

September 29, 2017

Via Electronic Submission

The Honorable J. Christopher Giancarlo
Chairman
U.S. Commodity Futures Trading Commission
Three Lafayette Centre, 1155 21st Street, NW
Washington, DC 20581

Re: Recommendations for “Project KISS” to Simplify CFTC Rules (RIN 3038–AE55)

Dear Chairman Giancarlo:

The Investment Adviser Association (IAA)¹ appreciates the opportunity to submit comments in response to the Commodity Futures Trading Commission’s (Commission’s or CFTC’s) Project KISS initiative. We strongly support this initiative and its goal of reducing the costs and burdens of CFTC regulation.² As buy-side participants in the financial markets, our members have a significant interest in effective and meaningful regulation of the commodities markets and market participants. And as fiduciaries to their clients under the Investment Advisers Act of 1940 (Advisers Act), our members, all of whom are SEC-registered investment advisers, also have a significant interest in ensuring that the interests of investors come first.

As a result of changes to the Commodity Exchange Act (CEA) under the Dodd-Frank Act (Dodd-Frank) and regulatory actions by the Commission in 2012 unrelated to the 2008 financial crisis and not required by Dodd-Frank, many of our members must now also register with the CFTC as commodity pool operators (CPOs) and/or commodity trading advisors (CTAs). This dual-registration results in bifurcated, overlapping, inconsistent, and duplicative regulation and oversight with little benefit to investors. We continue to urge the Commission to reconsider

¹ The IAA is a not-for-profit association that represents the interests of investment adviser firms that are registered with the U.S. Securities and Exchange Commission (SEC). Founded in 1937, the IAA’s membership consists of over 640 firms that collectively manage more than \$20 trillion in assets for a wide variety of individual and institutional investors, including pension plans, trusts, registered investment companies (RICs or mutual funds), private funds, endowments, foundations, and corporations. For more information, please visit the IAA website: www.investmentadviser.org.

² See “CFTC: A New Direction Forward,” Acting Chairman J. Christopher Giancarlo, CFTC (March 15, 2017), available at <http://www.cftc.gov/PressRoom/SpeechesTestimony/opagiancarlo-20> (announcing the launch of Project KISS, representing an agency-wide review of Commission rules, regulations and practices to make them simpler, less burdensome, and less costly), and “CFTC Requests Public Input on Simplifying Rules,” Release No. PR 7555-17 (May 3, 2017), available at <http://www.cftc.gov/PressRoom/PressReleases/pr7555-17> (seeking input from industry, stakeholders, and other interested parties regarding how Commission rules could be simplified and compliance burdens reduced).

CFTC regulation of CPOs and CTAs in light of longstanding SEC regulation of these entities and to tailor any regulation to limit duplication, inconsistency, and unnecessary and costly additional burdens that add little to investor protection.

I. EXECUTIVE SUMMARY

We urge the Commission to reconsider its regulation of CPOs and CTAs as part of Project KISS, with a view to whether any marginal benefit of CFTC regulation is justified by the disproportionate costs and burdens. More specifically, we request that the Commission reinstate or provide certain exclusions or exemptions, harmonize certain requirements with SEC requirements, allow for substituted compliance where appropriate, and codify, or at a minimum, streamline and synthesize in guidance, the large number of staff pronouncements on CPO/CTA registration and regulation.

We believe that our recommendations are consistent with the goals you have articulated for the Commission, including:

- Reducing regulatory burdens to make the Commission's rules, regulations, and practices simpler, less burdensome, and less costly, consistent with the President's executive orders;³
- Returning the CFTC to greater care and precision in rule drafting and a focus on minimizing the cost imposed by the agency's regulation; and
- Resetting the CFTC's focus on its core mission, including streamlining the CFTC's work and working cooperatively with other financial market regulators like the SEC.⁴

Our key recommendations relate to the following Project KISS initiatives: (A) **Registration** (CPOs and CTAs); (B) **Reporting** (CPOs and CTAs); and (C) **Miscellaneous** (codifying staff relief). We recognize that certain of our recommendations will involve rulemaking by the Commission.

A. Registration Initiative: Recommendations Relating to Registration Requirements for CPOs and CTAs

1. **Reinstate CPO exclusion.** The Commission should reinstate the exclusion from the definition of CPO in Regulation 4.5 as it existed prior to 2012.

³ See Exec. Order, Reducing Regulation and Controlling Regulatory Costs (January 30, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/01/30/presidential-executive-order-reducing-regulation-and-controlling-regulatory-costs>, and Exec. Order, Enforcing the Regulatory Reform Agenda (February 24, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/02/24/presidential-executive-order-enforcing-regulatory-reform-agenda>.

⁴ See "CFTC: A New Direction Forward," *supra* note 2.

2. **Restore CPO and CTA exemptions from registration.** The Commission should restore the CPO exemption from registration that was available prior to 2012 under the now-revoked Regulation 4.13(a)(4), and the corresponding CTA exemption from registration that was available under Regulation 4.14(a)(8)(i)(D).
3. **Amend Regulation 3.10(c)(3).** The Commission should amend Regulation 3.10(c)(3) to clarify that the exemptions from registration as a CPO and CTA provided thereunder are determined at the time of initial investment in a pool or entering into an agreement to provide commodity interest trading advice.

B. Reporting Initiative: Reporting and Recordkeeping Requirements for CPOs and CTAs

1. **Amend recordkeeping obligations for CPOs and CTAs.** The Commission should conform the applicable requirements for CPOs and CTAs regarding where records are maintained to those of other registrants.
2. **Extend CPO reporting deadlines.** The Commission should extend the deadlines for CPOs: (i) to distribute and file annual reports to harmonize the CFTC's reporting deadlines with those of the SEC (and provide more complete harmonization relief to CPOs of RICs); and (ii) to distribute quarterly or monthly account statements (A) generally by an additional 30 days, (B) by a further 30 days (total of 60) if the pools involved are funds-of-funds or invest in hard-to-value assets, and (C) by another 30 days (total of 90) if the pools involved are funds-of-funds-of-funds.⁵
3. **Modify Form CPO-PQR.** Form CPO-PQR should not require monthly rates of return or reporting of parallel managed accounts.

C. Miscellaneous

1. **Codify staff positions relating to CPOs and CTAs.** The Commission should codify the large number of Staff Letters issued during the last several years relating to CPOs and CTAs, or at a minimum, streamline and synthesize them in guidance (e.g., in FAQs).

In addition to our specific recommendations, we also support the recommendations made by SIFMA AMG in its submission on the Project KISS initiative. We have provided an Appendix to this letter with our recommendations for specific textual changes to the relevant regulations.

⁵ For convenience, we have set out our recommendations in the table form below.

II. RECOMMENDATIONS

A. Registration Requirements for CPOs and CTAs

1. The Commission should reinstate the exclusion from the definition of CPO under Regulation 4.5 as it existed prior to 2012.

CFTC Regulation 4.5 excludes from the definition of CPO “qualifying entities” that operate pools that are regulated by another regulatory authority. In 2012, the CFTC added new conditions for operators of RICs claiming exclusion under Regulation 4.5. These additional conditions were neither mandated by Dodd-Frank nor required for the Commission to be able to fulfill its mandate to regulate commodity interest markets. As the IAA and other trade associations noted during the Commission’s 4.5 rule proposal stage, we did not believe that there was any need to add conditions to the exclusion for RICs, especially in light of the extensive regulatory oversight of RICs by the SEC.⁶ Nor is there currently any such need. No other entities covered by Regulation 4.5, such as pension plans, are required to meet these additional conditions. We again urge the CFTC to recognize that duplicative regulation of activities that are already extensively regulated by the SEC is unnecessary, costly, and burdensome, and does not further investor interests.⁷

Although the Commission has attempted to minimize the duplication through its release harmonizing obligations of RICs⁸ and subsequent staff letters, these actions do not go nearly far enough to ameliorate the burdens inherent in unnecessary duplicative regulation. For instance, these newly-registered CPO operators of RICs have been required to become members of the National Futures Association (NFA), adding financial and compliance costs for both the new registrants and NFA during a period where budgets of all entities have been stretched to accommodate Dodd-Frank’s many mandates. In addition, certain individuals at these firms have been required to take and pass the Series 3 examination, even though many RICs do not invest directly in commodity interests and the vast majority will engage broker-dealers to solicit investors. We do not believe that RICs caused the crisis in the financial markets in the period leading to the enactment of Dodd-Frank.

⁶ See IAA statement at Roundtable on Proposed Amendments to Regulation 4.5 and Proposed Rescission of Regulations 4.13(a)(3) and (a)(4) of the Commodity Futures Trading Commission (July 6, 2011), available at <https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/110706cmnt.pdf>.

⁷ See Letter to CFTC from Karen L. Barr, General Counsel, IAA, re: Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, Proposed Rule, RIN 3038-AD30 (April 12, 2011), available at <https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/110412Acmnt.pdf>.

⁸ See *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 78 Fed. Reg. 52308, 52320-22 (August 22, 2013) (Harmonization Release) (Commission’s final regulations).

If the Commission restores the *status quo ante*, as the IAA recommends, the CFTC will still have tools to protect the integrity of the markets. The CFTC and NFA will continue to receive notice of which RIC operators claim the exclusion. In addition, RICs that trade in commodity interest markets will continue to be subject to large trader reporting, position limits, and antifraud, anti-manipulation, and disruptive trading prohibitions applicable to all traders. RIC operators claiming the CPO exclusion under Regulation 4.5 will also remain subject to special calls by the Commission.

We thus urge the Commission to remove the conditions added to the Regulation 4.5 RIC exclusion in 2012 by deleting paragraph (c)(2)(iii), as described in the Appendix to this letter. In the alternative, we support SIFMA AMG's recommendation to reduce the unnecessarily broad scope through more tailored interpretations of the conditions in current Regulation 4.5.

2. The Commission should restore the CPO exemption in Regulation 4.13(a)(4), which will also restore the corresponding CTA exemption in Regulation 4.14(a)(8)(i)(D).

Prior to 2012, Regulation 4.13(a)(4) exempted operators of certain private funds from CPO registration as long as the funds were offered only to certain highly sophisticated investors. Regulation 4.13(a)(4) was commonly relied upon by managers of private funds whose investors were "qualified eligible persons" under CFTC Rules, including non-U.S. persons. Regulation 4.13(a)(4) imposed no limits on the amount of trading in commodity interests, and commodity interests prior to Dodd-Frank did not include swaps. In 2012, however, the CFTC rescinded the registration exemption, resulting in significant new regulatory burdens for CPOs that had relied upon that exemption and were engaging in more than *de minimis* trading of commodity interests, even if such trading was done for risk management purposes. At the time, the IAA opposed the CFTC's proposal to rescind the exemption because we did not believe that rescission was necessary or appropriate to achieve the CFTC's stated goals of "improving transparency and increased accountability" or for the CFTC to be able to fulfill its mandate to regulate commodity interest markets.⁹ Nor was the rescission mandated by Dodd-Frank.

Before the rescission of Regulation 4.13(a)(4), advisers to many private funds also relied on an exemption from registration as a CTA under CFTC Regulation 4.14(a)(8) or 4.14(a)(10). Although neither of these rules was amended, the scope of the exemption under Regulation 4.14(a)(8)(i)(D), which exempts a CTA that only advises certain limited categories of private funds, including a CPO that operates funds in accordance with Regulation 4.13(a)(4), was significantly narrowed as a result of the rescission of Regulation 4.13(a)(4). Restoring the CPO exemption under Regulation 4.13(a)(4) would also restore the CTA exemption under Regulation 4.14(a)(8)(i)(D) to its prior coverage.

A large proportion of the affected CPOs and CTAs are SEC-registered investment advisers that are already subject to comprehensive regulation and oversight, including an

⁹ *Id.*

overarching fiduciary duty to clients under the Advisers Act, recordkeeping requirements, SEC Form PF reporting rules, the custody rule, the advertising rule, and SEC examination authority.¹⁰ The Commission's overlapping registration regime is duplicative of these requirements, is an unnecessary use of Commission resources, and does not provide any significant benefit to clients of these CPOs and CTAs beyond SEC regulatory requirements. We urge the Commission to reduce the unnecessary burdens of CPO/CTA registration for SEC-registered advisers by reinstating the Regulation 4.13(a)(4) exemption and the related Regulation 4.14(a)(8)(i)(D) exemption for SEC-registered investment advisers.

We also note our support for a recent petition for rulemaking submitted by the Alternative Investment Management Association, Ltd. (AIMA) seeking the re-adoption of Regulation 4.13(a)(4) to restore the exemption for CPOs/CTAs that have no place of business in the United States.¹¹

If the Commission restores the *status quo ante*, as we recommend, SEC-registered investment advisers and non-U.S. advisers that would be exempt CPOs will continue to remain subject to the antifraud prohibition in Section 4o of the CEA and the anti-manipulation, antifraud, and disruptive trading prohibitions applicable to all traders. They will also continue to be subject to large trader reporting requirements under Parts 15-21 of the CFTC's regulation and position limits, as well as to special calls by the Commission and advertising restrictions in CFTC Regulation 4.41.

The IAA has provided suggested revisions to the text of Regulations 4.13(a)(4) and 4.14(a)(8)(i)(D) in the Appendix to this letter.

3. The Commission should amend Regulation 3.10(c)(3) to clarify that the exemptions from registration as a CPO and CTA provided thereunder are determined at the time of initial investment in a pool or entering into an agreement to provide commodity interest trading advice.

CFTC Regulation 3.10(c)(3) permits a person acting as an introducing broker (IB), CTA, or CPO that is located outside of the United States¹² not to register with the CFTC if it is acting in such capacity only on behalf of persons located outside the United States. This exemption is

¹⁰ Based on data from CPO and CTA NFA annual questionnaires and Pool Quarterly Reports as of April 2017, approximately 833 registered CPOs were also registered with the SEC as investment advisers, and 139 CTAs were also registered with the SEC as investment advisers. According to NFA data, there were 1546 registered CPOs and 1656 registered CTAs as of August 31, 2017. See NFA membership information available at <https://www.nfa.futures.org/registration-membership/membership-and-directories.html>.

¹¹ See AIMA's *Petition for Rulemaking to Harmonize Registration Exemptions for CPOs and CTAs with Registration Exemptions for Investment Advisers* (June 23, 2017). We note that AIMA's petition addressed the issues involved mainly from the perspective of advisers located outside of the United States, while IAA's members are mostly, but not entirely, within the United States.

¹² As used in this letter, the reference to "United States" includes the United States and its territories or possessions.

conditioned on the transactions being submitted for clearing through a CFTC-registered futures commission merchant (FCM). Regulation 3.10(c)(2)(i) provides a similar exemption from registration for any Foreign Intermediary acting as an FCM.

The CFTC staff has provided no-action relief under which certain international financial institutions (IFIs) – such as the International Monetary Fund or the International Bank for Reconstruction and Development – are treated as foreign-located persons for purposes of this exemption, regardless of whether they have headquarters or other significant presence in the United States. The staff has also extended the exemption to uncleared swaps if the swaps are not subject to a Commission clearing mandate.¹³ The Commission has proposed codifying these staff letters and removing any reference to a clearing requirement in Regulation 3.10(c)(3)(i).¹⁴ However, this proposal has not yet been finalized. We commend the Commission on its proposal and recommend that it be finalized.¹⁵

The CFTC has not provided much additional guidance on this provision, including with respect to when the operator of a non-U.S. fund would be required to register as a CPO. In its final guidance on cross-border swaps regulation, the Commission noted that “[u]nder Commission regulation 3.10, the operator of a non-U.S. fund with even one U.S.-based owner is required to register as a commodity pool operator.”¹⁶ We question generally whether the Commission’s regulatory and oversight interest is implicated where there is so little nexus with the United States. But, to the extent the Commission retains this interpretation, we urge it, at the very least, to recognize the practical difficulty of confirming the physical location of each investor in a fund at all times, and recommend that the Commission modify Regulation 3.10(c)(3) so that the relevant time for determining whether the registration exemption is available is at the time of the sale of a commodity pool interest or upon entering into an investment management agreement with the client.

That this is the most appropriate point at which to determine whether an exemption is available is underscored by what has become known as the “snowbird” issue. Assume, for example, that an investment manager located in Canada only intends to offer its services to persons located in Canada, even though it may wish to trade in commodity interests listed on U.S. designated contract markets. If one of the investors in a Canadian investment fund subsequently moves to the United States, it is unclear if the Canadian manager would need to either register with the CFTC, qualify for another exemption if available, or redeem that

¹³ See CFTC Staff Letter 15–37 (June 4, 2015) and CFTC Staff Letter 16–08 (February 12, 2016).

¹⁴ *Exemption from Registration for Certain Foreign Persons*, 81 Fed. Reg. 51824 (August 5, 2016).

¹⁵ See Joint IAA Letter to CFTC re: Amendment to Commission Regulation 3.10(c): Exemption from Registration for Certain Foreign Persons, Proposed Rule, RIN No. 3028-AC26 (September 6, 2016), available at <https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/160906bcmnt.pdf>.

¹⁶ *Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations; Rule, 78 Fed. Reg. 45291, 45306 & n.149 (July 26, 2013).*

investor's investment or take other action. We urge the CFTC to clarify that the important measuring point should be the inception of the relationship rather than the subsequent relocation of the investor, as long as the manager is not soliciting U.S.-located investors.

Indeed, if the strict view expressed in the cross-border guidance controls, it is unfair for the exemption to become unavailable to a CPO or CTA once an investor or client--that was solely a foreign located person--has thereafter moved to the United States. Further, if the investor holds shares through a broker or other omnibus account arrangement, the CPO or CTA may never know if the investor has moved. Therefore, we believe that some reasonable flexibility must be incorporated into the regulation.

Commission staff has previously recognized the practical hurdles when it granted relief from registration as a CTA to an SEC-registered investment adviser that was providing commodity trading advice to a family of Canadian mutual funds. The staff applied the definition of "non-United States person" under CFTC Regulation 4.7 by looking at the time of sale of an interest in the fund.¹⁷ Time of investment is also the relevant inquiry under Regulation 4.13(a)(3), where, in order to claim the exemption under that provision, the fund manager must reasonably believe, *at the time of the investment*, that each investor is an accredited investor or a non-U.S. person.

The IAA thus recommends that the Commission modify Regulation 3.10(c)(3) to be in line with the relief under Regulations 4.7 and 4.13(a)(3), so that the registration exemption is available at the time of the sale or at the time of entry into the investment management agreement.

The IAA has provided suggested revisions to the text of Regulation 3.10(c)(3)(i) in the Appendix. We recommend that the provision be bifurcated so that Regulation 3.10(c)(3)(i)(A) governs IBs and Regulation 3.10(c)(3)(i)(B) governs CPOs and CTAs, and that the latter explicitly addresses the point at which to determine exemption eligibility discussed above.

The IAA also requests that the CFTC conform the treatment of the exemption under Regulation 3.10(c)(3) with that of the exemption from registration under Regulation 4.14(a)(8), so that a CTA may simultaneously rely upon the exemption under Regulation 3.10(c)(3) for certain clients and the statutory exemption under CEA Section 4m(3) with respect to other clients.¹⁸

B. Reporting and Recordkeeping Requirements for CPOs and CTAs

To the extent that the Commission determines not to provide the registration exemptions recommended above, we alternatively urge the Commission to harmonize and streamline the

¹⁷ CFTC Staff Letter 00-61 (May 12, 2000).

¹⁸ CFTC Staff Letter 05-13 (August 15, 2005). For a more fulsome discussion of this recommendation, see SIFMA AMG's Project KISS submission regarding changes to Regulation 3.10(c)(3).

recordkeeping and reporting requirements applicable to CPOs and CTAs in order to rationalize the financial regulatory framework. In particular, we urge the CFTC to adopt a substituted compliance regime for CFTC-registered CPOs and CTAs that are dually-registered as investment advisers with the SEC since they are already subject to comparable reporting and recordkeeping rules.

1. The Commission should conform the applicable requirements for CPOs and CTAs regarding where records are maintained to those of other registrants.

The IAA recognizes and appreciates that the CFTC, in the Harmonization Release, permitted CPOs to use the services of certain third parties for storage of required records. The Division of Swap Dealer and Intermediary Oversight (DSIO) subsequently provided exemptive relief so that CPOs may use any third party for this purpose.¹⁹ Just recently, this relief was extended by staff letter to CTAs.²⁰ However, even though CPOs and CTAs are no longer restricted with respect to where their records may be maintained, they are still required to file a notice regarding where the records will be kept.²¹ And, although the relief for CPOs and CTAs may appear to be substantially the same, the notice requirements are different, thus creating additional burdens for dually-registered entities. Many of our members are registered as CPOs and CTAs because they operate both pools and separately managed accounts to accommodate client preferences. CPOs claiming the third-party recordkeeper relief must file a notice with NFA and include certain representations from the third party. Conversely, CTAs must send an email to DSIO to claim third-party recordkeeping relief but need not include any third-party representations. To help NFA keep accurate records, CTAs must then file their notice with NFA as well.²² The treatment of CPOs and CTAs also differs from that of other CFTC registrants. For instance, FCMs and IBs have always been free to use third-party recordkeepers and have not been required to file any notice.²³

Not only is this an example of inconsistent treatment of registrants that does not appear to be warranted by differences among the registrants, but it also imposes additional costs with no apparent accompanying benefits. This is precisely an issue that is ripe for Commission consideration under Project KISS. We recommend that the Commission amend the CPO and CTA recordkeeping rules to provide exemptive relief consistent with the notice requirements applicable to other registrants' requirements.

¹⁹ CFTC Staff Letter 14-114 (September 8, 2014).

²⁰ CFTC Staff Letter 17-24 (April 20, 2017).

²¹ The notice requirements for CPOs are set forth in CFTC Regulations 4.7 (b)(5) and 4.23(c) and for CTAs in Staff Letter 17-24.

²² NFA Notice to Members I-17-11 (June 30, 2017).

²³ CFTC Regulation 1.35.

If the Commission determines not to harmonize the recordkeeping requirements to remove the additional requirements for use of third-party recordkeepers applicable to CPOs and CTAs, we respectfully request that the Commission at a minimum codify the staff letters discussed above in regulations so that the requirements will be easier for firms and their counsel to locate and to enable the industry to rely consistently on the relief.

2. The Commission should extend reporting deadlines to ease unnecessary compliance burdens for CPOs.

Many of our members have experienced significant compliance challenges in complying with the CFTC's unnecessarily burdensome and inflexible reporting deadlines. These members must prepare and provide to pool participants periodic and annual reports detailing the financial condition and performance of the pools that they operate. The reporting obligations are set forth in CFTC Regulation 4.22. Annual reports are due within 90 days after the pool's fiscal year-end. The annual reports must also be filed electronically with NFA, along with key financial balances from the report.

The Commission mandates strict adherence to its reporting deadlines, and may institute enforcement action against firms that are delinquent. To avoid a potential enforcement action, CPOs of pools that invest directly in commodity interests must generally request an extension by filing a hardship request with NFA prior to the report's original due date.²⁴ However, a CPO that operates a pool that is a fund-of-funds²⁵ (*i.e.*, it invests in other pools that trade commodity interests, but does not itself trade directly in commodity interests) may claim a 90-day automatic extension (subject to certain conditions) for filing the annual report of the pool, for a total of 180 days (under Regulation 4.22(f)(2)). Once the extension is claimed, there is no need to re-file for the extension on an annual basis and the extension continues to apply as long as the fund remains a fund-of-funds.

The IAA is recommending that the CFTC conform its regulations regarding preparation of pool reports to more fully match those of the SEC and to provide more time to prepare certain reports for pools with hard-to-value assets, or that operate as funds-of-funds or as funds-of-funds-of-funds.

We recognize and appreciate that, earlier this year, the DSIO provided exemptive relief regarding the filing of an annual financial statement in the instance of the liquidation of a series

²⁴ CFTC Regulation 4.22(f)(1). However, if the CPO is requesting an extension beyond 180 days after the pool's fiscal year end, it must file its request directly with the CFTC.

²⁵ In the suggested new regulatory text set forth in the Appendix, the IAA refers to "investments in another collective investment vehicle that is not operated by the commodity pool operator or an affiliate" as a means of defining a fund-of-funds. The IAA has included this definition so as to exclude master/feeder fund structures. The IAA recognizes and appreciates that the CFTC has previously granted relief in the master/feeder fund context and sees no reason to disturb or expand that relief. *See* CFTC Regulations 4.22(a)(4) and (c)(8), and references therein to Regulations 4.7(b)(2) and (b)(3), respectively.

of a series fund.²⁶ We have included language from that letter in our suggested amendments to Regulation 4.22. However, we also respectfully request that, as part of the review of requirements for annual reports of RIC pools, the Commission consider whether, given the comprehensive nature of the filings required by the SEC for series funds, further conformance of CFTC and SEC regulations in these circumstances is warranted.

Finally, we recommend that the Commission resolve the conflict in the timing of annual report filings by CPOs to RICs by exempting these CPOs, under CFTC Regulation 4.12(c)(3), from the requirements of CFTC Regulation 4.22 (requirements relating to reporting to pool participants). Since such CPOs are already subject to extensive reporting by the SEC, such an action would give true meaning to the statements in the Harmonization Release regarding substituted compliance with SEC regulations. Because the SEC's reporting regime for managers of RICs is comparable to and as comprehensive as the CFTC's for CPOs, substituted compliance would ensure fulsome disclosure and reporting by these CPOs.

The Commission stated in the Harmonization Release that a CPO of a RIC may elect to comply with CFTC requirements through substituted compliance with SEC regulations, and may file with NFA the financial statements that it prepares pursuant to its obligations with respect to the SEC.²⁷ The Commission further stated that it anticipated compliance with the annual reporting requirement would require “only addressing any potential formatting changes — *i.e.*, making sure the document is in PDF form as required by NFA — and uploading the document via NFA's Easy File system” taking “at most 2 hours per fund per sponsor.”²⁸ We note, however, that the key financial balances still have to be filed with NFA and that the reporting of such information may not be consistent with the reporting required under GAAP for RICs. Given the time and expense of calculating the key financial balances and filing the entire report with NFA, our members have found this estimate to be significantly lower than the actual burden.

(i) *Recommendation on deadline for CPOs filing annual reports*

We recommend the Commission provide additional flexibility for firms to file annual reports under certain circumstances where auditors may not be able to complete their work within specific dates because the final reports are dependent on data from underlying funds held by the pool. We note that the SEC's reporting deadline for annual reports for pools that are private funds under the Advisers Act is different from the CFTC's deadline for CPOs of the same private fund. In particular, to comply with the “audit provision” of Rule 206(4)-2 under the Advisers Act (the Custody Rule), a private fund adviser must distribute to pool investors audited financial statements generally prepared in accordance with generally accepted accounting principles (GAAP) within 120 days of the pool's fiscal year end.²⁹ However, the SEC has

²⁶ CFTC Staff Letter 17-04 (January 26, 2017).

²⁷ Harmonization Release, at 52311, 52325. CFTC Regulation 4.12(c)(3).

²⁸ *Id.* at 52325-26.

²⁹ The vast majority of private fund advisers use the audit provision to comply with the Custody Rule.

recognized that there are circumstances under which auditors might not be able to complete their work within the specified timeframes and permits some flexibility in these circumstances. For example, the auditor of a fund-of-funds would not be able to complete its work until the audit reports of the underlying funds are available. In this case, the SEC has indicated that it would not recommend enforcement action against an adviser of a fund-of-funds or a “top-tier fund” (*i.e.*, a fund-of-funds-of-funds) if the audited financial statements are distributed to investors within 180 days of the end of its fiscal year.³⁰ Under certain circumstances, the SEC will also further allow advisers to top-tier funds up to 260 days after a pool’s fiscal year end to distribute audited financial statements to investors.³¹ We recommend that the CFTC provide the same extensions. We have urged the Commission to address this inconsistency and unnecessarily burdensome reporting deadline for over five years, beginning with our comment letter on the CFTC’s harmonization proposal for RICs,³² and we again ask the Commission to address the issue. To conform to the SEC’s filing deadlines, we request the following:

Annual Report Filing Deadlines

Type of Pool	Days after fiscal year end
General	120 (increase of 30)
Hard-to-value assets ³³	120 (increase of 30)
Funds-of-funds	180 (no change)
Funds-of-funds-of-funds	260 (increase of 80)

(ii) Deadline for Quarterly or Monthly Account Statements

The CFTC should also extend the reporting deadlines in cases of funds-of-funds and where pools invest in hard-to-value assets. In addition to the annual reports discussed above, CPOs must provide interim financial reports to investors, denoted as account statements, and file these reports with NFA monthly (in the case of pools with net assets in excess of \$500,000 at the beginning of the pool’s fiscal year) or quarterly (for smaller pools). For all pools operated in

³⁰ See SEC Staff Responses to Questions About the Custody Rule (December 13, 2011), Questions VI.7 and VI.8.A, available at: http://www.sec.gov/divisions/investment/custody_faq_030510.htm.

³¹ *Id.*, Question VI.8B.

³² See Harmonization Release. The IAA comment letter raising this issue is available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=57449&SearchText=>.

³³ Hard-to-value assets are assets that are not traded on a trading facility and for which there is no widely accepted and broadly disseminated price series data.

accordance with CFTC Regulation 4.7(b), the interim reports are required at least quarterly. Generally, these reports are required to be filed within 30 days after the end of the reporting period.³⁴ The CFTC has granted no-action relief in certain cases to permit distribution of monthly interim reports in a fund-of-funds context within 45 rather than 30 days of the month end, but such relief is applicable only to the recipients of such letters.³⁵

In light of the IAA's recommendation that CPOs should have an additional 30 days generally to file annual reports (with longer extensions for complex situations), we believe that a similar extension of the time should be provided to distribute the account statements as well. We recommend that CPOs generally be given at least 60 days to distribute account statements (a 30-day increase). In addition, for the same reasons cited above with respect to annual reports, we recommend that additional time be provided to prepare these reports if the CPO is operating a fund-of-funds or a fund with hard-to-value assets.

Interim Report Filing Deadlines

Type of Pool	Days after reporting period end
General	60 (increase of 30)
Hard-to-value assets	90 (increase of 60)
Funds-of-funds	90 (increase of 60)
Funds-of-funds-of-funds	120 (increase of 90)

Finally, the time extensions for annual reports under the current regulations require the filing of a notice. The IAA recommends that, if such a notice is filed with respect to an annual report, it should not also need to be filed for an account statement, and vice versa, nor should it need to be re-filed for an extension on an annual basis.

³⁴ An account statement is not required for the last reporting period of the fiscal year if the annual report is sent to pool participants within 45 calendar days after the pool's fiscal year, which is impractical for funds-of-funds.

³⁵ See CFTC Staff Letters 16-54 (April 28, 2016) 16-53 (April 28, 2016), 15-44 (May 6, 2015), 14-142 (November 6, 2014), and 01-90 (December 11, 2001). We have heard DSIO staff members have indicated that they will accept estimates in account statements distributed by CPOs of funds-of-funds within the timeframes in the CFTC's regulations. We are unaware that such a statement has been committed to writing and thus cannot rely upon it being followed by the staff at large, let alone the Commission. Further, we do not believe that the Commission, NFA, or investors derive any benefit by having CPOs file an additional report with estimated figures.

3. Form CPO-PQR should not require monthly rates of return or reporting of parallel managed accounts.

CFTC Regulation 4.27 generally requires that CPOs registered or required to be registered with the CFTC file Form CPO-PQR. The IAA recommends that the CFTC revise two aspects of its guidance on filing Form CPO-PQR stated in the staff's frequently asked questions (FAQ) and a staff letter, both of which were unfortunately issued following and notwithstanding extensive industry input and discussion urging the Commission to take a different approach.³⁶

First, we urge the CFTC to eliminate the requirement that CPOs report monthly rates of return (ROR) on Form CPO-PQR. Many CPOs do not compute a monthly ROR. Private equity firms in particular generally compute ROR on a quarterly basis as they may hold illiquid assets and/or other hard-to-value assets. The CFTC staff has provided some limited relief in this area, stating in its FAQs that, with respect to certain illiquid and other hard-to-value assets, the requirement to report ROR on Form CPO-PQR for the intra-quarter months is satisfied if the CPO reports estimates of the monthly ROR, so long as such rates of return are based on reasonable methodologies.³⁷ The staff noted that "reasonable" in this context means estimated ROR that are reasonably consistent with ROR that would be calculated if all assets and positions are revalued at current market values. The staff also warned that a reasonable estimate is not a substitute for the quarterly valuation and ROR as customarily reported, and a reasonable estimate cannot be used for assets with readily available pricing data.

We understand from our members that it is costly for CPOs to be required to make additional ROR computations that they otherwise do not make, and we do not believe that such reporting provides any discernible regulatory benefit. We further note that such a requirement is inconsistent with CFTC Regulation 4.7(b)(2), which only requires quarterly reporting, and that it is also inconsistent with the comparable SEC reporting requirement. The SEC, in its instructions for its Form PF, clearly contemplates that pools may not all produce monthly returns and it does not require such monthly performance calculations if they are not calculated in the normal course of the pool's operations. The instructions in Item 17 of Section 1b of Form PF state that "You [the reporter] are required to provide monthly and quarterly performance results only if such results are calculated for the reporting fund (whether for purposes of reporting to current or prospective investors or otherwise)." Accordingly, we urge the Commission to make this adjustment to the reporting requirement in Form CPO-PQR. We ask that the CFTC revise its responses to FAQs 29, 30 and 31 so that reporting of monthly ROR is not required if the CPO only otherwise calculates quarterly ROR.

³⁶ CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CPO-PQR (November 5, 2015), available at http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/faq_cpopta110515.pdf, and CFTC Staff Letter 16-22 (February 25, 2016).

³⁷ CFTC Staff Letter 16-22.

Second, we recommend that the Commission eliminate the reporting on Form CPO-PQR of “dependent” parallel managed accounts. The CFTC requires that, for reporting purposes, parallel managed accounts (dependent or otherwise) be aggregated with the pool with the greatest amount of assets under management to which the accounts relate. Here again, there is a disconnect between CFTC and SEC reporting requirements, because the SEC only requires on Form PF that an adviser aggregate “dependent” parallel managed accounts³⁸ for purposes of determining whether the adviser meets any particular reporting threshold, but the adviser is not otherwise required to report information regarding dependent parallel managed accounts. Indeed, the CFTC forms are even internally contradictory, because Example 2 of Instruction 5 for Form CPO-PQR expressly states that a [dependent] parallel managed account is to be disregarded for reporting purposes.³⁹ Requiring the reporting of dependent parallel managed accounts on Form CPO-PQR is costly and burdensome for CPOs, could lead to double counting and confusion on the part of NFA and CFTC staff examining CPOs, and does not provide any discernible regulatory benefit.

Accordingly, we recommend that the CFTC revise its responses to FAQs 7, 15 and 16 to make it clear that CPOs should not be required to aggregate dependent parallel managed accounts for reporting purposes and to define the term in the same manner as the term is defined in the SEC’s Form PF. The IAA recognizes that DSIO has rejected these recommendations in Staff Letter 16-22, but we respectfully request that the Commission reconsider these issues. We have not included specific suggested text in these areas as we have for the regulatory amendments described above, but we would be happy to discuss such text with you and CFTC staff at your convenience.

C. Miscellaneous - Staff Letters issued relating to CPOs and CTAs

The CFTC’s staff has issued a large number of letters applicable to CPOs and CTAs in recent years. In certain cases, these letters were issued in response to numerous inquiries and thus have broad application beyond a single firm. In our view, it would be appropriate and useful to the industry and legal counsel for the CFTC to codify, or at a minimum, streamline and synthesize in guidance (*e.g.*, in FAQs), some of these letters so that persons that are new to the commodity interest industry or are newly subject to the CEA and regulations thereunder will be able to access applicable requirements and exemptions by consulting the Part 4 regulations rather than having to locate the applicable guidance from among a substantial body of staff letters.

We recommend addressing the following letters:

- 13-51 - Consolidated financial reports for controlled foreign corporations

³⁸ Under Form PF, a dependent parallel managed account is an account that is smaller than the private fund to which it relates.

³⁹ However, CFTC staff FAQ 10 states “[t]he term ‘dependent parallel managed accounts’ is not a term that has been defined in the Form CPO-PQR. As such, any reference to a ‘dependent parallel managed account’ in the instructions should be read to mean ‘parallel managed account.’”

- 14-112 - Consolidated financial reports for parent pools and trading subsidiaries
- 14-115 - Relief from filing Form CPO-PQR for registered CPOs that operate only pools in accordance with Regulations 4.5 or 4.13(a)(3)
- 14-96 and 14-126 - Delegation of CPO function⁴⁰
- 15-47 - Relief from filing Form CTA-PR for registered CTAs that do not direct trading of any commodity interest accounts
- 16-54 - Filing monthly rather than quarterly reports for pools being operated in accordance with Regulation 4.7 (and several similar letters)
- 17-04 - Liquidation audits for series pools
- 17-24 - CTA use of third-party recordkeepers
- 17-36 - Transaction-level requirements for non-U.S. swap dealers and
- 17-37 - Position aggregation requirements

The substantive decisions and underlying rationales are set forth in each of the staff letters. We are prepared to discuss the issues further should that be helpful. Some of these letters are the product of extensive discussions between industry representatives and Commission staff. Except as noted above, at this time the IAA is not recommending any additional relief in these areas, although such recommendations may be appropriate in the future. Finally, although the IAA urges the Commission to treat CPOs and CTAs like other registrants regarding where they keep their records, if the Commission does not decide to do so, we ask that the Commission at a minimum seek to codify the relief provided by Staff Letters 14-114 (CPOs) and 17-24 (CTAs) cited above.

* * * * *

⁴⁰ The IAA also believes that the relief recently provided by the DSIO staff, in Staff Letters 17-38, 17-39 and 17-40, to eliminate the common control requirement between the delegating CPO and the delegated CPO also be made available generally and codified into the Commission's Part 4 rules.

Mr. J. Christopher Giancarlo
U.S. Commodity Futures Trading Commission
September 29, 2017
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III. CONCLUSION

The IAA strongly supports the CFTC's Project KISS and its overarching goal of reducing the costs and burdens of CFTC regulation, and we appreciate the opportunity to offer the views of our members. We would be happy to discuss our comments or concerns at greater length with the Commission or its staff if that would be helpful. If you have any questions, please do not hesitate to call the undersigned at 202.293.4222.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Gail C. Bernstein". The signature is stylized with a large, sweeping loop at the end.

Gail C. Bernstein
General Counsel
Investment Adviser Association

A handwritten signature in black ink, appearing to read "Monique S. Botkin". The signature is written in a cursive style.

Monique S. Botkin
Associate General Counsel
Investment Adviser Association

CC: The Hon. Brian D. Quintenz, Commissioner
The Hon. Rostin Behnam, Commissioner
Michael Gill, Chief of Staff, Chairman
Matthew B. Kulkin, Director, Division of Swap Dealer and Intermediary Oversight
Amir Zaidi, Director, Division of Market Oversight
Brian Bussey, Director, Division of Clearing and Risk
Regina G. Thoele, Senior Vice President, Compliance, National Futures Association

APPENDIX A

Text of Proposed Rule Amendments (additions are underlined and deletions are ~~stricken through~~)

1. Regulation 3.10 is amended by revising paragraph (c)(3)(i) to read as follows:

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

* * * * *

(c) * * *

(3)(i)(A) A foreign located person ~~located outside the United States, its territories or possessions~~ engaged in the activity that meets the definition of: A ~~an~~ introducing broker, as defined in the Act and in §1.3(mm) of this chapter; ~~a commodity trading advisor, as defined in §1.3(bb) of this chapter; or a commodity pool operator, as defined in §1.3(nn) of this chapter, in connection with any commodity interest transaction executed bilaterally or made on or subject to the rules of any designated contract market or swap execution facility only on behalf of persons located outside the United States, its territories or possessions, is not required to register in such capacity provided that any such commodity interest transaction is submitted for clearing through a futures commission merchant registered in accordance with section 4d of the Act~~ as an introducing broker if such activity is solely on behalf of either foreign located persons or international financial institutions.

(B) A foreign located person engaged in activity that meets the definition of a commodity trading advisor or commodity pool operator, as defined in the Act and in §1.3(bb) or (cc) of this chapter, respectively, who the foreign located person reasonably believes, at the time that any persons first engage the foreign located person to provide commodity interest advice in the case of a person meeting the definition of commodity trading advisor, or who the foreign located person reasonably believes, at the time of the initial sale to any persons of a pool participation in the case of a person meeting the definition of commodity pool operator that such persons are either solely foreign located persons or international financial institutions, is not required to register as a commodity trading advisor or commodity pool operator, respectively. For the purposes of this paragraph (c)(3)(i)(B), a “foreign located person” means, in the case of a natural person, a person resident outside the United States, its territories, or possessions, and, in the case of a legal entity, a person that is not organized or incorporated under the laws of a state or other jurisdiction in the United States and whose principal place of business is located outside the United States, its territories, or possessions, or any such other person as the Commission determines.

* * * * *

2. Regulation 4.5 is amended by deleting paragraph (c)(2)(iii):

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

* * * * *

(c) * * *

(2) * * *

(iii) Furthermore, if the person claiming the exclusion is an investment company registered as such under the Investment Company Act of 1940, then the notice of eligibility must also contain representations that such person will operate the qualifying entity as described in Rule 4.5(b)(1) in a manner such that the qualifying entity:

(A) Will use commodity futures or commodity options contracts, or swaps solely for bona fide hedging purposes within the meaning and intent of Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5); 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 Rules 1.3(z)(1) and 151.5, a qualifying entity may represent that the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity’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 as defined in Rule 190.01(x) (17 CFR 190.01(x)) may be excluded in computing such five percent;

(B) 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 Rules 1.3(z)(1) and 151.5 (17 CFR 1.3(z)(1) and 151.5), determined at the time the most recent position was established, does not exceed 100 percent of the liquidation value of the pool’s portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For the purpose of this paragraph: (1) The term “notional value” shall be calculated for each futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract, by the current market price per unit, for each such option position by multiplying the number of contracts by the size of the contract, adjusted by its delta, in contract units (taking into account any multiplier specified in the contract, by the strike price per unit, for each such retail forex transaction, by calculating the value in U.S. Dollars for such transaction, at the time the transaction was established, excluding for this purpose the value in U.S. Dollars of offsetting long and short transactions, if any, and for any cleared swap by the value as determined consistent with the terms of 17 CFR part 45; and (2) The person may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade; and swaps cleared on the same designated clearing organization where appropriate; and

(C) Will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures, commodity options, or swaps markets.

* * * * *

3. Regulation 4.7 is amended by revising paragraph (b)(2) introductory text, by adding paragraphs (b)(2)(vi)(A), (B) and (C), by revising paragraph (b)(3)(i) by adding paragraph (b)(3)(i)(E), by revising paragraph (b)(4), by deleting paragraph (b)(5), and by revising paragraph (c)(2) to 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) * * *

(2) *Periodic reporting relief.* 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~~ 60 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:

* * * * *

(vi) (A) At any time, the commodity pool operator may file a notice with National Futures Association stating that its commodity pool has investments in one or more collective investment vehicles not operated by the commodity pool operator or one of its affiliates or that it is invested in assets that are difficult to value. The notice must contain the name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool and must be signed by the commodity pool operator in accordance with paragraph (h) of this section. For each reporting period following the filing of the notice described in this paragraph, for an investing pool, the commodity pool operator may file within 90 days after the end of the reporting period, or within 120 days after the end of the reporting period if the investing pool continues to invest in another such collective investment vehicle that in turn invests in another such collective investment vehicle, and it shall be presumed that the particular pool continues to invest in another such collective investment vehicle or in assets that are difficult to value; Provided, however, that, if the investing pool ceases investing in another such collective investment vehicle or in assets that are difficult to value, then the commodity pool operator must file electronically with National Futures Association an account statement within 30 days after the end of the pool's reporting period accompanied by a notice indicating the change in the pool's status.

(B) For these purposes, assets that are difficult to value are those that are not traded on a trading facility and for which there is no widely accepted and broadly disseminated price series data. The commodity pool operator shall submit to such special calls as the Commission may make to

demonstrate eligibility for and compliance with the applicable criteria for the longer period within which to file.

(C) A notice filing in accordance with paragraph (b)(2)(vi)(A) of this section is not required if the commodity pool operator has already filed the notice required by paragraph (f)(2)(i) of §4.22.

(3) *Annual report relief.* (i) Exemption from the specific requirements of §4.22(c) of this part; Provided, that, except as provided in paragraph (b)(3)(i)(E) of this section, within 90 120 calendar days after the end of the exempt pool's fiscal year or the permanent cessation of trading, whichever is earlier, the commodity pool operator electronically files with the National Futures Association and distributes to each participant in lieu of the financial information and statements specified by that section, an annual report for the exempt pool, affirmed in accordance with §4.22(h) which contains, at a minimum:

* * * * *

(E) In lieu of the time frame set forth in paragraph (b)(3)(i) of this section, the time within which to file and distribute an annual report for the exempt pool shall be 180 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier, if the pool invests in another collective investment vehicle not operated by the commodity pool operator or one of its affiliates or in assets that are difficult to value, or 260 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier, if the pool invests in another such collective investment vehicle that in turn invests in another such collective investment vehicle. The additional time provided in this paragraph (b)(3)(i)(E) will only be available if the pool operator has filed a notice in accordance with paragraph (b)(2)(vi)(A) of this section or §4.22(a)(7)(i) or (f)(2)(i) of this part.

* * * * *

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

~~(5) If the pool operator does not maintain its books and records at its main business office, the pool operator shall:~~

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

~~(A) 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;~~

~~(B) 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;~~

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

~~(D) Contains representations from the pool operator that:~~

~~(1) 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;~~

~~(2) It remains responsible for ensuring that all books and records required by this section are kept in accordance with §1.31;~~

~~(3) 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~~

~~(4) It will disclose in the pool's Disclosure Document the location of its books and records that are required under this section.~~

~~(ii) 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:~~

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

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

~~(C) Agrees to keep such required books and records open to inspection by any representative of the Commission, the National Futures Association, or the United States Department of Justice in accordance with §1.31 of this chapter.~~

~~(c) * * *~~

~~(2) *Recordkeeping relief.* Exemption from the specific requirements of §4.33; Provided, That the commodity trading advisor must maintain, at its main business office, all books and records~~

prepared in connection with his activities as the commodity trading advisor of qualified eligible persons (including, without limitation, records relating to the qualifications of such qualified eligible persons and substantiating any performance representations) and must make such books and records available to any representative of the Commission, the National Futures Association and the United States Department of Justice in accordance with the provisions of §1.31.

* * * * *

4. Regulation 4.12 is amended by revising paragraph (c)(3)(ii) to read as follows:

§4.12 Exemption from provisions of part 4.

* * * * *

(c) * * *

(3) * * *

~~(ii) Exemption from the Account Statement distribution requirement of §§4.22(a) and (b); Provided, however, that the pool operator:~~

~~(A) Causes the current net asset value per share to be available to participants;~~

~~(B) Causes the pool to clearly disclose:~~

~~(1) That the information will be readily accessible on an Internet Web site maintained by the pool operator or its designee or otherwise made available to participants and the means through which the information will be made available; and~~

~~(2) The Internet address of such Web site, if applicable; and~~

(ii) The pool operator will be exempt from all of the requirements of §4.22; Provided, however, that the pool operator:

(A) Causes to be available to participants:

(1) The current net asset value per share on a monthly basis; and

(2) Any annual report required by the Securities and Exchange Commission; and

(B) Clearly discloses that the information will be readily accessible on an Internet Web site maintained by the pool operator or its designee or otherwise made available to participants and the means through which the information will be made available, and the Internet address of such Web site, if applicable; and

* * * * *

5. Section 4.13 is amended by adding new paragraph (a)(4), as follows.

§ 4.13 Exemption from registration as a commodity pool operator.

(a) * * *

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

- (i) Interests in the pool are exempt from registration under the Securities Act of 1933, as amended (15 U.S.C. § 77, et seq.), and such interests are offered and sold either (A) without marketing to the public in the United States or (B) pursuant to Section 4 of the Securities Act of 1933, as amended (15 U.S.C. § 77d), and the regulations thereunder;
- (ii) 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)(4) of this section), that:
 - (A) Each natural person participant (including such person's self-directed employee benefit plan, if any), is a "qualified eligible person," as that term is defined in §4.7(a)(2); and
 - (B) Each non-natural person participant is a "qualified eligible person," as that term is defined in §4.7 under this title, or an "accredited investor," as that term is defined in §230.501(a)(1)-(3), (a)(7) and (a)(8) of the Securities Act of 1933;
- (iii) The person either:
 - (A) Is registered as an investment adviser pursuant to Section 203 of the Investment Advisers Act of 1940, as amended (15 U.S.C. § 80b-3); or
 - (B) Has no place of business in the United States, as such term is defined in Section 202(a)(30) of the Investment Advisers Act of 1940, as amended (15 U.S.C. § 80b-2(a)(30)) and regulations of the Securities and Exchange Commission thereunder.

Provided, That nothing in paragraph (a)(4) of this section will prohibit the person from claiming an exemption under this section if it additionally operates one or more pools that meet the criteria of paragraph (a)(3) of this section.

(6)

- (i) Eligibility for exemption under paragraph (a)(1), (a)(2), (a)(3), or (a)(4) of this section is subject to the person furnishing 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.

(ii) The person must make these disclosures by no later than the time it delivers a subscription agreement for the pool to a prospective participant in the pool.

(b)(1) Any person who desires to claim the relief from registration provided in paragraphs (a)(1), (a)(2), (a)(3), or (a)(4) of ~~by~~ this section must file electronically a notice of exemption from commodity pool operator registration with the National Futures Association through its electronic exemption filing system. The notice must:

(i) * * *

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

* * * * *

(e) * * *

(2) If a person operates one or more commodity pools described in paragraph (a)(3) or (a)(4) of this section, and one or more commodity pools for which it must be, and is, registered as a commodity pool operator, or if the person will be eligible to deregister as a commodity pool operator because, after complying with the requirements set forth below, it will be able to rely on registration exemptions or exclusions for all of the pools that it operates, the person is exempt from the requirements applicable to a registered commodity pool operator with respect to such ~~the~~ pool or pools ~~described in paragraph (a)(3) of this section~~; Provided, That the person:

(i) Furnishes in written communication physically delivered or delivered through electronic transmission to each prospective participant in a pool described in paragraph (a)(3) or (a)(4) of this section that it operates:

* * * * *

(iii) Provides each existing participant in a pool that the person elects to operate as described in paragraph (a)(3), or (a)(4) of this section a right to redeem the

participant's interest in the pool, and informs each such participant of that right no later than the time the person commences to operate the pool as described in paragraph (a)(3), or (a)(4) of this section.

* * * * *

6. Section 4.14 is amended by revising paragraph (a)(8)(i)(D) as follows:

§ 4.14 Exemption from registration as a commodity trading advisor.

(a) * * *

(8) * * *

(i) * * *

(D) A commodity pool operator who has claimed an exemption from registration under § 4.13(a)(3), 4.13(a)(4), or, if registered as a commodity pool operator, who may treat each pool it operates that meets the criteria of § 4.13(a)(3), 4.13(a)(4) as if it were not so registered.

* * * * *

7. Regulation 4.22 is amended by revising paragraph (a), by adding paragraphs (a)(7)(i), (ii) and (iii), by revising paragraphs (c) introductory text, (c)(7) introductory text, (c)(7)(i)(C) and (c)(7)(iii)(B), by adding paragraph (c)(7)(iii)(C), by revising paragraphs (f)(2) introductory text, (f)(2)(iii), (f)(2)(iv)(A), and (f)(2)(v), and by adding paragraph (f)(2)(vii) to read as follows:

§4.22 Reporting to pool participants.

(a) Except as provided in paragraph (a)(4), ~~or (a)(6)~~ or (a)(7) of this section, each commodity pool operator registered or required to be registered under the Act must periodically distribute to each participant in each pool that it operates, within ~~30~~ 60 calendar days after the last date of the reporting period prescribed in paragraph (b) of this section, an Account Statement, which shall be presented in the form of a Statement of Operations and a Statement of Changes in Net Assets, for the prescribed period. These financial statements must be presented and computed in accordance with generally accepted accounting principles consistently applied. The Account Statement must be signed in accordance with paragraph (h) of this section.

* * * * *

(7) (i) At any time, a commodity pool operator may file a notice with National Futures Association stating that a pool invests in one or more collective investment vehicles not operated by the commodity pool operator or one of its affiliates or that it is invested in assets that are difficult to value. The notice must contain the name, main business address, main telephone number and National Futures Association registration identification number of the commodity pool operator, and name and the identification number of the commodity pool and must be signed by the commodity pool operator in accordance with paragraph (h) of this section. For

each quarter following the filing of the notice described in paragraph (a)(7)(i) or (f)(2)(i) of this section, it shall be presumed that the pool continues to invest in another such collective investment vehicle and the commodity pool operator may file within 90 days after the end of the reporting period, or within 120 days after the end of the reporting period if the pool continues to invest in another such collective investment vehicle that in turn continues to invest in another such collective investment vehicle; Provided, however, that, if the pool no longer invests in another such collective investment vehicle, then the commodity pool operator must file electronically with the National Futures Association an account statement within 30 days after the pool's quarter-end accompanied by a notice indicating the change in the pool's status.

(ii) For these purposes, assets that are difficult to value are those that are not traded on a trading facility and for which there is no widely accepted and broadly disseminated price series data. The commodity pool operator shall submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria for the longer period within which to file.

(iii) A notice filing in accordance with paragraph (a)(7)(i) of this section is not required if the commodity pool operator has already filed the notice required by paragraph (f)(2)(i) of this section.

* * * * *

(c) Except as provided in paragraph (c)(7) or (c)(8) of this section, each commodity pool operator registered or required to be registered under the Act must distribute an Annual Report to each participant in each pool that it operates, and must electronically submit a copy of the Report and key financial balances from the Report to the National Futures Association pursuant to the electronic filing procedures of the National Futures Association, within ~~90~~ 120 calendar days after the end of the pool's fiscal year or the permanent cessation of trading, whichever is earlier; Provided, however, that if during any calendar year the commodity pool operator did not operate a commodity pool, the pool operator must so notify the National Futures Association within 30 calendar days after the end of such calendar year. The Annual Report must be affirmed pursuant to paragraph (h) of this section and must contain the following:

* * * * *

(7) For a pool that has ceased operation prior to, or as of, the end of the fiscal year, the commodity pool operator may provide the following, within ~~90~~ 120 days of the permanent cessation of trading, in lieu of the annual report that would otherwise be required by §4.22(c) or §4.7(b)(3):

(i) * * *

* * * * *

(C) If the commodity pool operator will not be able to liquidate the pool's assets in sufficient time to prepare, file and distribute the final annual report for the pool within ~~90~~ 120 days of the

permanent cessation of trading, the commodity pool operator must provide written notice to each participant and to National Futures Association disclosing:

* * * * *

(iii) * * *

(B) At the time of filing the Annual Report with the National Futures Association, certifies that it has received a written waiver from each participant from whom it is required to obtain a waiver to qualify for the relief available under this paragraph (c)(7). The commodity pool operator must maintain the waivers in accordance with §4.23 and must make the waivers available to the Commission or National Futures Association upon request. Notwithstanding the provisions of paragraph (g)(2)(ii) of this section, the relief made available by this paragraph (c)(7)(iii) will not be available where the commodity pool operator has not previously distributed an audited Annual Report to pool participants and submitted an audited Annual Report to the National Futures Association; or

(C) Is operating a series fund and is liquidating a series but otherwise continues operation of one or more of the remaining series; provided, that the commodity pool operator prepares unaudited Statements of Operations and Changes in Net Assets in accordance with generally accepted accounting principles applicable to pools registered under the Investment Company Act of 1940 and provides the Statements either through electronic or physical delivery either directly to all participants in the series or through the relevant financial intermediaries and to National Futures Association; and, provided further, if the entire corporate entity that constitutes the registered investment company is liquidated, or there is a concurrent liquidation of all of the series of the fund, the Form 8-F required to be filed with the Securities and Exchange Commission, when also provided to National Futures Association, will be accepted as substituted compliance with this section.

* * * * *

(f) * * *

(2) In the event a commodity pool operator finds that it cannot obtain information necessary to prepare annual financial statements for a pool that it operates within the time specified in either paragraph (c) of this section or §4.7(b)(3)(i), as a result of the pool investing in another collective investment vehicle not operated by the commodity pool operator or one of its affiliates, or, if applicable, another such collective investment vehicle that in turn invests in another such collective investment vehicle, it may claim an extension of time under the following conditions:

* * * * *

(iii) The notice must state the date by which the Annual Report will be distributed and filed (the “Extended Date”), which must be no more than:

(A) 180 calendar days after the end of the pool’s fiscal year, if the pool invests in another such collective investment vehicle not operated by the commodity pool operator or one of its affiliates; or

(B) 260 calendar days after the end of the pool’s fiscal year, if the pool invests in another such collective investment vehicle that in turn invests in another such collective investment vehicle.

(C) The Annual Report must be distributed and filed by the Extended Date.

(iv) * * *

(A) The pool for which the Annual Report is being prepared has investments in one or more collective investment vehicles not operated by the commodity pool operator or one of its affiliates or, if applicable, in one or more such collective investment vehicles that in turn invest in another such collective investment vehicle (the “Investments”);

* * * * *

(v) For each fiscal year following the filing of the notice described in paragraph (f)(2)(i) of this section, for a particular pool, it shall be presumed that the particular pool continues to invest in another collective investment vehicle not operated by the commodity pool operator or one of its affiliates or, if applicable, in one or more such collective investment vehicles that in turn invest in another such collective investment vehicle and the commodity pool operator may claim the extension of time; Provided, however, that if the particular pool is no longer investing in another collective investment vehicle, then the commodity pool operator must file electronically with the National Futures Association an Annual Report within 90 days after the pool’s fiscal year-end accompanied by a notice indicating the change in the pool’s status.

* * * * *

(vii) A notice filing in accordance with paragraph (f)(2) of this section is not required if the commodity pool operator has already filed the notice required by paragraph (a)(7)(i) of §4.22.

* * * * *

8. Regulation 4.23 is amended by revising the introductory text and deleting paragraph (c) to read as follows:

§4.23 Recordkeeping.

Each commodity pool operator registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner. ~~Books and records that are not maintained at the pool operator’s main business office shall be maintained by one or more of the following: the pool’s administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool.~~ All books and records shall be maintained in accordance with § 1.31. All books and records required by this section except those required by paragraphs (a)(3), (a)(4), (b)(1), (b)(2) and (b)(3) 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. If the books and records are maintained ~~at the commodity pool operator's main business office 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.~~

* * * * *

~~(c) 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.~~

9. Regulation 4.27 is amended by revising paragraph (c)(1) and by adding paragraphs (c)(3) and (c)(4) to read as follows:

§4.27 Additional reporting by advisors of certain large commodity pools.

(c) *Reporting.* (1) Except as provided in paragraphs (c)(2) through (c)(4) of this section, each reporting person shall file with the National Futures Association, a report with respect to the directed assets of each pool under the advisement of the commodity pool operator consistent with appendix A to this part or commodity trading advisor consistent with appendix C to this part.

* * * * *

(3) A commodity pool operator of a pool that is also the commodity pool operator of a wholly-owned subsidiary of that pool need is not required to file a report under this section for the subsidiary pool provided that the commodity pool operator files a report for the parent pool that includes the holdings, gains and losses, and other financial statement amounts attributable to the subsidiary. Such relief shall also apply in the circumstances where a pool is registered under the Investment Company Act of 1940 and has a controlled foreign corporation and the commodity pool operator of both entities files consolidated financial data for both entities in the report of the pool that is registered under the Investment Company Act of 1940.

* * * * *

10. Regulation 4.33 is amended by revising the introductory text to read as follows:

§4.33 Recordkeeping.

Each commodity trading advisor registered or required to be registered under the Act must make and keep the following books and records in an accurate, current and orderly manner ~~at its main business office and~~ in accordance with § 1.31. ~~If the commodity trading advisor's main business office is~~ such books and records are located outside the United States, its territories or

possessions, then upon the request of a Commission representative the trading advisor must provide such books and records as requested at the place designated by the representative in the United States, its territories or possessions within 72 hours after receipt of the request.

* * * * *