it is exempt from CPO registration.<sup>150</sup> Consistent with the relief provided in CFTC Staff Letter 14–115, the exempt CPO of the pool would not be required to report on a Form CPO–PQR.<sup>151</sup> It is therefore incongruent to require the same person to report on Form CTA–PR with respect to the operation of a pool for which it is not required to file a Form CPO–PQR. Accordingly, the Commission proposes

registered, but operates no pools, it is not required to file a Form CPO–PQR, as the terms of that form only require completion if the CPO also operates at least one pool. See CFTC Staff Letter 14–115, at 2.

<sup>148</sup> 17 CFR 4.14(a)(4).

<sup>149</sup> See 17 CFR part 4, appendix A and appendix C.

<sup>150</sup> 17 CFR 4.14(a)(5).

<sup>151</sup> See CFTC Staff Letter 14–115 at 2.

to remove the § 4.27 filing obligation for such CTAs by excluding from the Reporting Person definition any CTA that directs only the accounts of a pool for which it is exempt from registration as a CPO, and for which the CTA complies with the terms of a registration exemption under § 4.14(a)(5), but nevertheless elects to register as a CTA.

## II. Proposed Regulations

### A. Providing CPOs of Offshore Pools With Registration and Recordkeeping Relief Consistent With Advisory 18–96

#### 1. New § 4.13(a)(4): The 18–96 Exemption

The Commission is proposing to amend § 4.13 by adding a new exemption from CPO registration in the currently reserved paragraph (a)(4) for qualifying persons operating commodity pools outside of the United States. The 18–96 Exemption would incorporate the vast majority of the requirements in the Advisory (with the exception of requiring CPO registration) and would be limited in application to each pool for which the person claims exemption from registration under paragraph (a)(4).

Proposed § 4.13(a)(4)(i) through (vi) explain the substantive conditions that must be met to be eligible for the exemption. Because the 18–96 Exemption is based on the location of the pool and/or its participants, the exemption requirements, much like the Advisory, would focus on the location or base of activities for the pool, including the location and source of any capital invested in the exempt offshore pool. The 18–96 Exemption would include the following parameters: (i) The pool is, and will remain, organized and operated outside of the United States; (ii) the pool will not hold meetings or conduct administrative activities within the United States; (iii) no shareholder or other participant in the pool is or will be a U.S. person; (iv) the pool will not receive, hold or invest any capital directly or indirectly contributed from sources within the United States; and (v) the person, the pool, and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation in the pool from U.S. persons.

Consistent with its past prioritization of resources, the Commission intends that the requirements of the 18–96 Exemption would limit that exemption's availability to those persons operating commodity pools offshore, soliciting, accepting funds from, and managing assets from solely persons located

outside the United States, and otherwise having a very limited nexus with the Commission's jurisdiction and regulated markets. By virtue of providing a CPO registration exemption, the 18–96 Exemption, once claimed by a qualifying CPO for its offshore pool(s), would result in the claiming CPO receiving relief from the vast majority of significant compliance requirements in part 4, including § 4.27, which requires the filing of Form CPO–PQR with respect to the directed assets of each commodity pool under the advisement of any CPO that is registered or required to be registered, including any CPO currently claiming Advisory 18–96.

## 2. New § 4.13(a)(6): The Proposed Prohibition on Statutory Disqualifications

The Commission also proposes to amend § 4.13(a) by adding a new paragraph (a)(6). Proposed § 4.13(a)(6) would require any person claiming an exemption under paragraphs (a)(1) through (a)(5) of § 4.13 to represent that neither the person nor any of its principals is subject to any statutory disqualification under sections 8a(2) or 8a(3) of the Act, unless such disqualification arises from a matter which was previously disclosed in connection with a previous application, if such registration was granted, or which was disclosed more than thirty days prior to the claim of this exemption. As discussed above, the Commission believes preliminarily that this proposed amendment would provide additional customer protection because statutorily disqualified, unregistrable persons would no longer be permitted to claim the CPO exemptions under § 4.13(a)(1) through (a)(5).

## 3. Amendments to § 4.13: Claiming the Proposed 18–96 Exemption

The Commission is proposing to amend § 4.13(b) to incorporate the 18–96 Exemption into the existing timing and claims process for other CPO exemptions, which the Commission preliminarily believes establishes a reasonable timing requirement for such claims. Once adopted, this provision would apply to persons claiming the 18–96 Exemption for newly established offshore commodity pools. If this rulemaking is adopted, the Commission intends to permit all existing claimants under Advisory 18–96 to claim the 18–96 Exemption.

As proposed, § 4.13(b)(2)(i) would require a person claiming the 18–96 Exemption to do so within 30 days of

engaging in CPO activities that would make relief under § 3.10(c)(3)(i) unavailable to that person. Until that point in time, the person could freely rely on § 3.10(c)(3)(i), which is self-executing; such reliance would no longer be permitted, however, once the person is required to register or claim a CPO exemption with respect to a commodity pool that is marketed to U.S. persons, that contains funds belonging to U.S. persons, or that is otherwise operated in the U.S., its territories, or possessions. Therefore, proposed § 4.13(b)(2)(i) would require a person to claim the 18–96 Exemption within 30 days of such an occurrence, which the Commission preliminarily believes is sufficient time for a person to achieve compliance with the terms of the 18–96 Exemption.

## 4. Making the 18–96 Exemption Available on a Pool-by-Pool Basis

It is crucial to the proper functioning of the 18–96 Exemption that it be available on a pool-by-pool basis. This feature would permit claiming CPOs to be exempt with respect to their qualifying offshore commodity pools, while permitting them to maintain CPO registration for any commodity pools engaged in activities requiring such registration, *i.e.*, the CPO has solicited or accepted funds from U.S. persons for investment in the commodity pool. This characteristic would effectively differentiate the 18–96 Exemption from the relief currently provided under both Advisory 18–96 and § 3.10(c)(3)(i). Therefore, the Commission proposes to adopt in § 4.13 a new paragraph (e)(3), which would establish the 18–96 Exemption as clearly available on a pool-by-pool basis. Specifically, the Commission proposes to add § 4.13(e)(3), which would permit a CPO to claim the 18–96 Exemption with respect to qualifying offshore pools and to simultaneously register as a CPO with respect to other pools that require registration or are otherwise not exempt pools, and also to amend § 4.13(e)(1) to note the addition of new § 4.13(e)(3).

## 5. Other Amendments to Miscellaneous Provisions in § 4.13

Without any additional amendment, current § 4.13(a)(6) (proposed to be renumbered as paragraph (a)(7)) contains a reference to § 4.13(a)(4), where the 18–96 Exemption is proposed to be housed. That reference is a holdover from the original exemption in § 4.13(a)(4) rescinded by the Commission in 2012, and would require any person claiming the 18–96 Exemption to furnish in written

communication physically delivered or delivered through electronic transmission to each prospective participant in the pool: (A) A statement that the person is exempt from registration with the Commission as a commodity pool operator, and that therefore, unlike a registered commodity pool operator, it is not required to deliver a Disclosure Document and a certified annual report to participants in the pool; and (B) a description of the criteria pursuant to which it qualifies for such exemption from registration.<sup>152</sup> Section 4.13(a)(6)(ii) (proposed paragraph (a)(7)(ii)) would also require a person claiming any exemption thereunder to make these disclosures by no later than the time it delivers a subscription agreement for the pool to a prospective participant in the pool.

Because disclosure documents and certified annual reports are two of the most significant compliance burdens in part 4 of the Commission's regulations, it is critical that prospective participants be informed as to which, if any, customer protections apply to them and their investment, and as to what information they are entitled to receive from the CPO of their pool. Nonetheless, the Commission understands that currently, as proposed, only non-U.S. persons would be the participants in qualifying pools operated by persons claiming the 18–96 Exemption. The Commission notes that such disclosures generally would be more informative or helpful to U.S. person investors in exempt pools, but inquires whether non-U.S. persons would expect or otherwise benefit from such disclosures, such that the reference to § 4.13(a)(4) should be retained.<sup>153</sup> The Commission specifically requests comment on this issue below.

The Commission is also amending § 4.13(a)(3)(iii)(E) to remove a cross-reference to rescinded § 4.13(a)(4) and replace it with “non-U.S. persons.” This amendment would effectively adopt the interpretation in CFTC Staff Letter 04–13, discussed *supra*, by permitting non-U.S. person participants, regardless of their financial sophistication, to invest in § 4.13(a)(3) exempt pools.

<sup>152</sup> 17 CFR 4.13(a)(6).

<sup>153</sup> Indeed, one of several comments received on the Commission's 2006 proposal to rescind Advisory 18–96 stated that, “it is unnecessary and confusing to the non-U.S. domiciled investors to explain why the sponsor is not registered with a U.S. futures regulator, and recommended that Advisory 18–96 be retained as an option for CPOs,” because of the required disclosures in § 4.13. See 72 FR at 1661.

#### 6. Preserving Advisory 18–96’s Recordkeeping Location Relief With Amendments to § 4.23 and Certain Technical Amendments

As discussed above, the Commission has also determined to preserve Advisory 18–96’s relief from the generally applicable recordkeeping location requirement in § 4.23. Specifically, the Commission is proposing to amend § 4.23 by adding a new paragraph (c), such that registered onshore CPOs operating offshore commodity pools may seek relief from the requirement in that regulation that all books and records concerning the pool and CPO be kept at the CPO’s main business office, provided that the person meets the requirements thereunder incorporated from the Advisory. Proposed § 4.23(c) contains exemptive relief for this specific type of CPO with regard to the offshore commodity pool(s) it operates, and contains the vast majority of the requirements for claiming the equivalent relief under Advisory 18–96. Because § 4.23 applies to CPOs registered or required to be registered, the Commission preliminarily believes it is not necessary to incorporate the prohibition on statutory disqualifications in the requirements for claiming this proposed exemptive relief.

The Commission is also proposing a series of organizational, non-substantive amendments to § 4.23, which the Commission preliminarily believes would clarify the existing recordkeeping location requirement applicable to all CPOs registered or required to be registered, would retain current exemptive relief provided by that regulation, and overall, would make the regulation easier to read and understand, even with the addition of the exemptive relief also being proposed today. The Commission requests comment on whether these proposed amendments effectively incorporate in § 4.23 the recordkeeping location requirement relief currently found in Advisory 18–96, and whether the proposed technical amendments improve or otherwise alter that regulation or its application in any way.

#### *B. Proposed Family Office Exemptions*

Consistent with the CPO Family Office No-Action Letter, the Commission proposes to adopt for qualifying Family Offices a new regulatory exemption in § 4.13(a)(8). New § 4.13(a)(8) would provide relief from registration equivalent to the CPO Family Office No-Action letter, and the exemption’s availability would be contingent on the Family Office: (1)

Meeting the requirements for being deemed a Family Office pursuant to the SEC Family Office Exclusion in 17 CFR 275.202(a)(11)G–1; (2) restricting its investing and advisory activities solely to Family Clients, as defined in the SEC Family Office Exclusion; and (3) not engaging in the solicitation of persons other than Family Clients permitted under the SEC Family Office Exclusion. The prohibition against solicitation of non-Family Clients ensures that the exempt CPO is limiting its activities to those associated with the operation of a Family Office, as contemplated by the SEC Family Office Exclusion, which the Commission preliminarily believes would reduce its regulatory interest in such investment vehicles, when compared to other commodity pools.

As part of claiming exemptive relief under § 4.13, each person must file an annual notice under § 4.13(b)(4) confirming that the person remains exempt from registration. The Commission proposes to maintain the annual notice filing for all persons claiming relief under § 4.13, including persons claiming the new proposed exemption for Family Offices. The Commission believes that the notice requirement should ensure at least an annual assessment of whether the CPO of the Family Office remains eligible to rely upon the proposed exemption.

With respect to the CTA Family Office No-Action Letter, the Commission also proposes adding a new CTA registration exemption at § 4.14(a)(11) consistent with that relief. The Commission preliminarily believes that Family Offices that are also claiming relief from CPO registration under proposed § 4.13(a)(8) would already be eligible for relief from CTA registration by virtue of the existing exemption in § 4.14(a)(5), which provides an exemption from CTA registration for persons exempt from CPO registration that only advise a pool or pools for which the person is so exempt.<sup>154</sup> Therefore, the Commission is proposing to limit the new exemption in § 4.14(a)(11) to the advice provided to individual Family Clients. Consistent with most exemptions available under § 4.14, the Commission is also proposing that the new exemption for qualifying CTAs of Family Offices and Family Clients be self-executing, and is, therefore, not proposing to require a notice filing from claimants thereunder.

#### *C. Proposed Amendments Consistent With the JOBS Act Relief Letter*

The Commission proposes today to add to part 4 regulatory harmonization consistent with the JOBS Act Relief

Letter, through specific amendments to §§ 4.7(b) and 4.13(a)(3). In § 4.7, the paragraph (b) introductory text currently sets forth the eligibility requirements for CPOs claiming relief thereunder with respect to certain pools they operate. The Commission proposes to remove the reference to “section 4(2) of [the 33] Act,” to remove references to the act of “offering” the § 4.7 exempt pool, and to delete the text, “without marketing to the public.” The Commission intends that these amendments would permit CPOs claiming the exemptive relief in § 4.7(b) to engage in general solicitation or marketing, if eligible to do so under their securities law exemptions.<sup>155</sup>

Additionally, the Commission is proposing to break out the eligible claimants of the relief in § 4.7(b) into two new paragraphs, paragraphs (b)(1)(i) and (b)(1)(ii), and to renumber the remaining subparagraphs of § 4.7(b). These changes are intended to improve the readability and clarity of that regulation. With today’s proposed amendments, the operative requirements remaining in § 4.7(b) for non-bank CPOs claiming relief thereunder are that: (1) The CPO must be registered with respect to the exempt pool/offering; (2) participations in the exempt pool must be exempt from the Securities Act and/or offered and sold pursuant to Regulation D (under either § 230.506(b) or 230.506(c)) or resold pursuant to Rule 144A, 17 CFR 230.144A, or offered pursuant to Regulation S;<sup>156</sup> (3) the participations must be sold solely to QEPs; and (4) the registered CPO must file the required notice and otherwise comply with the requirements in § 4.7(d)<sup>157</sup> in operating the exempt pool. The Commission preliminarily believes that the amendments, as proposed, would achieve its goal of permitting commodity pools operated by CPOs claiming relief under § 4.7(b) to avail themselves of the JOBS Act relief adopted by the SEC, while retaining the other requirements currently set forth in that regulation.

The Commission is also proposing similar amendments to the registration exemption provided to eligible CPOs in § 4.13(a)(3). In § 4.13(a)(3)(i), the Commission proposes to delete the language, “such interests are offered and sold without marketing to the public in the United States,” and to replace it with a conditional statement

<sup>155</sup> The Commission notes that the amendments effectively give claiming CPOs the option to rely on the JOBS Act relief. CPOs continuing to offer traditional Regulation D issuances will still be able to rely on § 4.7(b) for relief as well.

<sup>156</sup> 17 CFR 230.901–230.904.

<sup>157</sup> 17 CFR 4.7(d).

<sup>154</sup> 17 CFR 4.14(a)(5).

incorporating Regulation D and Rule 144A by reference. Consequently, the proposed amendments to § 4.13(a)(3)(i) would require the interests to be exempt from registration under the 33 Act, and to the extent those interests are marketed and advertised in the U.S., the amendments would also require those interests only be so marketed or advertised in compliance with the provisions of Regulation D or of Rule 144A, as amended by the JOBS Act. Consistent with the proposed amendments to § 4.7(b) discussed above, the Commission preliminarily believes that the amendments, as proposed, would achieve its goal of permitting CPOs claiming relief under § 4.13(a)(3) to avail themselves of the JOBS Act relief adopted by the SEC with respect to those exempt commodity pools, while retaining the other requirements currently set forth under that section.

#### D. Proposed BDC Exclusion

The Commission proposes to amend § 4.5 to include investment advisers (as defined above, IAs) of BDCs under paragraph (a) as a type of entity that shall be excluded from the CPO definition with respect to the operation of a “qualifying entity,”<sup>158</sup> and to include BDCs as a type of “qualifying entity” under paragraph (b), for which an exclusion may be so claimed.<sup>159</sup> Because BDCs are similarly situated to RICs, the Commission preliminarily believes that IAs of BDCs should be subject to the same operational requirements as CPOs of RICs, an approach consistent with that taken by Commission staff through the BDC No-Action Letter. Because the CPOs of both RICs and BDCs would be their IAs, the Commission also proposes revising § 4.5(a)(1)<sup>160</sup> to refer to the registered IA, rather than the investment company itself, as the entity claiming the CPO exclusion. Because of the similarities between BDCs and RICs, the Commission preliminarily believes IAs of BDCs should be required to reaffirm their § 4.5 exclusion claim on an annual basis, which is consistent with the existing requirements for IAs of RICs under § 4.5(c)(5).<sup>161</sup> Finally, the Commission concludes that the existing language in § 4.6 should be sufficient to provide exclusionary relief for IAs of BDCs with respect to the CTA definition without additional proposed amendments.<sup>162</sup>

<sup>158</sup> 17 CFR 4.5(a).

<sup>159</sup> 17 CFR 4.5(b).

<sup>160</sup> 17 CFR 4.5(a)(1).

<sup>161</sup> 17 CFR 4.5(c)(5).

<sup>162</sup> 17 CFR 4.6. Section 4.6 provides an exclusion from the CTA definition to, among others, a person

#### E. § 4.27 Relief

The Commission proposes to amend § 4.27 to exclude certain registered CPOs and CTAs from the definition of “reporting person” in § 4.27(b). Specifically, the Commission proposes to place the definition of “reporting person” in a new paragraph (b)(1) and to add a new paragraph § 4.27(b)(2) that would limit the application of the “reporting person” definition, such that the registered CPOs and CTAs discussed above would no longer be required to report on Forms CPO-PQR and CTA-PR, as applicable. The Commission is also proposing to revise the title of § 4.27 to more accurately reflect the substance of the section.

### III. Request for Comments

The Commission requests comment on all aspects of the Proposal. Additionally, the Commission would appreciate consideration of the following specific questions.

#### A. Advisory 18–96 and the Proposed 18–96 Exemption

1. Should CPOs claiming the 18–96 Exemption be required to disclose the exemption to participants in their offshore commodity pools? Would such disclosure be meaningful to offshore investors? If the Commission were to require such disclosure, what timing requirement should be established? Should it be identical to, or different from, the timing requirement proposed in the NPRM for claiming the 18–96 Exemption?

2. Do the proposed amendments to § 4.13(e) clearly establish that the 18–96 Exemption is available to CPOs for each individual commodity pool meeting the terms therein, without regard to the claimant’s registration status? If not, how could the amendments be improved?

3. The Commission also requests comment on the prohibition on statutory disqualifications proposed in § 4.13 generally, the impact of adopting this provision on industry participants and currently exempt CPOs, and also, on what, if any, other statutory disqualifications should be permissible for exempt CPOs and their principals. In particular, comments should address any or all of the following questions: What are the concerns and benefits associated with the expansion of the prohibition on statutory disqualifications to the CPO registration

excluded from the CPO definition by § 4.5, whose commodity interest advisory activities are solely incidental to its operation of those trading vehicles for which § 4.5 provides relief, *i.e.*, in this case, an IA of a BDC. *Id.*

exemptions set forth in § 4.13(a)(1), (a)(2), (a)(3), and (a)(5), or proposed to be set forth in § 4.13(a)(4)? Do the limited exceptions that would permit certain statutory disqualifications successfully address any unintended consequences of adding the prohibition to § 4.13, while still providing a base level of customer protection by preventing statutorily disqualified individuals from legally operating exempt commodity pools? Generally, how should the Commission handle the implementation of the statutory disqualification prohibition? Specifically, how should the prohibition apply to current claimants under § 4.13? How much time should the Commission allow for filing updated exemption claims subject to the prohibition? How much time should the Commission allow for an exempt CPO to replace statutorily disqualified principals, in order to maintain eligibility for a § 4.13 exemption?

4. When a qualifying CPO is transitioning from reliance upon § 3.10(c)(3)(i) to the 18–96 Exemption, is 30 days sufficient time in which to claim the 18–96 Exemption for qualifying offshore pools? Generally, please provide comment on whether the interaction between § 3.10(c)(3)(i) and the 18–96 Exemption, as proposed, is understood.

5. Is the language in proposed § 4.13(e)(3) effective to make the 18–96 Exemption available on a pool-by-pool basis, such that a claim for the 18–96 Exemption would be able to co-exist with a simultaneous CPO registration or even other exemption claims? If not, why not?

6. Should the Commission adopt all of the proposed requirements for the relief under proposed § 4.23(c)? Which requirements could be dropped? Why? Are there additional or different conditions to this relief that the Commission should consider adopting?

#### B. Proposed Family Office Exemptions

7. Should CPOs of Family Offices organized as commodity pools be required to annually recertify their eligibility for the proposed exemption under § 4.13(a)(8)? What are the costs and burdens that an annual notice requirement would impose?

8. Information on BASIC is provided to the public as a means of ensuring that basic information regarding a person’s registration status with the Commission is readily available. Given that the persons claiming the proposed CPO exemption for the operation of Family Offices are proposed to be prohibited from soliciting non-Family Client participants, should notices filed by

Family Offices claiming the proposed CPO exemption in § 4.13(a)(8) be included in NFA's public BASIC database?

9. Does the proposed bifurcation of the CTA relief provided to (a) CTAs of Family Offices organized as commodity pools, and (b) CTAs of individual Family Clients clearly and effectively provide relief from registration for CTAs that advise Family Offices in their capacity as an exempt CPO and/or as a CTA to individual Family Clients? Is there a clearer or more advantageous way to effectuate such relief?

10. Should a notice be required in order to claim the proposed exemption in § 4.14(a)(11) for CTAs of Family Clients? If so, should such CTAs be required to recertify eligibility for such exemption on an annual, or longer term, basis? What are the costs and burdens that such an annual notice requirement would impose on those CTAs?

#### *C. Proposed Amendments Consistent With the JOBS Act Relief Letter*

11. Do the amendments to §§ 4.7(b) and 4.13(a)(3) effectively incorporate in 17 CFR part 4 the general marketing and solicitation permitted by the JOBS Act, consistent with the JOBS Act Relief Letter? Are there additional amendments the Commission should consider that would ensure this relief is completely added to the part 4 regulatory regime?

#### *D. Proposed Adoption and Expansion of Exemptive Letter Relief From § 4.27 Filings*

12. Are there any additional classes of registered CPOs or CTAs that should be excluded from the definition of "Reporting Person" in § 4.27(b)? If yes, please identify the class or classes, and explain why they should be so excluded.

### **IV. Related Matters**

#### *A. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) requires Federal agencies, in promulgating regulations, to consider whether the rules 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. 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.<sup>163</sup>

The regulatory amendments proposed by the Commission in this release would affect only persons registered or required to be registered as CPOs and CTAs, persons claiming exemptions from registration as such, and certain persons excluded from the CPO definition. 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.<sup>164</sup> With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria for an exemption from registration under § 4.13(a)(2).<sup>165</sup> Because these proposed regulations generally apply to persons registered or required to be registered as CPOs with the Commission, and/or provide relief to qualifying persons from registration as such, as well as from related compliance burdens, the RFA is not applicable to this Proposal with respect to CPOs.

Regarding CTAs, the Commission has previously considered whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.<sup>166</sup> As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.

The portions of this Proposal directly impacting CTAs propose a registration exemption consistent with DSIO's CTA Family Office No-Action Letter, as well as expanded exemptive relief from the Form CTA-PR filing requirement in § 4.27 for certain categories of CTAs. These proposed amendments are not expected to impose any new burdens on market participants or Commission registrants. Rather, to the extent that this Proposal provides an exemption from the requirement to register as a CTA or from the Form CTA-PR filing requirement in § 4.27, the Commission preliminarily believes it is reasonable to infer that such exemptions would be

<sup>164</sup> 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).

<sup>165</sup> *Id.* at 18619–20. Section 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).

<sup>166</sup> See *id.* at 18620.

much less burdensome to those persons than either CTA registration or the preparation and filing of Form CTA-PR. In fact, the Commission has not proposed herein to require a notice filing for either the proposed exemption for CTAs of Family Offices and Family Clients, or the expanded relief proposed for certain CTAs under § 4.27.<sup>167</sup> Consequently, the Commission does not expect small entities to incur any additional costs as a result of the Proposal, as applicable to CTAs.

Similarly, the Commission preliminarily does not believe that the benefits associated with the exemption from CTA registration for CTAs of Family Offices and Family Clients, or the expanded relief from the requirement to prepare and file Form CTA-PR, will result in a significant economic impact on small CTAs. The regulatory obligations associated with CTA registration and compliance are not significantly burdensome, being limited to the completion of a registration application, the preparation and distribution of a disclosure document (if required), the maintenance of certain books and records, and the annual completion of Form CTA-PR, which consists of two questions with several subparts. Although relief from these obligations is beneficial to small CTAs, the Commission preliminarily believes that this does not rise to the level of significant economic impact.

Therefore, the Commission has preliminarily determined that, to the extent that the Proposal affects CTAs, it will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that these proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities.

#### *B. Paperwork Reduction Act*

##### 1. Overview

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.<sup>168</sup> Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a

<sup>167</sup> The Commission notes that it requests comment on whether the Commission should adopt regulations requiring CPOs of Family Offices to file a notice to claim the proposed exemption under § 4.13(a)(8) and to annually affirm that claim, and/or requiring CTAs of Family Offices to file a notice to claim the proposed exemption in § 4.14(a)(11). See *supra* pt. III, Request for Comments.

<sup>168</sup> See 44 U.S.C. 3501 *et seq.*

<sup>163</sup> 5 U.S.C. 601 *et seq.*

collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). This Proposal, if adopted, would result in a collection of information within the meaning of the PRA, as discussed below. The Commission is therefore submitting this NPRM to OMB for review.

The Proposal amends two collections of information for which the Commission has previously received control numbers from OMB. The first collection of information is, “Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038–0005” (Collection 3038–0005). Collection 3038–0005 primarily accounts for the burden associated with part 4 of the Commission’s regulations that concern compliance obligations generally applicable to CPOs and CTAs, as well as certain enumerated exemptions from registration as such and exclusions from those definitions, and available relief from compliance with certain regulatory requirements. The Commission is proposing to amend this collection to reflect the notices proposed to be required to claim certain of the registration exemptions and the CPO exclusion proposed herein, as well as the expected reduction in the number of registered CPOs and CTAs filing Forms CPO–PQR and CTA–PR, pursuant to the proposed revisions to § 4.27.

The Commission also proposes to amend a second collection entitled, “Part 3—Registration, OMB control number 3038–0023” (Collection 3038–0023), which pertains to the registration of intermediaries generally, to reduce the number of persons registering as CPOs and CTAs as a result of the regulatory amendments proposed herein. Therefore, the Commission is proposing adjustments to each of these collections accordingly. The responses to these collections of information are mandatory.

The collections of information in the Proposal would make available to eligible persons: (1) The 18–96 Exemption in proposed § 4.13(a)(4), which incorporates the majority of the relief provided by Advisory 18–96, and which would exempt from CPO registration qualifying CPOs with regard to their offshore pools; (2) the Advisory 18–96 recordkeeping location relief for qualifying, registered CPOs, which is proposed to be added to § 4.23; (3) the exemptions from CPO and CTA registration for qualifying Family Offices in proposed §§ 4.13(a)(8) and

4.14(a)(11); (4) the proposed expansion of the exclusion in § 4.5 for IAs of BDCs; and (5) the proposed exemptive relief made available through amendments to the Reporting Person definition in § 4.27(b), such that qualifying CPOs and CTAs no longer have to file Forms CPO–PQR or CTA–PR.

In each instance, eligible persons have the option to elect the proposed registration or compliance exemption or exclusion if they are so qualified, but have no obligation to do so. For this reason, except to the extent that the Commission is amending Collection 3038–0005 for PRA purposes to reflect these alternatives, and Collection 3038–0023 to reduce the number of persons registering as CPOs or CTAs, today’s Proposal is not expected to impose any significant new burdens on CPOs or CTAs. Rather, to the extent that the proposed amendments provide registration exemptions or definitional exclusions, and/or alternatives to comprehensive compliance with Commission regulations, through the adoption of amendments consistent with existing exemptive and no-action letter relief, it is reasonable for the Commission to infer that the proposed amendments will generally prove to be less burdensome for persons eligible to claim the proposed alternative relief.

## 2. Revisions to the Collections of Information

### a. OMB Control Number 3038–0005

Collection 3038–0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on March 14, 2017.<sup>169</sup> As stated above, Collection 3038–0005 governs responses made pursuant to part 4 of the Commission’s regulations, pertaining to the operations of CPOs and CTAs. Generally, under Collection 3038–0005, the estimated average time spent per response will not be altered; however, the Commission has made adjustments, discussed below, to the collection to account for new and/or lessened burdens expected under the NPRM due to persons claiming the proposed registration exemptions or exclusion and proposed relief.

For example, the Commission estimates that the number of persons responding to the portion of the collection associated with § 4.13(b)(1) (the requirement to file a claim for an exemption under that section) will increase by at least the number of

persons currently claiming the CPO Family Office No-Action Letter, *i.e.*, 200 CPOs.<sup>170</sup> The Commission also preliminarily believes that there may be increased notice filings under § 4.13(b)(1), if the 18–96 Exemption is adopted as proposed. Due to the flexibility of the proposed 18–96 Exemption as compared to § 3.10(c)(3)(i), its adoption may cause more CPOs to claim relief from registration on a pool-by-pool basis through the 18–96 Exemption with respect to their offshore pools, rather than with respect to their operations as a whole.

Conversely, no adjustments need to be made to Collection 3038–0005 to account for the proposed JOBS Act amendments because persons relying on the exemptive relief therein are, as a condition of relief, currently required to claim an exemption under §§ 4.7 or 4.13, as applicable to them, and therefore, are already counted in this collection. The Commission further proposes an increase to the number of respondents under § 4.5, which will account for new claims the Commission anticipates receiving from IAs of BDCs seeking to claim the expanded exclusion from the CPO definition.

With regard to § 4.27, the Commission is proposing to reduce the number of persons filing all schedules of Forms CPO–PQR and CTA–PR to reflect the categories of registered CPOs and CTAs that are proposed to be considered outside the Reporting Person definition in § 4.27(b). Because there is no notice filing required for this relief, there is no new burden associated with the actual claiming of the relief provided under the revisions to § 4.27 proposed herein.

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

*Estimated number of respondents:*

45,270.

*Annual responses for all respondents:*  
129,042.

*Estimated average hours per response:*  
2.83.<sup>171</sup>

*Annual reporting burden:* 365,764.

The Commission estimates that the proposed amendments to § 4.23 will add the following burden:

*Estimated number of respondents:* 50.

<sup>169</sup> See Notice of Office of Management and Budget Action, OMB Control No. 3038–0005, available at [https://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=201701-3038-005](https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005) (last retrieved July 31, 2018).

<sup>170</sup> No adjustments are proposed to be made to account for the CTA Family Office No-Action Letter claims (100 claims received) because the Commission has not proposed a filing requirement for that new exemption. Rather, like the majority of the exemptions in § 4.14, the Commission has proposed to add that relief as a self-executing exemption in § 4.14, though it has requested comment on this feature of the Proposal.

<sup>171</sup> The Commission rounded the average hours per response to the second decimal place for ease of presentation.

*Annual responses by each respondent:* 3.

*Estimated average hours per response:* 0.5.

*Annual reporting burden:* 75.

The Commission estimates that the proposed CPO registration exemptions under § 4.13(a)(4) and 4.13(a)(8) will result in 250 additional notice filings under § 4.13(b)(1). Therefore, the Commission proposes to increase the burden associated with § 4.13(b)(1) to be as follows:

*Estimated number of respondents:* 3,872.

*Annual responses by each respondent:* 3.

*Estimated average hours per response:* 0.5.

*Annual reporting burden:* 1,936.

The Commission estimates that the proposed exclusion for IAs of BDCs under § 4.5 will result in 50 additional notice filings under § 4.5. Therefore, the Commission proposes to increase the burden associated with § 4.5 to be as follows:

*Estimated number of respondents:* 7,940.

*Annual responses by each respondent:* 1.

*Estimated average hours per response:* 0.5.

*Annual reporting burden:* 3,970.

With respect to the burden associated with the proposed amendments to § 4.27, the Commission is updating the number of respondents. Specifically, the Commission is modifying the number of respondents to better reflect the average number of CPOs registered with the Commission, less those CPOs that will be eligible for the relief provided by the proposed amendments to the Reporting Person definition in § 4.27. The Commission has historically averaged approximately 1,800 registered CPOs. Based on the number of exemptions filed by CPOs pursuant to §§ 4.5 and 4.13, and filed under Advisory 18–96, the Commission estimates that approximately 100 of those CPOs would be eligible for relief from filing Form CPO–PQR under the proposed amendments to § 4.27. Therefore, the Commission is proposing to set the number of respondents filing Schedule A of Form CPO–PQR on an annual basis at 1,700. The total respondents for this revised collection is further broken out below into two categories, based on the size of the CPO and whether the CPO files Form PF: 1,450 respondents on Schedule A of Form CPO–PQR for non-large CPOs and CPOs filing Form PF, and 250 respondents on Schedule A of Form CPO–PQR for Large CPOs not filing Form PF.

The Commission is similarly considering the number of registered CTAs with respect to the filing of Form CTA–PR, and then reducing the number of filers by the number of CTAs the Commission anticipates will be eligible for the relief proposed herein. Specifically, the Commission has historically averaged approximately 1,600 registered CTAs. Based on the information collected on Form CTA–PR, the Commission estimates that 720 registered CTAs would be eligible for the relief proposed herein, resulting in the difference of 880 CTAs being required to file Form CTA–PR. Therefore, the Commission estimates that the total burden associated with the proposed amendments to § 4.27, reflecting the revised average number of CPOs and CTAs registered with the Commission, to be as follows:

For Schedule A of Form CPO–PQR for non-Large CPOs and Large CPOs filing Form PF:

*Estimated number of respondents:* 1,450.

*Annual responses by each respondent:* 1.

*Estimated average hours per response:* 6.

*Annual reporting burden:* 8,700.

For Schedule A of Form CPO–PQR for Large CPOs not filing Form PF:

*Estimated number of respondents:* 250.

*Annual responses by each respondent:* 4.

*Estimated average hours per response:* 6.

*Annual reporting burden:* 6,000.

For Schedule B of Form CPO–PQR for Mid-size CPOs:

*Estimated number of respondents:* 400.

*Annual responses by each respondent:* 1.

*Estimated average hours per response:* 4.

*Annual reporting burden:* 1,600.

For Schedule B of Form CPO–PQR for Large CPOs not filing Form PF:

*Estimated number of respondents:* 250.

*Annual responses by each respondent:* 4.

*Estimated average hours per response:* 4.

*Annual reporting burden:* 4,000.

For Schedule C of Form CPO–PQR for Large CPOs not filing Form PF:

*Estimated number of respondents:* 250.

*Annual responses by each respondent:* 4.

*Estimated average hours per response:* 18.

*Annual reporting burden:* 18,000.  
For Form CTA–PR:

*Estimated number of respondents:* 880.

*Annual responses by each respondent:* 1.

*Estimated average hours per response:* 0.5.

*Annual reporting burden:* 440.

The total new burden associated with Collection 3038–0005, in the aggregate, reflecting the reduction in burden associated with § 4.27 and the new burden associated with the other amendments proposed by the NPRM, is as follows:

*Estimated number of respondents:* 43,912.

*Annual responses for all respondents:* 112,715.

*Estimated average hours per response:* 3.13.

*Annual reporting burden:* 352,279.

b. OMB Control Number 3038–0023

The Commission expects that persons that are currently counted among the estimates for Collection 3038–0023 with respect to CPO and CTA registration with the Commission will deregister as such, due to the availability of the additional registration exemptions and exclusion proposed herein. Therefore, the Commission proposes to deduct the expected claimants of that relief from the total number of persons required to register with the Commission as CPOs and CTAs.

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

*Respondents/Affected Entities:* 77,857.

*Estimated number of responses:* 78,109.

*Estimated average hours per response:* 0.09.

*Estimated total annual burden on respondents:* 7,029.8.

*Frequency of collection:* Periodically.

The currently approved total burden associated with § 3.21(e) under Collection 3038–0023, which remains unchanged under the Proposal, is as follows:

*Respondents/Affected Entities:* 396.

*Estimated number of responses:* 396.

*Estimated average hours per response:* 1.25.

*Estimated total annual burden on respondents:* 495.

*Frequency of collection:* Annually.

The Commission is proposing to reduce the number of registrants by the estimated number of claimants with respect to each of the registration exemptions and exclusion proposed today. Specifically, the Commission estimates 50 persons will claim relief from CPO registration under the 18–96

Exemption, 200 persons will claim relief from registration as the CPO of a qualifying Family Office, 100 persons will claim relief from registration as the CTA of a qualifying Family Office or Family Clients, and 50 persons will claim relief from registration associated with the operation of a BDC pursuant to the expanded exclusion in § 4.5. Therefore, the Commission proposes to reduce the burden associated with Collection 3038–0023, such that the total burden associated with the collection, excluding the burden associated with § 3.21(e), will be as follows:

*Respondents/Affected Entities:*  
77,457.

*Estimated number of responses:*  
77,689.

*Estimated average hours per response:*  
0.09.

*Estimated total annual burden on respondents:* 6,992 hours.

### 3. Request for Comments on Collection

The Commission invites the public and other Federal agencies to comment on any aspect of the proposed information collection requirements discussed above. Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments in order to (i) evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collections of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information proposed to be collected; and (iv) minimize the burden of the proposed collections of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology.

Those desiring to submit comments on the proposed information collection requirements should submit them directly to the Office of Information and Regulatory Affairs, OMB, by fax at (202) 395–6566, or by email at [OIRASubmissions@omb.eop.gov](mailto:OIRASubmissions@omb.eop.gov). Please provide the Commission with a copy of submitted documents, so that all comments can be summarized and addressed in the final rule preamble. Refer to the **ADDRESSES** section of this NPRM for comment submission instructions to the Commission. A copy of the supporting statements for the collections of information discussed above may be obtained by visiting <http://www.RegInfo.gov>. OMB is

required to make a decision concerning the collections of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

### C. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.<sup>172</sup> Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) considerations.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with 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 NPRM on all activity subject to the proposed 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).<sup>173</sup> In particular, the Commission notes that some CPOs and CTAs are located outside of the United States.

#### 1. Consideration of the Costs and Benefits of the Commission's Action

The baseline for the Commission's consideration of the costs and benefits of the Proposal is the regulatory status quo, as determined by the CEA and the Commission's existing regulations in 17 CFR part 4. The Commission recognizes, however, that to the extent that market

participants have relied on relevant Commission staff action, the actual costs and benefits of the proposed rulemaking, as realized in the market, may not be as significant. Because each proposed amendment addresses a discrete issue, which may impact a unique subgroup within the universe of entities captured by the CPO and CTA statutory definitions, the Commission has determined to analyze the costs and benefits associated with each proposed change separately, as presented below. The Commission has endeavored to assess the expected costs and benefits of the proposed amendments in quantitative terms wherever possible. Where estimation or quantification is not feasible, however, the Commission has provided its assessment in qualitative terms.

#### a. Summary of the Proposal

As discussed in greater detail below, and in the foregoing preamble, the Commission preliminarily believes that the amendments proposed herein enable the Commission to discharge its regulatory oversight function with respect to the commodity interest markets, while reducing the potential burden on persons whose commodity interest activities are subject to the Commission's regulations applicable to CPOs and CTAs. Specifically, the CFTC is proposing to amend §§ 4.13 and 4.23 by adopting new exemptions that would permit a CPO that solicits and/or accepts funds from solely non-U.S. persons to participate in offshore commodity pools it operates to claim a registration exemption with respect to such pools, and to permit an onshore, registered CPO of an offshore commodity pool to keep the pool's original books and records at the pool's offshore location, rather than with the onshore CPO.

Importantly, a CPO claiming the 18–96 Exemption, as proposed in new § 4.13(a)(4), would still be subject to the anti-manipulation and anti-fraud provisions of the CEA (just like Advisory 18–96 claimants currently), and by virtue of § 4.13(c), would be required to make and keep books and records for an exempt pool, and to submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the criteria of the 18–96 Exemption. In conjunction with the proposed 18–96 Exemption, the Commission is also proposing to adopt a prohibition on statutory disqualifications applicable to any exemption claimed under § 4.13, and to amend the *de minimis* exemption in § 4.13(a)(3) to explicitly permit non-

<sup>172</sup> 7 U.S.C. 19(a).

<sup>173</sup> 7 U.S.C. 2(i).

U.S. persons as exempt commodity pool participants.

The Commission is also proposing to amend existing 17 CFR part 4 regulations in a manner consistent with DSIO's CPO Family Office Letter and CTA Family Office Letter by adopting new CPO and CTA registration exemptions under §§ 4.13 and 4.14. The Commission further proposes regulatory amendments consistent with current letter relief available to BDCs, through certain revisions to the exclusion from the definition of CPO for IAs of RICs in § 4.5. Additionally, the Commission is proposing to amend 17 CFR part 4 to incorporate the relief in CFTC Staff Letter 14–115<sup>174</sup> from § 4.27 filings provided to CPOs that only operate commodity pools in accordance with §§ 4.5 and 4.13, as well as the relief provided under CFTC Staff Letter 15–47<sup>175</sup> to CTAs that do not direct trading of any commodity interest accounts. The Commission further proposes to extend this relief to registered CTAs that only advise commodity pools for which the CTA is also the commodity pool's CPO.

#### b. Benefits

##### i. Benefits Related to the Adoption of the 18–96 Exemption

The Commission intends that the 18–96 Exemption, as proposed, will ultimately provide more comprehensive relief from CPO and pool regulation. As stated above, the Commission preliminarily believes that providing CPO registration relief beyond that currently provided by § 3.10(c)(3)(i) or available in Advisory 18–96 would be beneficial and consistent with the Commission's past prioritization of agency resources for the regulation of intermediary activities affecting U.S. participants in commodity interest markets. Consequently, the Commission also preliminarily believes that eligible persons will receive several benefits from the adoption of the proposed 18–96 Exemption. Because the relief available under the proposed 18–96 Exemption would primarily be an exemption from CPO registration with respect to the operated offshore pools, a claiming CPO would no longer be required to include such offshore pools on Form CPO–PQR filings, relief which is currently not provided by the terms of Advisory 18–96. This will result in a

meaningful, significant reduction in the burdens imposed by the Commission's regulations on CPOs of commodity pools, whose only connections with the U.S. are the location of the CPO and participation in the U.S. commodity interest markets.

Moreover, by enabling the 18–96 exemption to be claimed on a pool-by-pool basis, the Commission is providing additional flexibility to CPOs that operate and offer to participants a mix of onshore and offshore pools. Under § 3.10(c)(3)(i), an offshore CPO that wished to operate pools offered to U.S. persons would be required to choose between the potentially more costly options of having such pools operated by an affiliate registered with the Commission or otherwise eligible for other relief, operating all pools (regardless of location) consistent with another registration exemption, or registering as a CPO and listing all operated pools with the Commission. In contrast, the proposed 18–96 Exemption would enable the CPO to register, or claim an alternative registration exemption such as § 4.13(a)(3), with respect to its commodity pools offered to U.S. persons, but remain exempt from CPO registration, pursuant to proposed § 4.13(a)(4), with respect to its qualifying offshore pools. This would permit the CPO to utilize the operational efficiencies inherent in being able to deploy the same institutional resources across all pools it operates, rather than bifurcating staff and assets across affiliates for purposes of minimizing regulatory costs.

The Commission is aware of some offshore CPOs that are currently limiting their CPO activities solely to offshore pools with offshore participants precisely to remain eligible for the exemption provided by § 3.10(c)(3)(i). By making proposed § 4.13(a)(4) available on a pool-by-pool basis, the Commission preliminarily believes it likely that more offshore CPOs may choose to create pools available to U.S. participants because such CPOs would no longer be required to bear the costs of compliance for offshore pools qualifying for the proposed 18–96 Exemption. Therefore, such CPOs may provide additional investment choices to domestic participants and additional competition for CPOs already operating onshore.

Furthermore, by proposing new exemptions with respect to both the CPO registration of an offshore pool's operator, and the recordkeeping location of an offshore pool's books and records, the Commission intends to confirm the continued availability of Advisory 18–96 relief in the form of amendments to

17 CFR part 4. The Commission is hopeful that the adoption of these new regulatory exemptions will eliminate the need for persons to search for a Commission staff advisory that is over 20 years old, and which, even in 2018, may only be claimed by eligible persons through a paper filing with the Commission. Rather, under the Proposal, a person would now be able to utilize NFA's Online Registration System (ORS) to submit claims of relief electronically, consistent with the mechanism used to claim all other regulatory registration and compliance exemptions available to CPOs and CTAs. This amendment would modernize the effort needed to effectuate such claims and eliminate the costs and expenses to claimants associated with paper filings, *e.g.*, drafting, faxing and/or mailing the requisite notice to both the Commission and NFA.

The proposed amendments also would require persons claiming new § 4.13(a)(4) to annually affirm their claims of exemption for qualifying exempt pools. The Commission preliminarily believes that this requirement promotes transparency regarding the number of entities that would be exempt from CPO registration pursuant to the 18–96 Exemption as proposed, and would also enable the Commission to reassess the exemption's efficacy over time by collecting data on its usage by industry. Consistent with the annual notice requirement for the other exemptions in § 4.13, the Commission proposes to mandate the filing of these notices within 60 days of the calendar year end; the Commission preliminarily believes this to be the most operationally efficient time for filing such an annual notice.

Additionally, the Commission preliminarily believes that there are significant benefits to adopting the prohibition on statutory disqualifications from the terms of Advisory 18–96, as a criteria for all exemptions under § 4.13(a)(1) through (a)(5). The Commission also preliminarily believes that currently, pool participants may be exposed to risk posed by regulations permitting the operation of an offered pool by a person who, generally, would not otherwise be permitted to register with the Commission. Even if the activities of a CPO do not rise to a level warranting Commission oversight through registration, a prospective participant should be able to be confident that a collective investment vehicle using commodity interests is not operated by a person who, for example, is enjoined from engaging in fraud or

<sup>174</sup> CFTC Staff Letter 14–115, available at <https://www.cftc.gov/idc/groups/public/%40rlettergeneral/documents/letter/14-115.pdf> (last retrieved July 31, 2018).

<sup>175</sup> CFTC Staff Letter 15–47, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/15-47.pdf> (last retrieved July 31, 2018).

embezzlement.<sup>176</sup> As noted above,<sup>177</sup> prior to the rescission of § 4.13(a)(4), Commission staff became aware that a number of persons who were statutorily disqualified from CPO registration were operating commodity pools pursuant to that exemption, and thereby, were continuing to participate in the commodity interest markets with funds solicited and accepted from members of the American public, notwithstanding those disqualifications. The proposed adoption of this prohibition should eliminate the unintended loophole that currently exists, and would permit participants in commodity pools exempt under § 4.13(a)(1)–(a)(5) to be assured that the CPO managing their assets is, at least not statutorily disqualified.

Finally, consistent with prioritizing the application of 17 CFR part 4 requirements to CPOs with respect to pools offered and operated on behalf of U.S. person participants, the 18–96 Exemption, as proposed, would permit a claiming CPO thereunder to remain registered with respect to its operation of commodity pools onshore and/or on behalf of U.S. persons. The Commission would retain all of its authority associated with oversight of its registrants and could still take corrective action, should the CPO engage in wrongdoing in the U.S. commodity interest markets.

#### ii. Benefits Related to the Proposed Family Office Exemptions From CPO and CTA Registration

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

Second, because the proposed exemptions harmonize the Commission's treatment of Family Offices with that of the SEC, Family Offices will generally only be required to comply with one standard to determine their registration and compliance obligations with respect to both their securities and commodity interest transactions. Although DSIO had previously issued no-action relief letters for both CPO and CTA registration, Family Offices wishing to

avail themselves of this relief were required to prepare a notice making specific representations and to submit the document electronically to a specific email inbox. It is anticipated that, upon finalization of the Proposal, Family Offices would be able to claim the proposed exemption under new § 4.13(a)(8) through NFA's ORS without having to create and submit their own document to claim the exemption. Moreover, for Family Offices claiming relief from CTA registration, the Commission is proposing to make that exemption available without a notice filing, consistent with the majority of the existing exemptions available to CTAs under § 4.14.

Like the other exemptions available under § 4.13, the Commission is proposing to require Family Offices claiming relief from CPO registration to file an annual notice affirming their eligibility. The Commission preliminarily believes that this annual assessment of eligibility would promote transparency regarding the number of entities exempt from registration pursuant to the proposed Family Office exemption and would enable the Commission to assess its efficacy over time. Consistent with the notices required to annually affirm compliance with other exemptions in § 4.13, the notices would be required to be filed within 60 days of the end of the calendar year. The Commission preliminarily believes proposing a timeframe consistent with that already required for annual notices of other existing CPO registration exemptions would reduce complexity in the regulation, and would employ a requirement to which claiming CPOs have already grown accustomed.

#### iii. Benefits Related to the Proposed JOBS Act Relief

The Commission preliminarily believes that the proposed alignment of §§ 4.7(b) and 4.13(a)(3) with the SEC's JOBS Act amendments to Regulation D and Rule 144A would result in several benefits. By harmonizing Commission regulations that specifically reference the statutory and regulatory provisions governing unregistered, exempt securities offerings, the proposed amendments would facilitate full implementation of the JOBS Act by making the relief from the prohibition on general solicitation more widely available. Moreover, the Proposal would eliminate the distinction between private offerings of commodity pools and other privately offered collective investment vehicles that do not transact in commodity interests, thereby treating

similarly situated offerors in a consistent manner.

The Commission notes that persons complying with the terms of Rule 506(c) or Rule 144A and claiming relief under either § 4.7 or § 4.13(a)(3), as proposed to be amended, would still generally be required to limit participants in the offered pool to QEPs. As such, the Commission preliminarily believes that adopting these proposed amendments would neither result in an erosion of the customer protections provided to non-sophisticated pool participants under 17 CFR part 4, nor would it cause an expansion of the relief available under §§ 4.7 and 4.13(a)(3), beyond the discrete issue of solicitation with respect to an exempt securities offering. Thus, the Commission preliminarily believes that there would be a substantial benefit in aligning its regulations with those of its sister regulator, in the interest of fostering cooperation and comity, especially where there is limited customer protection risk for the retail public.

#### iv. Benefits Related to the Exclusion of IAs of BDCs From the CPO Definition

The Commission preliminarily believes that there would be several benefits arising from the proposed exclusion of IAs of BDCs<sup>178</sup> from the definition of CPO in § 4.5. First, the proposed exclusion would enable IAs of BDCs to continue to use commodity interests, consistent with the no-action relief currently in place, as an economical option for reducing the risks related to BDCs' investments in eligible portfolio companies. The proposed exclusion would permit this without subjecting BDCs to the costs associated with having its IA registered as a CPO, and without requiring BDCs and their IAs to comply with the applicable provisions of part 4 of the Commission's regulations. This should enable BDCs and their IAs to deploy more of their resources in furtherance of their statutory purpose, investing in and providing managerial assistance to small- and mid-sized U.S. companies, which would thereby also further one of the statutory goals of the Investment

<sup>178</sup> The Commission has previously determined that a RIC's IA is the appropriate person to serve as the CPO of a RIC for regulatory purposes, and consequently, the Commission is proposing herein to amend § 4.5(a)(1) to designate the IA as the person excluded from the CPO definition. See CPO CTA Final Rule, 77 FR at 11259. Due to the similarities between BDCs and RICs, the amendments proposed by the Commission today are based on the conclusion that the registered IA is also an appropriate selection as the excluded entity in the BDC context.

<sup>176</sup> 7 U.S.C. 12a(2)(C)(ii).

<sup>177</sup> See, *supra*, section 1.B.3.

Company Act of 1940 (as defined above, ICA).

As described more fully above, BDCs are subject to oversight by the SEC that is comparable to that agency's regulation of RICs, and BDCs use commodity interests primarily for bona fide hedging purposes. Because of this similarity to a type of investment vehicle that is already included within the universe of "qualifying entities" under § 4.5, the proposed amendments would treat substantively comparable entities in a consistent manner, thereby enabling members of the public and industry to better predict their regulatory obligations when establishing new investment vehicles. Absent these amendments, IAs of BDCs wishing to avail themselves of the no-action relief from CPO registration are required to prepare a notice filing containing specific representations and to submit the document electronically to a specific email inbox. The Commission anticipates that, upon finalization of this NPRM, registered IAs operating and advising BDCs would be able to claim the proposed exclusion under § 4.5 through NFA's ORS without having to create their own document to claim the proposed exclusion.

#### v. Benefits Related to Relief Under Section 4.27 for CPOs and CTAs

The Commission preliminarily believes that there would be several benefits associated with providing relief from the filings required by § 4.27 to registered CPOs only operating pools pursuant to claimed exclusions under § 4.5 or exemptions under § 4.13, and to registered CTAs that, during the Reporting Period, either only advised pools of which they were also the registered or exempt CPO, or did not direct the trading of any commodity interest accounts whatsoever. Removing the § 4.27 reporting requirement for these persons would eliminate the costs associated with the preparation and filing of Forms CPO-PQR or CTA-PR. The Commission preliminarily believes that this could provide a significant cost savings for these persons, and ultimately, for their participants or clients.

#### c. Costs

##### i. Costs Related to the Proposed 18–96 Exemption

The Commission preliminarily believes there would be some costs associated with the 18–96 Exemption, as proposed. For instance, persons claiming the proposed exemption under new § 4.13(a)(4) would be required to file an annual notice affirming their

eligibility for the exemption, consistent with the requirement applicable to persons claiming all other exemptions available under § 4.13. For purposes of calculating costs of this proposed amendment, the Commission has estimated that a CPO may require 0.5 hours per pool to complete and electronically file the notice with NFA, at an average salary cost of \$57 per hour.<sup>179</sup> The Commission further estimates that 50 CPOs may be affected,<sup>180</sup> each with an average of 3 pools subject to the notice requirement. On this basis, the Commission anticipates an annual cost per entity of approximately \$86.<sup>181</sup> Across all affected entities, the Commission estimates a total annual cost of approximately \$4,300.<sup>182</sup>

With respect to the expansion of the statutory disqualification prohibition to exemption claimants under § 4.13(a)(1) through (a)(5), the Commission lacks data sufficient to determine how many CPOs might be required to cease operating commodity pools pursuant to the exemptions available thereunder, due to the presence of statutorily disqualified principals. There are certainly costs associated with either divesting from commodity interests held within a collective investment vehicle, or in completely winding up a commodity pool's operations, some of which may be experienced by pool participants as opportunity costs and possibly realized losses. The Commission preliminarily believes, however, that these costs would be limited to the first year following adoption of the Proposal, and that, in

<sup>179</sup> The Commission notes that the salary estimates are based upon the May 2017 Findings of National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics. See Occupational Employment Statistics, Bureau of Labor Statistics, available at <https://www.bls.gov/oes/> (last visited July 23, 2018). The Commission's estimate incorporates the mean hourly wage of persons employed in the "Securities, Commodity Contracts and Other Financial Investments and Related Activities" Industry, under the following occupation codes: Compliance Officers (13–1041) at \$43.27, Lawyers (23–1011) at \$94.20, and Paralegals and Legal Assistants (23–2011) at \$33.53. The Commission chose these occupational categories in recognition of the types of staff the Commission preliminarily believes would most commonly be responsible for evaluating eligibility and filing claims for the registration exemptions and exclusion proposed herein. The \$57 per hour wage estimate is derived from a weighted average, rounded to the nearest dollar, with the salaries attributable to each of the three occupation codes given equal weight.

<sup>180</sup> This number is based on the number of claims filed under Advisory 18–96 for the relief for offshore pools as of June 4, 2018.

<sup>181</sup> The Commission calculates this amount as follows: (3 pools per CPO) × (0.5 hours per pool) × (\$57 per hour) = \$86.

<sup>182</sup> The Commission calculates this amount as follows: (\$86 per CPO) × (50 CPOs) = \$4,300.

subsequent years, participants would benefit from the assurance that any CPO that is soliciting them or accepting their funds for investment in an exempt pool operated pursuant to § 4.13(a)(1)–(a)(5) is, at a minimum, registerable.

With respect to the new exemption under § 4.23, which proposes relief consistent with Advisory 18–96 permitting a domestic, registered CPO to keep its pool's original books and records at the office of the operated offshore pool, the Commission has estimated, for purposes of calculating the costs of this proposed amendment, that a CPO may require 0.5 hours per pool to complete and file the notice with NFA at an average salary cost of \$57 per hour. The Commission further estimates that 50 CPOs may be affected,<sup>183</sup> each with an average of 3 pools subject to the notice requirement. On this basis, the Commission anticipates a one-time cost per entity of approximately \$86.<sup>184</sup> Across all affected entities, the Commission estimates a total annual cost of approximately \$4,300.<sup>185</sup> The Commission preliminarily believes that this would be the extent of the costs associated with the proposed incorporation in 17 CFR part 4 of the recordkeeping relief in Advisory 18–96.

##### ii. Costs Related to the Proposed Family Office Exemptions From CPO and CTA Registration

The Commission preliminarily believes there would be some costs associated with the proposed exemptions from CPO and CTA registration for Family Offices. As proposed herein, persons claiming relief under proposed § 4.13(a)(8) would be required to file an annual notice affirming their eligibility, consistent with the requirement applicable to persons claiming most other exemptions available under § 4.13. For purposes of calculating costs of the Proposal, the Commission has estimated that a CPO may require 0.5 hours per pool to complete and electronically file the notice with NFA at an average salary cost of \$57 per hour. The Commission further estimates that 200 CPOs may be affected,<sup>186</sup> each with an average of 3 pools subject to the notice requirement. On this basis, the Commission

<sup>183</sup> This number is based on the number of claims filed under Advisory 18–96 for the relief for offshore pools as of June 4, 2018.

<sup>184</sup> The Commission calculates this amount as follows: (3 pools per sponsor) × (0.5 hours per pool) × (\$57 per hour) = \$86.

<sup>185</sup> The Commission calculates this amount as follows: (\$86 per CPO) × (50 CPOs) = \$4,300.

<sup>186</sup> This number is based on the number of claims received pursuant to the CPO Family Office No-Action Letter, as of July 17, 2018.

anticipates an annual cost per entity of approximately \$86.<sup>187</sup> Across all affected entities, the Commission estimates a total annual cost of approximately \$17,200.<sup>188</sup> Family Offices would also be required to incur expenses associated with the initial determination as to their eligibility for the proposed exemptions. The Commission currently does not have the necessary data to estimate the amount of this expense. The Commission seeks comment as to the amount of such expenses and how this expenditure compares to the costs associated with registration as a CPO and compliance with 17 CFR part 4.

With respect to persons claiming relief under proposed § 4.14(a)(11), because the Commission is not proposing to require a notice filing to claim the relief, the Commission expects that the costs associated with the exemption would be limited to the expenses associated with making the determination as to the person's initial and ongoing eligibility for the proposed exemption. The Commission currently does not have the necessary data to estimate the magnitude of that expense, but would encourage commenters to submit information as to the costs and benefits associated with the exemption from CTA registration, and how such expenses would compare to those required to register as a CTA and to generally comply with 17 CFR part 4.

#### iii. Costs Related to the Proposed Adoption of JOBS Act Relief

The Commission does not anticipate any costs associated with this proposed rulemaking beyond those already identified and analyzed by the SEC when it finalized its amendments to Regulation D and Rule 144A pursuant to the JOBS Act.

#### iv. Costs Related to the Proposed Exclusion of IAs of BDCs From the CPO Definition

The Commission preliminarily believes there would be some costs associated with the exclusion from the definition of CPO for registered IAs of BDCs proposed today. As proposed herein, persons claiming the new exclusion from the definition of CPO with respect to the operation of BDCs under § 4.5 would be required to file an annual notice affirming eligibility, consistent with that required of the registered IAs of RICs. For purposes of calculating costs of the proposed

<sup>187</sup> The Commission calculates this amount as follows: (3 pools per CPO) × (0.5 hours per pool) × (\$57 per hour) = \$86.

<sup>188</sup> The Commission calculates this amount as follows: (\$86 per CPO) × (200 CPOs) = \$17,200.

amendment, the Commission has estimated that a person may require 0.5 hours per pool to complete and electronically file the notice with NFA at an average salary cost of \$57 per hour. The Commission further estimates that 50 persons may be affected,<sup>189</sup> each with an average of 1 BDC subject to the notice requirement. On this basis, the Commission anticipates an annual cost per entity of approximately \$29.<sup>190</sup> Across all affected entities, the Commission estimates a total annual cost of approximately \$1,450.<sup>191</sup>

Registered IAs of BDCs that claim the proposed exclusion under § 4.5 would also have to expend resources to monitor compliance with the applicable trading thresholds in proposed § 4.5(c)(2)(iii). The Commission preliminarily believes that the initial year of compliance with those thresholds would likely be the most costly, as the IAs would possibly need to increase compliance staff and/or provide training for existing compliance staff to ensure effective monitoring of ongoing compliance with the exclusion's terms. The Commission anticipates that certain aspects of this compliance program might be automated to lower substantially the annual costs in subsequent years.

#### v. Costs Related to Relief Under Section 4.27 for CPOs and CTAs

The Commission does not anticipate any costs associated with this proposed amendment, as it is not requiring any action to be taken by CPOs and CTAs that qualify for the proposed exemptions from the Reporting Person definition in § 4.27 to claim that relief.

#### 2. Section 15(a) Considerations

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

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

The Commission preliminarily believes that the amendments proposed in this release maintain the efficacy of the customer protections of the Commission's regulatory regime while reducing costs. Specifically, with respect to the 18–96 Exemption, as proposed, the Commission would maintain its oversight with respect to

<sup>189</sup> This number is based on the number of claims received pursuant to CFTC Staff Letter 12–40, as of July 17, 2018.

<sup>190</sup> The Commission calculates this amount as follows: (1 pool per CPO) × (0.5 hours per pool) × (\$57 per hour) = \$29.

<sup>191</sup> The Commission calculates this amount as follows: (\$29 per CPO) × (50 CPOs) = \$1,450.

commodity pools with U.S. person participants, while providing relief with respect to the operation of offshore pools, the potential and actual participants of which are generally located outside of the U.S. Moreover, by extending the prohibition on statutory disqualifications to CPOs claiming exemptive relief under § 4.13(a)(1) through (a)(5), the Commission preliminarily believes that it would be providing additional protection to members of the public by reducing the possibility of fraud and other illegal conduct in exempt pools offered by such persons.

The Commission preliminarily believes that the proposed exemptions for Family Offices would also have a limited impact on the protections provided to market participants and the public—because Family Offices, by definition, are not offered to persons other than Family Clients, the general public would not be negatively affected by their failure to register as CPOs and CTAs with the Commission. Moreover, as discussed above, the Commission preliminarily believes that the familial relationships inherent in Family Offices would provide a reasonable alternative mechanism to protect the interests of Family Clients. The Commission preliminarily believes that its regulatory interest in Family Offices is distinct from and much lower than in the case of arms-length transactions between CPOs and pool participants, or CTAs and advisory clients.

With respect to the proposed alignment with the SEC's revisions to Regulation D and Rule 144A pursuant to the JOBS Act, the Commission does not believe that its proposed amendments to §§ 4.7 and 4.13(a)(3) would alter the protections currently available to market participants and the public. Pools offered pursuant to claims of relief under either § 4.7 or § 4.13(a)(3) would still be limited in their permitted participants to QEPs, and the relief provided by those regulations would otherwise remain unchanged. As such, less sophisticated members of the American public would not be able to purchase interests in pools that would not be subject to the full panoply of the compliance obligations under 17 CFR part 4. Therefore, there would be no reduction in the protections in place now by virtue of the proposed JOBS Act amendments.

The Commission preliminarily believes that the proposed exclusion for registered IAs of BDCs would not negatively impact the protection of market participants or the public. BDCs, as well as their registered IAs, continue to be regulated by the SEC under the

ICA, and pursuant to the terms of the proposed exclusion, BDCs operated thereunder will be limited in the extent to which they can use commodity interests by the trading thresholds discussed above.

With respect to the relief provided to certain CPOs and CTAs from the reporting requirements of § 4.27, the Commission does not believe, preliminarily, that eliminating reporting from those persons described herein would have a deleterious impact on the Commission's protection of market participants and the public because of such persons' extremely limited activity in the commodity interest markets.

**b. Efficiency, Competitiveness, and Financial Integrity of Markets**

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of efficiency, competitiveness, and financial integrity considerations. The Commission has not identified a specific effect on the efficiency, competitiveness, and financial integrity of markets as a result of the proposed regulations.

**c. Price Discovery**

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of price discovery considerations. The Commission preliminarily believes that the proposed amendments will not have a significant impact on price discovery.

**d. Sound Risk Management**

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of sound risk management practices. The proposed amendments to the regulations reflect the Commission's preliminary determination that such amendments should harmonize Commission regulations with other federal laws to exempt and reduce the regulatory burden on certain entities.

**e. Other Public Interest Considerations**

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a proposed regulation in light of other public interest considerations. The Commission has not identified other public interest considerations relevant to the costs and benefits of the proposed regulations.

**f. Request for Comment**

The Commission invites comment on its preliminary consideration of the

costs and benefits associated with the various changes to 17 CFR part 4 proposed herein, especially with respect to the five factors that the Commission is required to consider under section 15(a) of the CEA. In addressing these areas and any other aspect of the Commission's preliminary cost-benefit considerations, the Commission encourages commenters to submit any data or other information they may have quantifying and/or qualifying the costs and benefits of the Proposal. The Commission specifically requests comment on the following questions, in addition to those posed above:

13. Has the Commission accurately identified the benefits of the Proposal? Are there other benefits to market participants or the public that may result from the adoption of this NPRM that the Commission should consider? Please provide specific examples and explanations of any such benefits.

14. Has the Commission accurately identified the costs of the Proposal? Are there additional costs to market participants or the public that may result from the adoption of this NPRM that the Commission should consider? Please provide specific examples and explanations of any such costs.

15. Does the Proposal impact the section 15(a) factors in any way that is not described above? Please provide specific examples and explanations of any such impact.

**D. Antitrust Laws**

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.<sup>192</sup>

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

The Commission has considered the Proposal to determine whether it is anticompetitive and has preliminarily identified no anticompetitive effects. The Commission requests comment on whether the Proposal is anticompetitive

and, if it is, what the anticompetitive effects are.

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

**List of Subjects in 17 CFR Part 4**

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

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

**PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS**

■ 1. The authority citation for part 4 continues to read as follows:

**Authority:** 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

■ 2. In § 4.5, revise paragraphs (a)(1), (b)(1), introductory text of paragraph (c)(2), (c)(2)(i), (c)(2)(ii), and introductory text of paragraph (c)(2)(iii) to read as follows:

**§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term "commodity pool operator."**

(a) \* \* \*

(1) An investment adviser registered as such under the Investment Advisers Act of 1940, as amended;

\* \* \* \* \*

(b) \* \* \*

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered as such, under the Investment Company Act of 1940, as amended, or a business development company that elected an exemption from registration as an investment company under the Investment Company Act of 1940;

\* \* \* \* \*

(c) \* \* \*

(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in the following ways, as applicable:

(i) The person will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is

<sup>192</sup> 7 U.S.C. 19(b).

operated by a person who has claimed an exclusion from the definition of the term “commodity pool operator” under the Act and, therefore, who is not subject to registration or regulation as a pool operator under the Act; *Provided*, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other Federal or State regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity’s investment policies and objectives that the other regulator requires to be made available to the entity’s participants; and

(ii) The person will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this paragraph (c); *Provided, however*, that the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject; and

(iii) If the person is an investment adviser claiming an exclusion with respect to the operation of a qualifying entity under paragraph (b)(1) of this section, then the notice of eligibility must also contain representations that such person will operate that qualifying entity in a manner such that the qualifying entity:

\* \* \* \* \*

■ 3. Amend § 4.7 paragraph (b) by:

- a. Revising introductory text of paragraph (b);
- b. Renumbering paragraphs (b)(1) through (b)(5) as paragraphs (b)(2) through (b)(6);
- c. Adding a new paragraph (b)(1); and
- d. Revising renumbered paragraph (b)(3).

The addition and revisions read as follows:

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

\* \* \* \* \*

(b) *Relief available to commodity pool operators—(1) Eligibility.* Relief from specific compliance obligations is available to certain registered commodity pool operators with respect

to the pool(s) they operate, *provided that* the registered commodity pool operator files the required notice under paragraph (d) of this section and otherwise complies with the conditions of paragraph (d) of this section in operating the exempt pool(s).

(i) Regarding an offering that is exempt from registration under section 4(a)(2) of the Securities Act of 1933 and/or offered and sold pursuant to Regulation D, §§ 230.500–230.508 of this title, or resold pursuant to Rule 144A, § 230.144A of this title, or an offering that is offered and sold pursuant to Regulation S, §§ 230.901–230.905 of this title, any registered commodity pool operator who sells participations in such a pool solely to qualified eligible persons may claim any or all of the relief described in this paragraph (b) with respect to such pool.

(ii) Regarding the operation of a pool that is a collective trust fund, the securities of which are exempt from registration pursuant to section 3(a)(2) of the Securities Act of 1933 and sold solely to qualified eligible persons, any bank registered as a commodity pool operator may claim any or all of the relief described in this paragraph (b) with respect to such pool.

\* \* \* \* \*

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

- (A) The net asset value of the exempt pool as of the end of the reporting period;
- (B) The change in net asset value from the end of the previous reporting period; and
- (C) Either the net asset value per outstanding participation unit in the exempt pool as of the end of the reporting period, or the total value of the participant’s interest or share in the exempt pool as of the end of the reporting period.

(ii) Where the pool is comprised of more than one ownership class or series, the net asset value of the series or class on which the account statement is reporting, and the net asset value per unit or value of the participant’s share, also must be included in the statement required by this paragraph (b)(3); except that, for a pool that is a series fund

structured with limitation on liability among the different series, the account statement required by this paragraph (b)(3) is not required to include the consolidated net asset value of all series of the pool.

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

\* \* \* \* \*

- 4. Amend § 4.13 by:
  - a. Revising paragraphs (a)(3)(i) and (a)(3)(iii)(E);
  - b. Adding paragraph (a)(4);
  - c. Renumbering paragraph (a)(6) as paragraph (a)(7);
  - d. Adding a new paragraph (a)(6) and paragraph (a)(8);
  - e. Revising paragraphs (b)(1)(ii), (b)(2), and (e)(1); and
  - f. Adding paragraph (e)(3).

The revisions and additions read as follows:

**§ 4.13 Exemption from registration as a commodity pool operator.**

\* \* \* \* \*

- (a) \* \* \*
- (3) \* \* \*

(i) Interests in the pool are exempt from registration under the Securities Act of 1933, and the interests are marketed and advertised to the public in the United States solely, if at all, in compliance with Regulation D, §§ 230.500 through 230.508 of this title, or with Rule 144A, § 230.144A of this title;

\* \* \* \* \*

- (iii) \* \* \*
- (E) A non-U.S. person; and

\* \* \* \* \*

(4) For each pool for which the person claims exemption from registration under this paragraph (a)(4):

- (i) The pool is, and will remain, organized and operated outside of the United States;
- (ii) The pool will not hold meetings or conduct administrative activities within the United States;
- (iii) No shareholder of or other participant in the pool is or will be a U.S. person;
- (iv) The pool will not receive, hold or invest any capital directly or indirectly contributed from sources within the United States; and

(v) The person, the pool, and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation in the pool from U.S. persons.

\* \* \* \* \*

(6) Any person who desires to claim an exemption under paragraphs (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5) of this section must represent that neither the person nor any of its principals is subject to any statutory disqualification under section 8a(2) or 8a(3) of the Act, unless such disqualification arises from a matter which was previously disclosed in connection with a previous application, if such registration was granted, or which was disclosed more than thirty days prior to the claim of this exemption.

\* \* \* \* \*

(8) For each pool for which the person claims exemption from registration under this paragraph (a)(8):

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

(ii) The pool qualifies as a "family office," as defined in

§ 275.202(a)(11)(G)-1 of this title; and

(iii) The person reasonably believes, at the time of investment, or in the case of an existing pool, at the time of conversion to a pool meeting the criteria of paragraph (a)(8) of this section, that each person who participates in the pool is a "family client" of a "family office," as defined in

§ 275.202(a)(11)(G)-1 of this title.

(b)(1) \* \* \*

(ii) Contain the section number pursuant to which the operator is filing the notice (*i.e.*, § 4.13(a)(1), (2), (3), (4), (5) or (8)) and represent that the pool will be operated in accordance with the criteria of that paragraph; and

\* \* \* \* \*

(2)(i) The person must file the notice by no later than the time that the pool operator delivers a subscription agreement for the pool to a prospective participant in the pool; *Provided, however that:*

(A) In the case of a claim for relief under § 4.13(a)(4), the person must file the notice within 30 days of registering as a commodity pool operator, or claiming an exemption pursuant to this section with respect to pools marketed to U.S. persons, containing funds belonging to U.S. persons, or otherwise operated in the U.S., its territories, or possessions.

(B) In the case of a claim for relief under § 4.13(a)(5), the person must file the notice by the later of the effective date of the pool's registration statement under the Securities Act of 1933 or the date on which the person first becomes a director or trustee; and

(C) Where a person registered with the Commission as a commodity pool operator intends to withdraw from registration in order to claim exemption hereunder, the person must notify its pool's participants in written communication physically delivered or delivered through electronic transmission that it intends to withdraw from registration and claim the exemption, and it must provide each such participant with a right to redeem its interest in the pool prior to the person filing a notice of exemption from registration.

\* \* \* \* \*

(e)(1) Subject to the provisions of paragraphs (e)(2) and (e)(3) of this section, if a person who is eligible for exemption from registration as a commodity pool operator under this section nonetheless registers as a commodity pool operator, the person must comply with the provisions of this part with respect to each commodity pool identified on its registration application or supplement thereto.

\* \* \* \* \*

(3) If a person operates one or more commodity pools described in paragraph (a)(4) of this section, and one or more commodity pools for which it must be, and is, registered as a commodity pool operator, the person is exempt from the requirements applicable to a registered commodity pool operator with respect to the pool or pools described in paragraph (a)(4) of this section.

\* \* \* \* \*

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

**§ 4.14 Exemption from registration as a commodity trading advisor.**

\* \* \* \* \*

(a) \* \* \*

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

\* \* \* \* \*

■ 6. Revise § 4.23 to read as follows:

**§ 4.23 Recordkeeping.**

(a) Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records concerning any commodity pool it operates, as well

as the pool operator itself, in an accurate, current and orderly manner, and maintain such books and records in accordance with § 1.31 of this chapter.

Unless otherwise noted, all books and records required to be kept under this section shall be kept and maintained at the pool operator's main business office. Books and records that are not maintained at the pool operator's main business office shall be maintained by one or more of 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, pursuant to the relief provided in paragraphs (b) or (c) of this section.

(1) *Concerning the commodity pool.*

(i) An itemized daily record of each commodity interest transaction of the pool, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the futures commission merchant and/or retail foreign exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold (including, in the case of a retail forex transaction, offset), exercised, expired (including, in the case of a retail forex transaction, whether it was rolled forward), and the gain or loss realized.

(ii) A journal of original entry or other equivalent record showing all receipts and disbursements of money, securities and other property.

(iii) The acknowledgment specified by § 4.21(b) for each participant in the pool.

(iv) A subsidiary ledger or other equivalent record for each participant in the pool showing the participant's name and address and all funds, securities and other property that the pool received from or distributed to the participant. This requirement may be satisfied through a transfer agent's maintenance of records or through a list of relevant intermediaries where shares are held in an omnibus account or through intermediaries.

(v) Adjusting entries and any other records of original entry or their equivalent forming the basis of entries in any ledger.

(vi) A general ledger or other equivalent record containing details of all asset, liability, capital, income and expense accounts.

(vii) Copies of each confirmation or acknowledgment of a commodity interest transaction of the pool, and each purchase and sale statement and each monthly statement for the pool

received from a futures commission merchant, retail foreign exchange dealer or swap dealer.

(viii) Cancelled checks, bank statements, journals, ledgers, invoices, computer generated records, and all other records, data and memoranda prepared or received in connection with the operation of the pool.

(ix) The original or a copy of each report, letter, circular, memorandum, publication, writing, advertisement or other literature or advice (including the texts of standardized oral presentations and of radio, television, seminar or similar mass media presentations) distributed or caused to be distributed by the commodity pool operator to any existing or prospective pool participant or received by the pool operator from any commodity trading advisor of the pool, showing the first date of distribution or receipt if not otherwise shown on the document.

(x) A Statement of Financial Condition as of the close of:

(A) Each regular monthly period if the pool had net assets of \$500,000 or more at the beginning of the pool's fiscal year, or

(B) Each regular quarterly period for all other pools. The Statement must be completed within 30 days after the end of that period.

(xi) A Statement of Income (Loss) for the period between:

(A) The later of: The date of the most recent Statement of Financial Condition furnished to the Commission pursuant to § 4.22(c), April 1, 1979 or the formation of the pool, and

(B) The date of the Statement of Financial Condition required by paragraph (a)(1)(x) of this section. The Statement must be completed within 30 days after the end of that period.

(xii) A manually signed copy of each Account Statement and Annual Report provided pursuant to § 4.22, 4.7(b) or 4.12(b), and records of the key financial balances submitted to the National Futures Association for each commodity pool Annual Report, which records must clearly demonstrate how the key financial balances were compiled from the Annual Report.

(2) *Concerning the commodity pool operator.* (i) An itemized daily record of each commodity interest transaction of the commodity pool operator and each principal thereof, showing the transaction date, quantity, commodity interest, and, as applicable, price or premium, delivery month or expiration date, whether a put or a call, strike price, underlying contract for future delivery or underlying commodity, swap type and counterparty, the futures commission merchant or retail foreign

exchange dealer carrying the account and the introducing broker, if any, whether the commodity interest was purchased, sold, exercised, or expired, and the gain or loss realized; *Provided, however,* that if the pool operator is a counterparty to a swap, it must comply with the swap data recordkeeping and reporting requirements of part 45 of this chapter, as applicable.

(ii) Each confirmation of a commodity interest transaction, each purchase and sale statement and each monthly statement furnished by a futures commission merchant or retail foreign exchange dealer to:

(A) The commodity pool operator relating to a personal account of the pool operator; and

(B) Each principal of the pool operator relating to a personal account of such principal.

(iii) Books and records of all other transactions in all other activities in which the pool operator engages. Those books and records must include cancelled checks, bank statements, journals, ledgers, invoices, computer generated records and all other records, data and memoranda which have been prepared in the course of engaging in those activities.

(3) All books and records required to be kept by this section, except those required by paragraphs (a)(1)(iii), (a)(1)(iv), (a)(2)(i), (a)(2)(ii), and (a)(2)(iii), must be made available to participants for inspection and copying during normal business hours. Upon request, copies must be sent by mail to any participant within five business days if reasonable reproduction and distribution costs are paid by the pool participant.

(4) If the books and records are maintained at the commodity pool operator's main business address that is outside the United States, its territories or possessions, then upon the request of a Commission representative, the pool operator must provide such books and records as requested at the place in the United States, its territories or possessions designated by the representative within 72 hours after the pool operator receives the request.

(b) If the pool operator does not maintain its books and records at its main business office, the pool operator shall:

(1) At the time it registers with the Commission or delegates its recordkeeping obligations, whichever is later, file a statement that:

(i) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the pool operator;

(ii) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the pool operator;

(iii) Specifies, by reference to the respective paragraph of this section, the books and records that such person will be keeping; and

(iv) Contains representations from the pool operator that:

(A) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by this section changes, by identifying in such amendment the new location and any other information that has changed;

(B) It remains responsible for ensuring that all books and records required by this section are kept in accordance with § 1.31;

(C) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the pool operator's main business office; *Provided, however,* that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the pool operator will obtain and provide such original books and records for inspection at the pool operator's main business office within 72 hours of such a request; and

(D) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.

(2) The pool operator shall also file electronically with the National Futures Association a statement from each person who will be keeping required books and records in lieu of the pool operator wherein such person:

(i) Acknowledges that the pool operator intends that the person keep and maintain required pool books and records;

(ii) Agrees to keep and maintain such records required in accordance with § 1.31 of this chapter; and

(iii) Agrees to keep such required books and records open to inspection by any representative of the Commission or the United States Department of Justice in accordance with § 1.31 of this chapter and to make such required books and records available to pool participants in accordance with this section.

(c) Each registered commodity pool operator whose main business office is located in the United States, its territories or possessions, and who operates a commodity pool that has its main business office outside of the United States, its territories or

possessions, may claim relief from the requirement in paragraph (a) of this section that such books and records be kept at the pool operator's main business office, *provided however*, that the registered pool operator files a claim for exemptive relief with the National Futures Association representing that:

(1) The pool operator will maintain the original books and records of the commodity pool at the main office of the commodity pool located outside the United States, its territories or possessions, and states the name, title, full mailing address, telephone number, and relationship to the commodity pool of the person who will have custody of the pool's original books and records and the location outside the United States where those books and records will be kept;

(2) The pool operator desires to maintain such books and records outside the United States in furtherance of compliance with Internal Revenue Service requirements for relief from U.S. federal income taxation;

(3) The pool operator will maintain duplicate books and records of the commodity pool at a designated office in the United States, its territories or possessions listed in the notice;

(4) The claim is electronically signed by an individual duly authorized to bind the pool operator; and

(5) Within 72 hours after the request from the Commission, the United States Department of Justice, or the National Futures Association, the original books and records will be provided to such representative at a place located in the United States that is specified by the representative.

■ 7. Amend § 4.27 by revising the section heading and paragraph (b) to read as follows:

**§ 4.27 Additional reporting by commodity pool operators and commodity trading advisors.**

\* \* \* \* \*

(b) *Persons required to report.* (1) Except as provided in paragraph (b)(2) of this section, a reporting person is:

(i) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or

(ii) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(2) The following categories of persons shall not be considered reporting persons, as that term is defined in paragraph (b)(1) of this section:

(i) A commodity pool operator that is registered, but operates only pools for which it maintains an exclusion from the definition of the term "commodity pool operator" in § 4.5 and/or an exemption from registration as a commodity pool operator in § 4.13;

(ii) A commodity trading advisor that is registered, but does not direct, as that term is defined in § 4.10(f), the trading of any commodity interest accounts;

(iii) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is registered as a commodity pool operator and, though registered, complies with § 4.14(a)(4); and

(iv) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is exempt from registration as a commodity pool operator, and though registered, complies with § 4.14(a)(5).

\* \* \* \* \*

Issued in Washington, DC, on October 9, 2018, by the Commission.

**Christopher Kirkpatrick,**  
*Secretary of the Commission.*

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

**Appendices to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors—Commission Voting Summary and Chairman's Statement**

**Appendix 1—Commission Voting Summary**

On this matter, Chairman Giancarlo and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

**Appendix 2—Statement of Chairman J. Christopher Giancarlo**

In response to the Request for Information issued as part of Project KISS, the Commission received a number of letters

from members of the asset management industry suggesting areas of potential rulemaking that, in their view, would make the Commission's regulations more efficient and less burdensome. I believe that today's notice of proposed rulemaking furthers both of those interests.

This proposal would incorporate relief from registration and compliance obligations for commodity pool operators (CPOs) and commodity trading advisors (CTAs) consistent with relief currently provided by staff letters and advisories. By integrating this relief now into the Commission's regulations, the Commission is eliminating the need to search for a staff advisory that is over 20 years old and is providing legal certainty to entities currently relying upon the staff relief. This will make regulatory obligations clearer and thereby facilitate compliance.

Specifically, today's notice of proposed rulemaking would reduce burdens for CPOs that operate pools in multiple jurisdictions by permitting them to register with respect to the pools that solicit or accept U.S. domiciled participants. It would maintain an exemption with respect to those offshore activities whose only nexus to the U.S. is that the CPO also manages some U.S. derived assets. It would also shore up our consumer protection provisions by prohibiting statutorily disqualified persons from operating exempt pools and soliciting and accepting funds, thereby giving such pool participants more confidence in their pool's operator. It would ensure that the Commission's regulations treat similarly situated entities in a commensurate manner by excluding the investment advisers of business development companies under terms identical to those under which the investment advisers of registered investment companies are already excluded. It would also eliminate the burden of filing data collection forms for persons with no meaningful, reportable information. Finally, it would provide appropriate relief to the operators and advisors of asset management vehicles whose clients are limited to a single family, consistent with the terms of a comparable regulation adopted by the SEC, furthering our efforts at harmonizing with our fellow regulators in how we treat market participants in this space.

In short, this proposal appropriately tailors regulation and codifies decades-old no action relief in line with the goals of the CFTC's Project KISS. I expect this proposal to be the first in a series of staff recommendations to streamline and simplify regulation of commodity pool operators and commodity trading advisors.

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