MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

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Via Electronic Submission: https://comments.cftc.gov

Christopher Kirkpatrick
Secretary of the Commission
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors (RIN Number 3038–AE76)

Dear Mr. Kirkpatrick:

Managed Funds Association ("**MFA**")[1] welcomes the opportunity to comment on the Commodity Futures Trading Commission's ("**Commission**") notice of proposed rulemaking on the "Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors" ("**Proposed Rules**").[2] We strongly support the Proposed Rules and the Commission's decision to codify the relief provided by certain existing Commission Staff advisories, letters and, guidance into formal rules. We believe this approach is consistent with the Dodd-Frank Act[3] and the Commission's goals of simplifying Commission regulations and making them less burdensome.[4] Moreover, these Commission Staff letters have provided important guidance and relief that, in the case of some letters, have contributed to the effective functioning of the market for commodity pool operators ("**CPOs**") and commodity trading advisers ("**CTAs**") for decades. Thus, codifying this relief is important because it will provide greater legal certainty

[1] Managed Funds Association represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry's contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policymakers in Asia, Europe, the Americas, Australia and many other regions where MFA members are market participants.

[2] 83 FR 27444 (October 18, 2018), available at: https://www.gpo.gov/fdsys/pkg/FR-2018-10-18/pdf/2018-22324.pdf ("**Proposed Rule Release**").

[3] The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, 124 Stat. 1376–2223, available at: https://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf.

[4] *See* Proposed Rule Release at 52903-4, discussing how issuance of the Proposed Rules is in response to the Project KISS initiative. *See also* Commission request for information on "Project KISS", 82 FR 21494 (May 9, 2017); amended by 82 FR 23765 (May 24, 2017), available at: https://comments.cftc.gov/KISS/KissInitiative.aspx.

to CPOs and CTAs. Therefore, we would urge the Commission to move forward with finalizing the Proposed Rules subject to a few clarifications.

In particular, MFA applauds the Commission for codifying the relief related to the JOBS Act[5] to ensure that dually-registered CPOs and CTAs can engage in general solicitation and general advertisement with respect to the private offering of their commodity pools under 506(c) of Regulation D[6] and part 4 of the Commission regulations.

In addition, we appreciate the Commission incorporating the relief in CFTC Staff Advisory 18-96[7] which, among other things, would provide an important new exemption from CPO registration where the CPO manages offshore commodity pools with a limited U.S. nexus. However, in expanding the relief provided in Staff Advisory 18-96 and integrating it into the Commission rules, there are a few places where some additional clarification would be helpful to ensure effective compliance with the new rules. In particular, MFA respectfully requests that the Commission explicitly clarify in the final rule release:

1. The process for disclosing statutory disqualifications when claiming a § 4.13 exemption, which is important given the convergence of: (i) the breadth and ambiguity of sections 8a(2) and 8a(3) of the Commodity Exchange Act ("**CEA**"),[8] (ii) the extension of the requirement to CPOs that have already claimed a § 4.13 exemption, and (iii) the potential for CPOs to have unintentional (most often, minor) violations of which they were not aware at the time of violation; and

2. That it is the Commission's intention to allow market participants to be able to continue to rely on existing Commission Staff letters and guidance provided in relation to Staff Advisory 18-96 once that relief is incorporated into the final rules.

MFA also requests that the Commission adopt the relief for the books and records location requirement as codified in proposed § 4.23(a)(4). We discuss each of these requests in greater detail below and we would appreciate the Commission providing clarification or confirmation of these matters when it finalizes the Proposed Rules.

I. Support for Codifying Commission Staff Advisory 18-96

MFA strongly supports the Commission incorporating the relief provided in Commission Staff Advisory 18-96[9], and creation of the new proposed exemption § 4.13(a)(4) from CPO registration.

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[5] The Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012), available at: https://www.govinfo.gov/content/pkg/BILLS-112hr3606enr/pdf/BILLS-112hr3606enr.pdf.

[6] Regulation D under the Securities Act of 1933, as amended, CFR §230.500, available at: https://www.ecfr.gov/cgi-bin/text-idx?SID=e282de4f5c69b6a69c70dd05d5b92d39&mc=true&node=sg17.3.230_1498.sg11&rgn=div7.

[7] Commission 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" (April 11, 1996), available at: https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm.

[8] 7 U.S.C. 1, available at: https://www.law.cornell.edu/uscode/text/7/chapter-1.

[9] *See supra* note 7.

We agree with the Commission that, given the increasingly global nature of many CPOs' business activities, it is reasonable and judicious not to expend Commission resources to require registration of CPOs operating commodity pools with a limited U.S. nexus.[10] In addition, many CPOs have been relying on the relief provided by Staff Advisory 18-96 for many years, and such relief has been to the benefit of the pool participants and the markets. Therefore, we support the Commission's decision to codify this relief.

As mentioned, below we will highlight a few specific areas that need further Commission clarification or confirmation as it finalizes the amendments to incorporate Staff Advisory 18-96 into the Commission's part 4 regulation. However, we emphasize that we strongly desire that the Commission move forward with finalizing the Proposed Rules, and codifying Staff Advisory 18-96. Rather, we are identifying these issues because we think that, without further guidance in these areas before the Commission finalizes the Proposed Rules, it will necessitate Commission Staff providing additional relief letters in the future, and thus, frustrate the Commission's goal of simplifying its regulations and conserving its resources.

A. Clarification of Statutory Disqualification Disclosure Process

MFA supports the Commission extending the prohibition on statutory disqualifications to CPOs claiming any § 4.13 exemption, and we agree that it is an appropriate step to enhance customer protection.[11] However, from a compliance perspective, we would appreciate additional clarity on the process for a CPO to disclose a statutory disqualification when claiming any of the § 4.13 exemptions. We believe that the absence of a clear disclosure process presents a number of compliance issues given: (i) the breadth and ambiguity of CEA sections 8a(2) and 8a(3),[12] (ii) the extension of the requirement to CPOs that have already claimed a § 4.13 exemption, and (iii) the potential for CPOs to have unintentional (most often, minor) violations of which they were not aware at the time of violation.

Under Staff Advisory 18-96, a pre-condition to claiming that relief was that neither the CPO nor any of its principals was subject to a statutory disqualification. In the Proposed Rules, the Commission proposes to extend this prohibition to all CPOs claiming any § 4.13 exemption such that for a CPO to avail itself of any such exemption, neither it nor its principals could be subject to any CEA section 8a(2) or 8a(3) statutory disqualification.[13] The Proposed Rules also contain an exception to this prohibition where "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".[14]

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[10] *See* Proposed Rule Release at 52914, explaining how limiting the new proposed § 4.13(a)(4) exemption to commodity pools with a limited U.S. nexus is consistent with the Commission's past prioritization of resources.

[11] *See id*. at 52906, discussing the Commission's customer protection concerns.

[12] *See supra* note 8.

[13] Proposed Rule Release at 52906-7. *See also id*. at 52927, proposed new § 4.13(a)(6).

[14] *Id*. at 52906.

While the Proposed Rules provide guidance around the timing of disclosure to the National Futures Association ("**NFA**") for CPOs newly claiming a § 4.13 exemption,[15] there is no clarity on the timing of disclosure for CPOs that have already claimed a § 4.13 exemption and who would newly become subject to the prohibition on statutory disqualifications. In addition, in the Proposed Rule Release, the Commission does not discuss the process for either CPOs newly claiming an exemption or currently exempt CPOs to disclose their statutory disqualifications to the NFA. There is also no indication that either the Commission or the NFA will be establishing such a process. Because sections 8a(2) and 8a(3) cover a broad range of criminal and regulatory violations that include (and go beyond) the Commission regulations, we have a number of concerns with the practical implementation of this disclosure requirement due to the lack of a clear disclosure process. We will provide three examples of such concerns below.

First, MFA is concerned because the list of violations contained in sections 8a(2) and 8a(3) is not a clear, discrete, and exhaustive list. While certain violations contained in this provisions (*e.g.*, where a court has made a final judgement of a criminal conviction are clear and unambiguous, other violations are more open-ended and uncertain. For example, section 8a(3)(M) allows the Commission to refuse to register or to register conditionally a regulated entity if "there is other good cause". That language does not point to a specific violation that a CPO could anticipate and be able to disclose.

Second, we believe it is particularly important for the Commission to clarify the disclosure process for CPOs that are already claiming a § 4.13 exemption. Under the Proposed Rules, currently exempt CPOs would newly become subject to the proposed prohibition on statutory disqualifications.[16] As a result, we expect there to be some currently exempt CPOs who the Commission has previously found to have violated Commission regulations where those violations fall within CEA sections 8a(2) or 8a(3).

For example, a CPO currently relying on the § 4.13(a)(3) exemption may have previously violated the § 4.23 recordkeeping rules and been subject to a Commission fine. Such recordkeeping violations are fairly common, and currently would not prevent the CPO from claiming an exemption from registration. However, under the Proposed Rules, since this recordkeeping violation would be captured by CEA section 8a(3)(A),[17] the CPO would need to disclose it. While the current part 4 regulations require exempt CPOs to provide an annual notice to the NFA or update changes to the CPOs' information,[18] the Commission did not amend those provisions in the Proposed Rules to incorporate a process for the proposed new statutory disqualification disclosures. As mentioned, we support the disclosure of all statutory disqualifications, but in the context of currently exempt CPOs where this disclosure could change their ability to continue to

[15] *See id*. at 52927, proposed new § 4.13(b)(2), which sets forth the timing for disclosure of the statutory disqualification depending on the exemption being claimed.

[16] *See id*., proposed new § 4.13(a)(6).

[17] 7 U.S.C. § 12a(3)(A)

[18] *See* 17 CFR 4.13(4) and 17 CFR 4.13(5).

claim their current exemption, it is key for the Commission and/or NFA to clarify the timing and process for disclosure.

Third, MFA is concerned about the process for disclosing violations of other U.S. authorities' regulations which are covered by CEA Sections 8a(2) and 8a(3). CEA Sections 8a(2) and 8a(3) allow the Commission to refuse to register a regulated entity due to violations of other U.S. authorities' regulations, such as regulations of the Securities and Exchange Commission ("**SEC**").[19] Disclosing such violations as required under the Proposed Rules could be difficult (if not impossible) because it is possible for a regulated entity to violate U.S. securities laws, but not be aware of such violation at the time of the violation.

For example, Rule 105 of Regulation M generally prohibits SEC-regulated entities from purchasing securities in follow-on or secondary offerings when the purchaser has effected short sales in the securities within a specified amount of time prior to the pricing of an offering.[20] However, a Rule 105 violation does not require intent by the short seller to engage in a prohibited transaction. Rather, the violation occurs when the short sale is effected in the restricted five-day window and then the investor purchases shares of the same security in the offering, regardless of the purchaser's knowledge of, or intent to commit, a violation. As a result, Rule 105 violations are generally unintentional violations, and market participants may not be aware of their violation at the time it occurs and until the SEC brings an action against the regulated entity. Thus, as a practical matter, we are not certain how a CPO could comply with the disclosure requirement in the Proposed Rules in such a situation, regardless of whether the CPO is newly claiming a § 4.13 exemption or is already exempt.

MFA understands the Commission's goal of having CPOs self-report statutory disqualifications applicable to them and their principals when seeking to avail themselves of any § 4.13 exemption. However, the process issues raised by the open-ended language in CEA section 8a(3)(M), the extension of the statutory disqualification provision to currently exempt CPOs, and the potential Rule 105 violation are three examples of the many practical issues that we believe arise from the proposed disclosure requirement. Greater Commission guidance will minimize the need for individual requests for further Staff guidance, as well as ensure that market participants that are only engaged in a *de minimis* level of derivatives activity and do not warrant prioritization by the Commission, continue to be eligible for an exemption under § 4.13. Therefore, we would appreciate the Commission giving further thought to these issues, and providing robust clarification on the disclosure timing and process in the final rule release.

B. Continued Reliance on Subsequent Commission Staff Letters

While Staff Advisory 18-96 provides a critical piece of relief from CPO regulation with respect to certain offshore commodity pools, Commission Staff also issued various additional, supplementary letters and guidance to clarify the relief provided by Staff Advisory 18-96. In incorporating the Staff Advisory 18-96 relief into the part 4 regulations, MFA believes it is the

[19] *See e.g.*, 7 U.S.C. § 12a(3)(B), discussing the Commission's ability to refuse to register a CPO for violation of a enumerated list of securities laws.

[20] *See* 17 CFR 242.105, available at: https://www.law.cornell.edu/cfr/text/17/242.105.

Commission's intention to allow market participants to be able to continue to rely on the related Staff letters and guidance. However, we would appreciate it if the Commission could explicitly clarify that intention in the final rule release.

Regardless of how comprehensive or clear any Commission Staff advisory, letter, or other relief is written, market participants will have questions or need additional relief as they seek to determine how to apply that relief to their particular facts and circumstances. In the case of Staff Advisory 18-96, such issues have necessitated that Commission Staff issue a number of additional relief letters over the last 22 years.

For example, in 1997, Staff of the Commission's then-Division of Trading and Markets issued Commission Letter No. 97-48.[21] In that letter, Commission Staff provided guidance about the extent to which an offshore commodity pool could have U.S.-sourced seed capital provided by its CTA and still claim the exemptive relief under Staff Advisory 18-96. Among other things, in that letter, Commission Staff took the position that "the relief available under the Advisory (or pursuant to previously issued no-action relief) is not rendered unavailable by the participation in an offshore pool of a U.S. person where that person is, e.g., the pool's CPO, CTA or a principal thereof".[22]

While some of the relief in Commission Letter No. 97-48 was specific to the facts and circumstances of the commodity pool in question, the above relief was non-fact specific, and thus, of general applicability to any number of offshore commodity pools with U.S. CTAs. Because this relief has been in existence and relied upon for almost as long as Staff Advisory 18-96, it would be harmful for the Commission to cease allowing market participants to be able to rely on this letter.

In addition, as mentioned, Commission Letter No. 97-48 is just one of many relief letters that Commission Staff has issued with respect to Staff Advisory 18-96. If the Commission does not confirm that reliance on such Commission Staff letters will continue to be permissible once the Commission incorporates Staff Advisory 18-96 into the part 4 regulations, it would necessitate market participants reaching out to Commission Staff to obtain new relief to replace the existing relief. Such duplicative efforts would frustrate the Commission's goal of reducing burdens on Commission Staff, and instead, would have the opposite effect of requiring Commission Staff effectively to devote time to previously-settled issues by necessitating the reconsideration and reissuance of the many existing Staff letters.

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[21] Commission Letter No. 97-48, Division of Trading and Markets, "Request for Confirmation of Availability of Advisory 18-96 and for Relief from CPO Registration", (May 6, 1997), available at: https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/97-48.pdf.

[22] *Id*. Citing *e.g.*, Commission Interpretative Letter 85-13, [1984-86 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,786 (October 16, 1985). *See also* Rule 4.13(a)(2)(ii) which, for the purpose of determining the availability of an exemption from registration for the CPO of a family, club or small pool, excludes from the computation of no more than 15 participants allowable under that exemption such persons as immediate family members of the CPO.

As a result, it is important for the Commission to clarify in the final rule release that market participants can continue to rely on existing Commission Staff letters issued with respect to Staff Advisory 18-96, even once the Commission codifies that advisory in its part 4 regulations.

C. Support for Books and Records Location Exemption

Another important piece of Staff Advisory 18-96 relief that the Proposed Rules would incorporate into the part 4 regulations is the relief that "permits qualifying, registered onshore CPOs to claim exemptive relief from solely the books and records location requirement in § 4.23".[23] MFA applauds this relief and strongly supports the Commission adopting proposed § 4.23(a)(4).

As the Commission is aware, for offshore commodity pools that have a main business office located outside of the U.S., it was burdensome to require the CPO to maintain the original copies of the offshore commodity pool's books and records in the CPO's U.S. office. Therefore, Staff Advisory 18-96 provided valuable relief by allowing the original copies of those books and records to remain at the pool's main offshore business office so long as the U.S. office had a copy of those books and records and could produce the originals upon request from relevant U.S. authorities. MFA believes that Staff Advisory 18-96 struck an appropriate balance between U.S. authorities' needs to have access to the original copies for oversight and judicial purposes and the burden placed on offshore commodity pools and their onshore CPOs.

As a result, we are pleased that the Commission is proposing to amend § 4.23 to incorporate this books and records location relief, and we urge its prompt adoption.

II. Support for Codifying CFTC Staff Letter 14–116

MFA applauds the Commission for codifying the relief provided in CFTC Staff Letter 14–116 (the "**JOBS Act Relief Letter**")[24] because we agree with the Commission that it is an important goal to permit "commodity pools operated by CPOs claiming relief under § 4.7(b) to avail themselves of the JOBS Act relief adopted by the SEC".[25]

As the Commission knows, many private funds[26] regulated by the SEC are also commodity pools regulated by the CFTC. These pools' operators are often dually-registered (or exempt from registration) with the SEC and with the CFTC, and at times, privately offer these pools pursuant to both: (1) Rule 506 of Regulation D under the Securities Act of 1933, as amended (the "**1933**

[23] Proposed Rule Release at 52905.

[24] CFTC Staff Letter 14–116, Division of Swap Dealer and Intermediary Oversight, "Exemptive Relief from Provisions in Regulations 4.7(b) and 4.13(a)(3) Consistent with JOBS Act Amendments to Regulation D and Rule 144A" (Sept. 9, 2014), available at: https://www.cftc.gov/idc/groups/public/%40lrlettergeneral/documents/letter/14-116.pdf.

[25] Proposed Rule Release at 52915.

[26] "Private fund" means an investment vehicle the securities of which are not registered under the Securities Act of 1933, and which is excluded from the definition of an "investment company" under Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940.

Act"),[27] and (2) an exemption from CPO registration pursuant to either § 4.7(b) or § 4.13(a)(3). As Commission Staff recognized in the JOBS Act Relief Letter, passage of the JOBS Act[28] created a regulatory conflict for such dually-registered CPOs. Specifically, the JOBS Act amended the 1933 Act to permit the use of "general solicitation or general advertising" in connection Rule 506(c) private offerings. However, §§ 4.7(b) and 4.13(a)(3)(i) of the Commission's rules continued to prohibit CPOs relying on these exemptions for engaging in "marketing to the public".

To resolve this conflict, Commission Staff issued the JOBS Act Relief Letter, which has served as a critical bridge to harmonize the regulations of the Commission and SEC. In that letter, Commission Staff granted "exemptive relief from the Regulation 4.7(b) requirements that an offering be exempt pursuant to section 4(a)(2) of the 33 Act and be offered solely to QEPs, and from the requirement in Regulation 4.13(a)(3)(i) that securities be 'offered and sold without marketing to the public'"[29] subject to certain conditions. This relief has been beneficial to dually-registered CPOs and provided needed comfort that they could engaging in 506(c) private offerings without violating Commission regulations.

MFA commends the Commission's efforts to harmonize regulations between its part 4 regulations and the SEC regulations applicable to investment advisers and private funds under the securities laws. We also appreciate the Commission's desire "to provide legal certainty with respect to the transactions engaged in by, dually-regulated CFTC and SEC entities".[30] Therefore, we strongly support the Commission's decision to amend §§ 4.7(b) and 4.13(a)(3)(i) to codify the relief provided in the JOBS Act Relief Letter.

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MFA thanks the Commission for considering our views on the Proposed Rules. We welcome the opportunity to discuss our views with you in greater detail. Please do not hesitate to contact the undersigned at (202) 730-2600 with any questions the Commission or its Staff might have regarding this letter.

Respectfully submitted,

/s/ Carlotta D. King

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[27] 17 CFR 230.506, available at: https://www.law.cornell.edu/cfr/text/17/230.506.

[28] *See supra* note 5.

[29] JOBS Act Relief Letter at 6.

[30] Proposed Rule Release at 52911.