December 17, 2018

Via Electronic Submission

Christopher Kirkpatrick, Secretary
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 (Proposal) – CFTC RIN 3038-AE76

Dear Mr. Kirkpatrick:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to submit comments on the Commodity Futures Trading Commission's (**CFTC's or Commission's**) proposed amendments (**Proposal**) to certain registration and compliance obligations for commodity pool operators (**CPOs**) and commodity trading advisors (**CTAs**).[2] IAA members, all of which are registered as investment advisers with the Securities and Exchange Commission (**SEC**) under the Investment Advisers Act of 1940, as amended (**Advisers Act**), are fiduciaries to their clients and are committed to acting in their clients' best interest. The IAA supports effective and meaningful regulation of the commodities markets and market participants, and we thus strongly support the CFTC's Project KISS initiative[3] and its goals to reduce costs and burdens of CFTC regulation.[4]

We commend the Commission for issuing this Proposal in response to the Project KISS initiative as well as to the staff's internal review of the CFTC's regulatory regime. We also appreciate that the Commission considered comments in our 2017 Letter to codify no-action relief provided in

[1] The IAA is a not-for-profit association dedicated to advancing the interests of SEC-registered investment advisers. The IAA's more than 650 member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit our website: www.investmentadviser.org.

[2] Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (Oct. 18, 2018).

[3] *See* CFTC Requests Public Input on Simplifying Rules, Rel. No. PR 7555-17 (May 3, 2017) (**Project KISS**), *available at* http://www.cftc.gov/PressRoom/PressReleases/pr7555-17, 82 Fed. Reg. 21494 (May 9, 2017); *amended by* 82 Fed. Reg. 23765 (May 24, 2017).

[4] IAA Letter to Chairman J. Christopher Giancarlo from Gail C. Bernstein, General Counsel, and Monique S. Botkin, Associate General Counsel, IAA re: Recommendations for "Project KISS" to Simplify CFTC Rules (RIN 3038–AE55) (Sept. 29, 2017) (**2017 Letter**), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/IAA-Letter-to-Chairman-Giancarlo-9-29-17.pdf.

Staff Letter 14–115 for CPOs that only operate commodity pools in accordance with Regulations 4.5 and 4.13 and Staff Letter 15–47 for registered CTAs that do not direct trading of any commodity interest accounts.[5] Codification of no-action relief into regulation will make the relief permanent and will reduce unnecessary compliance burdens on market participants to assess the regulatory landscape, particularly for newer entrants into the market.

We are pleased that the Chairman views this Proposal as the first of several modifications to the Part 4 regulations, and we look forward to working with the Commission and its staff on these efforts.[6] In addition to providing comment on this effort to streamline earlier guidance, we discuss areas in which we believe the Commission should address overlapping and duplicative regulation more broadly. In our 2017 Letter, we recommended that the CFTC (i) reinstate the exclusion from the definition of CPO in Regulation 4.5 as it existed prior to 2012 and (ii) restore the CPO exemption from CFTC registration for SEC-registered investment advisers that was available prior to 2012 under the previous Regulation 4.13(a)(4) (and reinstate the corresponding CTA registration exemption that was available under Regulation 4.14(a)(8)(i)(D)). Echoing our comments, as well as those of many others on the Project KISS initiative, the U.S. Department of the Treasury (**Treasury**) made similar recommendations to the CFTC in October 2017 (**Treasury Report**).[7] We again urge the CFTC to reconsider its regulatory regime for SEC-registered CPOs and CTAs and to work with the SEC to tailor its regulation of these entities to limit duplication, inconsistency, and unnecessary and costly additional burdens that add little investor protection.

With regard to the CFTC's current Proposal, we are concerned that several proposed provisions and statements in the accompanying release will make the CFTC regulatory framework more complicated and burdensome for SEC-registered investment advisers, rather than simpler and less burdensome. In those areas, we urge the CFTC to clarify and revise the amendments to more clearly reflect current global markets and diverse global business models.

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[5] *See* 83 Fed. Reg. at 52904.

[6] *See* Statement of CFTC Chairman J. Christopher Giancarlo on Proposed Amendments to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors (Oct. 9, 2018), available at https://www.cftc.gov/PressRoom/PressReleases/7825-18 ("I expect this proposal to be the first in a series of staff recommendations to streamline and simplify regulation of commodity pool operators and commodity trading advisors.").

[7] *U.S. Department of Treasury, A Financial System That Creates Economic Opportunities: Asset Management and Insurance* at 45-48 (Oct. 2017), available at https://www.treasury.gov/press-center/press-releases/Documents/A-Financial-System-That-Creates-Economic-Opportunities-Asset_Management-Insurance.pdf.

Executive Summary

Our recommendations cover four main areas:

I. The CFTC Should Follow Treasury's Recommendations that the CFTC Eliminate Duplicative Registration Requirements. The CFTC should amend its regulations so that an SEC-registered investment adviser to an investment company registered with the SEC is exempt from dual registration and regulation by the CFTC as a CPO. It should also amend its regulations to exempt SEC-registered private fund advisers from registration as CPOs since those advisers are subject to comprehensive regulatory oversight by the SEC.

II. The CFTC Should Revise Proposed Regulation 4.13(a)(4) to Eliminate Outdated Conditions from Advisory 18-96. If the CFTC adopts Regulation 4.13(a)(4), it should revise several of the proposed provisions that are no longer relevant. It should also clarify certain aspects of the new and related exemptions.

III. The CFTC Should Clarify that CPOs may Rely on Both Regulation 3.10(c)(3) and Regulation 4.13(a)(3). The CFTC should clarify the treatment of all exemptions from CPO and CTA registration to make it clear that a person may use available exemptions in combination (referred to as "stacking").

IV. The CFTC Should Exclude SEC-Registered Investment Advisers From the Proposed Statutory Disqualifications or Alternatively Narrow the Applicable Scope of the Disqualifications. The CFTC should exclude SEC-registered investment advisers – which are already subject to the SEC's statutory disqualification regime – from the proposed new requirement that persons claiming CPO registration exemptions certify that they are not subject to statutory disqualifications under Commodity Exchange Act (**CEA**) Sections 8a(2) or (3). Alternatively, the CFTC should narrow the application of the proposed statutory disqualification requirements to ensure that claimants are afforded at least the same process as registrants.

We discuss each of our recommendations below. We also make several recommendations in Section V of this letter to address other areas of CFTC regulation affecting CPOs and CTAs.

I. The CFTC Should Follow Treasury's Recommendations that it Eliminate Duplicative Registration Requirements

Treatment of SEC-Registered Advisers to Registered Funds. 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 registered investment companies (registered funds) claiming exclusion under Regulation 4.5, even if they

were already registered with the SEC.[8] These additional conditions were neither mandated by the Dodd-Frank Act (**Dodd-Frank**) nor required for the CFTC to be able to fulfill its mandate to regulate commodity interest markets. The Treasury Report noted that, because of these 2012 changes, "the CFTC's expanded jurisdiction now captures many funds that do not resemble, or compete with, traditional commodity pools."[9] This is the case "[e]ven though the CFTC presented the de facto commodity pool issue as one of the principal reasons for its 2012 amendments."[10] The Treasury Report noted these funds and their advisers must comply with both the SEC's regulatory regime and the separate regime administered by the CFTC and the National Futures Association (**NFA**), including requirements for disclosure, shareholder reports, financial statements, recordkeeping, and periodic reports under the CEA. Although the CFTC provided limited relief to entities subject to dual registration and regulation, registered funds and their advisers must still demonstrate compliance with the onerous conditions of the relief.[11]

Treatment of SEC-Registered Advisers to Private Funds. Prior to the CFTC's 2012 repeal of former Regulation 4.13(a)(4), the provision provided an exemption for CPOs of private funds offered only to certain highly sophisticated investors. With regard to private fund advisers, the Treasury Report discussed Dodd-Frank's provisions that "SEC-registered investment advisers are not required to register with the CFTC as CTAs if they are not advising commodity pools engaged primarily in trading commodity interests. Conversely, a CFTC-registered CTA is not required to register with the SEC as an investment adviser, unless its predominant business is giving securities-related advice." However, Treasury noted that Dodd-Frank "did not include similar provisions designed to prevent dual registration requirements for CPOs."[12] It noted that in the 2012 rulemaking, the CFTC rejected requests to apply the same rationale to, and provide a limited exemption from, the CPO registration requirement for SEC-registered investment advisers that are not primarily engaged in trading commodity interests, finding that dual registration was "not irreconcilable" with Dodd-Frank. However, as the Treasury Report pointed out, "[t]he CFTC provided no analysis of why SEC regulation of investment advisers was inadequate and merely responded that 'regulation is necessary to ensure a well-functioning market and to provide investor protection.'"[13]

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[8] *See* Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012).

[9] Treasury Report at 46.

[10] *Id.*

[11] *Id*. *See* Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 78 Fed. Reg. 52308 (Aug. 22, 2013).

[12] Treasury Report at 47 (footnotes omitted.)

[13] *Id*.

To address this unnecessary duplication for SEC-registered advisers of both registered fund and private funds, the Treasury Report recommended the three steps below.[14] These recommendations are consistent with longstanding IAA recommendations to the CFTC, and we urge the Commission to implement them:[15]

Regulation 4.5. "The CFTC should amend its rules so that an investment company registered with the SEC and its adviser are exempt from dual registration and regulation by the CFTC as a CPO. To address concerns of de facto commodity pools operating without sufficient oversight, the CFTC and the SEC should work together to identify a single regulator for these entities, with the goal that oversight of these entities will either remain with the SEC or be transferred to the CFTC and NFA."
Information Sharing. "The CFTC and the SEC should cooperate to share information provided by their respective regulated entities so that disclosures made to one agency can address the information needs of the other agency to monitor the markets for securities and derivatives transactions."
Former Regulation 4.13(a)(4). "The CFTC should amend its rules to exempt private funds and their advisers from registration as CPOs if the advisers are subject to regulatory oversight by the SEC. Treasury also recommends that the CFTC review and determine what, if any, exemptions should be made available for SEC-exempt reporting advisers."

The burdens of overlapping and duplicative regulatory regimes on dually-registered CPOs and CTAs are substantial. While we appreciate the CFTC's efforts to reduce some of these burdens as described in the Proposal, we believe that the Commission should provide more comprehensive relief to these entities. We thus respectfully request that the CFTC recognize the current and long-standing investor protection role of the SEC and amend CFTC registration rules for SEC-registered advisers to avoid duplicative regulation. We also urge the agencies to continue to work together to adopt rule changes or provide other relief to address regulations on investment advisers registered with the SEC that impose costs without commensurate benefit. We would welcome the opportunity to assist the CFTC to appropriately define *de facto commodity pools* and identify when an SEC-registered investment adviser is *primarily* engaged in trading commodity interests.

[14] Treasury Report at 154. Although the Proposal intends to create a new Regulation 4.13(a)(4), we do not believe that should prevent the CFTC from reinstating former Regulation 4.13(a)(4) as it existed prior to the 2012 amendments.

[15] *See* 2017 Letter; 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; 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.

II. The CFTC Should Revise Proposed Regulation 4.13(a)(4) to Eliminate Outdated Conditions from Advisory 18-96

The CFTC proposes a new exemption from CPO registration in Regulation 4.13(a)(4) for CPOs of offshore pools that meet five proposed conditions: (i) the pool is, and will remain, organized and operated outside of the United States; (ii) the pool will not hold meetings or conduct administrative activities within the United States; (iii) no shareholder of or other participant in the pool is or will be a U.S. person; (iv) the pool will not receive, hold, or invest any capital directly or indirectly contributed from sources within the United States; and (v) the person, the pool, and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation in the pool from U.S. persons. The exemption would be available to both exempt and registered CPOs, on a pool-by-pool basis, with regard to offshore pools meeting the conditions. The conditions of proposed Regulation 4.13(a)(4) are adapted from CFTC Advisory 18-96, which provided relief to registered CPOs only, as opposed to unregistered or exempt CPOs, from the disclosure, reporting, and certain recordkeeping requirements with respect to certain offshore pools.[16]

We appreciate the CFTC's efforts to use staff guidance as a basis to create an additional exemption from CPO registration for non-U.S. persons with respect to their commodity pool operations "that have a limited nexus with markets or participants within the Commission's jurisdiction."[17] However, while the provisions of Advisory 18-96 may have been relevant when adopted over 20 years ago, not all of the conditions of the Advisory are relevant today as conditions for a new exemption from registration. Therefore, we recommend the following revisions:

Source of Capital (Condition (iv)). We recommend eliminating the condition that would require a CPO to determine the investors' direct or indirect sources of capital. As a practical matter, this could call into question the availability of the exemption in many factual scenarios, such as if an investor who is a lifelong resident outside the United States wired funds to the pool from an account that the investor held in the United States. This source of capital condition is inconsistent with simplifying and streamlining regulations and with the realities of today's global business environment, and should thus be removed.

Limitation on Administrative Activities in the United States (Condition (ii)). We recommend eliminating the condition that no administrative activities be conducted in the United States. Given the increasingly global nature of business operations today, conducting some administrative activities within the United States should not make the exemption unavailable.

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[16] 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," reprinted in [1994-1996 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶26,659 (April 11, 1996).

[17] 83 Fed. Reg. at 52906.

This requirement in the Advisory was adopted to reflect the relevant tax law at the time, which is no longer applicable.[18] Accordingly, this condition should not be required to claim the relief.

"Reasonable Belief" Standard to Determine Exemption Eligibility. The CFTC should confirm that, as with other CFTC exemptions, proposed Regulation 4.13(a)(4) includes a "reasonable belief" that the investor is eligible at the time of investment. Former Regulation 4.13(a)(4) – which, as noted, the CFTC repealed in 2012 – provided that a CPO claiming the exemption from registration could do so if it reasonably believed, at the time of investment, that all pool participants met the criteria needed for the CPO to claim the exemption. Regulations 4.13(a)(3)(iii) and 4.7(a)(2) have similar reasonable belief provisions regarding investor status necessary for a CPO to claim registration relief, and we believe such a provision is appropriate here too.[19]

The CFTC should also confirm that proposed Regulation 4.13(a)(4), if adopted, will require testing of non-U.S. status only at the time of investment and not on an ongoing basis. A CPO claiming an exemption thereunder should not be required to continuously monitor the status of its pool participants at all times, since this would impose an undue if not impossible compliance burden on CPOs claiming the proposed exemption and is unnecessary to fulfill the purposes of the exemption. If the investor decides to invest when it is a non-U.S. person, the fact that the person may re-locate to the United States at a later date should not make the CPO ineligible to maintain the registration exemption.[20]

The CFTC should also confirm that the exemption under proposed Regulation 4.13(a)(4) would be available if the investor acquires its interests or shares in the pool via an offshore secondary market transaction consistent with the provisions of SEC Regulation S,[21] as long as the transaction does not involve the issuer of such securities, or its agents, affiliates, or

[18] The Taxpayer Relief Act of 1997 included a provision to simplify and reduce administrative costs for offshore investment vehicles. Since January 1, 1998, offshore investment vehicles with U.S. investment managers are exempt from federal income taxation for securities and commodity interest trading profits even if their trading activities and "principal office" and related administrative functions are conducted in the United States. It is no longer necessary to maintain books and records outside of the United States to qualify for the relevant tax exemption.

[19] The Regulation 4.13(a)(3)(iii) relief is for pools only trading a *de minimis* amount of commodity interests, and the Regulation 4.7(a)(2) relief is for pools only being offered to "qualified eligible persons."

[20] We reiterate a recommendation in our 2017 Letter to amend Regulation 3.10(c)(3) to clarify that eligibility for the exemptions from registration as a CPO and CTA are determined at the time of initial investment in a pool or entering into an agreement to provide commodity interest trading advice. For the same reasons that we discuss above in connection with clarifications to proposed new Regulation 4.13(a)(4), a CPO or CTA claiming an exemption under Regulation 3.10(c)(3) should not be required to continuously monitor the status of its pool participants at all times. Such a requirement would impose an undue if not impossible compliance burden on persons claiming the exemption.

[21] 17 C.F.R. §§230.901-230.905 and preliminary notes.

intermediaries. This treatment would be consistent with relief provided by the SEC and is needed for exchange-traded funds or where the issuer has no control over secondary market purchasers.

Disclosure. While we agree that appropriate disclosure is important, we do not believe it is necessary for CPOs claiming that exemption to separately disclose the exemption.[22] We recommend that CPOs be permitted to inform investors about their reliance on the exemption, consistent with other regulatory disclosure requirements and antifraud proscriptions, but without mandating specific disclosure.

Time Permitted to Convert from other Exemptions, if Applicable. The CFTC has proposed a 30-day conversion period, if a firm choses to convert in reliance on proposed Regulation 4.13(a)(4).[23] We recommend that the Commission provide a longer phase-in period to provide more flexibility and be less burdensome. We note that the CFTC provided a substantial phase-in period (over ten months) after it repealed former Regulation 4.13(a)(4) in 2012.

III. The CFTC Should Clarify that CPOs May Rely on Both Regulation 3.10(c)(3) and Regulation 4.13(a)(3)

The CFTC requests comment on whether the interaction between proposed Regulation 4.13(a)(4) and Regulation 3.10(c)(3)(i) is understood.[24] We believe that this proposed interaction is not well understood, and we are concerned that the CFTC's discussion of the interplay of these two exemptions is inconsistent with current industry understanding.

The CFTC has long permitted the stacking of exemptions. Consistent with this, it appears that, under the Proposal, a CPO would be able to claim an exemption from registration for certain pools operated in accordance with Regulation 4.13(a)(3) – exemption for certain private fund managers under certain conditions – and, at the same time, claim an exemption for other pools operated in accordance with proposed Regulation 4.13(a)(4) – exemption for operators of non-U.S. pools.[25] However, the text in the release seems to disallow stacking of Regulation 3.10(c)(3) with proposed Regulation 4.13(a)(4).[26]

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[22] 83 Fed. Reg. at 52916, Question 1.

[23] *Id*. at Question 4.

[24] 83 Fed. Reg. at 52916. Regulation 3.10(c)(i).

[25] 83 Fed. Reg. at 52921.

[26] *Id*. at 52906, 52914 ("the person could freely rely on § 3.10(c)(3)(i), which is self-executing; such reliance [on 3.10(c)(3)(i)] would no longer be permitted, however, once the person is required to register or claim a CPO exemption with respect to a commodity pool that is marketed to U.S. persons, that contains funds belonging to U.S. persons, or that is otherwise operated in the U.S., its territories, or possessions.").

This is inconsistent with how the CFTC treats other exemptions, is contrary to established industry practice, and is not justified by any investor- or market-protection rationale. The same logic that applies to the stacking of the Regulation 4.13(a)(3) and proposed Regulation 4.13(a)(4) exemptions applies equally to Regulation 3.10(c)(3) pools, and we do not believe that the CFTC has provided any justification for treating them differently. We therefore urge the CFTC to confirm that, as with proposed Regulation 4.13(a)(4), a CPO may also claim an exemption from registration for some pools operated under Regulation 3.10(c)(3) *and* other pools operated under Regulation 4.13(a)(3).[27] As the CFTC notes in the Proposal, a CPO should not: "be required to choose between the potentially more costly options of having such [Regulation 4.13(a)(3)] pools operated by an affiliate registered with the CFTC or otherwise eligible for other relief, operating all pools (regardless of location) consistent with another registration exemption, or registering as a CPO and listing all operated pools with the Commission."[28]

There are also important jurisdictional reasons for the CFTC to show restraint in this regard. The relationship between an intermediary and its investors, if both are located outside of the United States, should be left to the regulatory authorities in those other jurisdictions. If the intermediary wants to operate a pool for which it can claim an exemption under Regulation 4.13(a)(3), the intermediary should be permitted to do so without losing its exemption for separate pools that have no U.S. investors. The CFTC has and retains full authority to oversee trading on markets located in the United States, through market surveillance, position limits, and large trader reports, which are applicable to any person trading on U.S. markets, no matter where the person is located.[29] We believe that the recent White Paper authored by Chairman Giancarlo supports this approach.[30]

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[27] This will also align CPO treatment with CTA treatment. For instance, Section 4m(1) of the CEA provides a statutory exemption from CTA registration for any CTA "who, during the course of the preceding twelve months, has not furnished commodity trading advice to more than fifteen persons and who does not hold himself out generally to the public as a commodity trading advisor." Under Section 4m(1), a non-U.S. CTA may separately claim an exemption under Regulation 3.10(c)(3) even if it has up to 15 advisees that are U.S. resident during a 12-month period, provided that the non-U.S. CTA does not hold itself out generally to the public as a CTA. The CFTC has previously provided for the use of different CTA exemptions for different clients. *See* 52 Fed. Reg. 41975, 41978 (Nov. 2, 1987) ("depending on the nature of its activities a CTA may be exempt from registration as such under either or both" Regulation 4.14(a)(8) and Section 4m(l); CFTC Staff Letter 05-13 (Aug. 15, 2005) ("The Division sees no reason why the Commission's reasoning with respect to simultaneous reliance upon Section 4m(1) and Rule 4.14(a)(8) should not also apply where a CTA seeks to rely simultaneously upon Section 4m(3) and Rule 4.14(a)(8)").

[28] *Id.* at 52921.

[29] We also separately recommend that the CFTC codify previous staff letters and proposals to amend Regulation 3.10(c)(3) related to the requirement to submit transactions for clearing and the treatment of certain international financial institutions. *See* CFTC Staff Letters 15-37 (June 4, 2015) and 16-08 (Feb. 12, 2016); Exemption From Registration for Certain Foreign Persons (Proposed Rule), 81 Fed. Reg. 51824 (Aug. 5, 2016).

[30] Cross-Border Swaps Regulations Version 2.0, A Risk-Based Approach with Deference to Comparable Non-U.S. Regulation (Oct. 1, 2018) at 20, available at https://www.cftc.gov/sites/default/files/2018-10/Whitepaper_CBSR100118_0.pdf (noting that Section 2(i) of the CEA provides that the CFTC's swaps authority

IV. The CFTC Should Exclude SEC-Registered Investment Advisers From the Proposed Statutory Disqualifications in Regulation 4.13(a)(6) or Alternatively Narrow the Scope of the Statutory Disqualifications

The CFTC proposes to condition all of the CPO registration exemptions in Regulation 4.13(a) – other than the family office exemption – on the operator and its principals not being subject to the statutory disqualifications under either Section 8a(2) or Section 8a(3) of the CEA.[31] This condition, which would be codified at proposed Regulation 4.13(a)(6), would be brought over from Advisory 18-96 but would extend to additional exemptions beyond that covered by the Advisory. Proposed Regulation 4.13(a)(6) thus goes well beyond codifying existing relief, and, instead of simplifying the regulation of or reducing the burdens imposed on CPOs, it would add substantial new burdens to CPOs of exempt pools.

Moreover, while the IAA supports the CFTC's investor protection goals, we do not believe the provisions add any additional protections for clients or prospective clients of SEC-registered investment advisers and ask that SEC-registered advisers be excluded from the proposed regulation. To the extent that the CFTC determines to apply proposed Regulation 4.13(a)(6) to SEC-registered advisers, however, we recommend that the CFTC narrow the applicable statutory disqualifications to better reflect the differences between a claim of exemption and an application for registration and to ensure that claimants are afforded at least the same process as registrants.

Regulation 4.13(a)(6) Should Not Apply to SEC-Registered Investment Advisers. SEC-registered investment advisers are already subject to a statutory disqualification regime under the Advisers Act, and advisers to SEC-registered investment companies are subject to additional disqualification provisions under the Investment Company Act. An SEC-registered investment adviser claiming a CPO exemption would thus already have been screened by the SEC as a condition of registration and be subject to ongoing disclosure obligations with respect to statutory disqualifications.[32] We thus do not believe it is necessary for the CFTC to impose additional statutory disqualification requirements.

"shall not apply" to activities outside the United States unless those activities "have a direct and significant connection with activities in, or effect on, commerce of the United States…Section 2(i) of the CEA imposes a significant limitation on the CFTC's extraterritorial authority).

[31] The condition would not apply if the disqualification arises from a matter that was previously disclosed in connection with a previous registration application where the registration was granted, or where the disqualification was disclosed more than thirty days prior to the claim of the exemption.

[32] *See* Section 203(e) and (f) of the Advisers Act and Section 9(a) of the Investment Company Act. *See* also Item 11 of Form ADV Part 1A and Item 9 of Form ADV Part 2A, which require disclosure of financial misconduct.

If Regulation 4.13(a)(6) Applies to SEC-Registered Advisers, it's Scope and Application Should be Narrowed. To the extent that the Commission determines to adopt Regulation 4.13(a)(6) and does not exclude SEC-registered advisers from its provisions, we make the following recommendations:

Remove References to Section 8a(3). Section 8a(3) permits the CFTC to refuse or condition (but not revoke or suspend) registration upon a finding, after a hearing, that an applicant for registration has engaged in certain misconduct. The conduct identified in Section 8a(3) is broad in scope and time-frame and goes far beyond fraud. For instance, Sections 8a(3)(B), (E), and (M) cover certain misdemeanor convictions no matter how old, settlements with the SEC for any violation of the securities laws even if there was no impact on the person's securities registration, and the vaguely stated "other good cause."[33] We do not believe, therefore, that Section 8a(3) captures conduct that should be disqualifying for an exemption. Accordingly, we ask that the CFTC remove the reference to Section 8a(3) in Regulation 4.13(a)(6). At a minimum, the CFTC should (i) exclude Section 8a(3)(B) if there is no impact on securities registration; (ii) eliminate Section 8a(3)(M); and (iii) limit the Section 8a(3) matters to matters that are no more than 10 years old (from the date of the event).[34]

Hearing or Other Process. Under Section 8a(3), registration may not be denied without a hearing. In addition, in accordance with CFTC guidance, the NFA also provides a hearing in the context of Section 8a(2) disqualifications. Proposed Regulation 4.13(a)(6) does not provide for a hearing to resolve any potential disqualification. Instead, it proposes to impose an absolute bar on claiming the exemption. If persons with a disqualification are allowed to be or remain registered after a hearing, then surely it would be appropriate to allow persons claiming an exemption (with presumably less commodity interest activity) to have a hearing or other process in order to resolve any issues.[35]

Knowledge Standard. Further, similar to the "bad actor" disqualifications in SEC Rule 506(d),[36] the disqualifications should not apply if the entity did not know, and, in the exercise of reasonable care, could not have known that a disqualification exists.

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[33] We understand that the NFA routinely clears these SEC settlements, so it would not be appropriate to statutorily disqualify a person who has entered into such a settlement from claiming an exemption.

[34] A 10-year limitation would be consistent with the disciplinary history disclosure requirements in Item 11 of Form ADV Part 1A.

[35] The "bad actor" disqualifications in Rule 506(d) of Regulation D under the Securities Act of 1933 (**Securities Act**) allow the SEC, upon a showing of good cause, to have the disqualification not apply. The rule also allows the court or regulatory authority that enters the relevant order, judgment or decree to provide that the disqualification should not apply. *See* SEC Rule 506(d)(2)(ii) and (iii).

[36] Rule 506(d)(2)(iv) of Regulation D.

Compliance Date. The new regulation would extend to persons who previously claimed any Regulation 4.13(a) exemption. These persons are not currently statutorily disqualified from claiming any such exemption. Should the CFTC determine to disqualify all such persons, we urge it to include a delayed compliance date of at least one year[37] so that firms could address any disqualifications that could be a bar to claiming the exemption before the exemption is revoked. If an exemption were to be lost, an entity would need appropriate time to register as a CPO and for its associated persons to take and pass the relevant examinations. Consequently, an adequate compliance period is reasonable and appropriate, and we request that the CFTC make it clear that a person would not be subject to an enforcement action for being in violation of registration requirements during this compliance period.

Finally, because a registered CPO may also claim an exemption in Regulation 4.13(a), we agree that if proposed Regulation 4.13(a)(6) is adopted and SEC-registered investment advisers are not excluded, there should be a carve-out if the matter was disclosed in connection with the previously-granted registration.

V. Additional Recommendations

In addition to comments on proposed Regulations 4.13(a)(4) and (a)(6), we provide the following recommendations.

Proposed Amendment to the De Minimis Exemption in Regulation 4.13(a)(3): U.S. Person Definition. The Proposal would amend the *de minimis* commodity pool exemption in Regulation 4.13(a)(3) to explicitly permit non-U.S. person participants, regardless of their financial sophistication. The CFTC recognizes that market participants, relying on CFTC Staff Letter 04–13,[38] are generally not considering whether non-U.S. person participants meet one of the investor sophistication criteria listed in Regulation 4.13(a)(3)(iii). The CFTC appears to be using the definition of "non-U.S. person" as used in Regulation 4.7(a)(1)(iv). We recommend that the CFTC clarify the term "non-U.S. person" for these purposes, and use the definition either in Regulation 4.7(a)(1)(iv)[39] or from Regulation S of the Securities Act.[40] Having a clear definition would help prevent issues that could arise with respect to existing pools being operated in accordance with Regulation 4.13(a)(3) where the definition of non-U.S. person is not clear. We

[37] If these matters will be resolved by the Commission itself, or via delegated authority to the staff, a period of more than six months may be required. Accordingly, the CFTC could consider whether to delegate this function to the NFA.

[38] CFTC Staff Letter 04-13 (April 14, 2004).

[39] *See* 83 Fed. Reg. at 52907 & n.44.

[40] We also recommend the CFTC clarify that its view is consistent with the SEC's view under Regulation S that a person is a non-U.S. person if he or she makes a new contribution after moving to the U.S. where the decision to reinvest dividends was made when outside of the U.S.

also recommend that if the CFTC adopts proposed Regulation 4.13(a)(4), it should clarify the term "U.S. person" in that context as well.

CPO Recordkeeping Relief. As the CFTC considers certain amendments to Regulation 4.23 related to recordkeeping, we strongly recommend that Regulation 4.23(b)(2) with regard to certifications by unregulated third-party recordkeepers be deleted.[41] This subparagraph requires that a CPO claiming relief that would allow it to keep records other than at its main business office file an attestation with the NFA acknowledging that the records will be kept in accordance with Regulation 1.31 and agreeing that the records will be open to inspection by the CFTC and certain others. CPOs have found it exceedingly difficult to obtain a certification from unregulated third-party recordkeepers. More importantly, this requirement, does not apply to other categories of CFTC registrants, such as CTAs and FCMs, and there is no compelling reason that it should apply to CPOs.[42]

We also suggest deleting the reference to Regulation 4.21(b) in proposed Regulation 4.23(a)(1)(iii) as Regulation 4.21(b) has been rescinded.

CTA Exemption in Regulation 4.14(a)(8) - Consistency with Former Regulation 4.13(a)(4). CTAs are exempt from registration as such if they advise certain types of pools.[43] We request that the CFTC add proposed Regulation 4.13(a)(4) to this list of pools, if adopted, so that they may be advised by an exempt CTA.

Codification of the Staff's Delegation Relief (Regulation 4.5). We appreciate that the CFTC proposes to codify in Regulation 4.5 the relief that the investment adviser is the CPO of a registered fund or business development company. However, we also recommend that the CFTC (i) codify the delegation relief for operators of private funds, particularly the relief contained in

[41] Regulation 4.23(b)(2) requires a pool operator to file a statement, with the NFA, from an entity that will be keeping required books and records for the pool operator where the entity must: (i) acknowledge that the pool operator intends that the entity keep and maintain the required pool books and records; (ii) agree to keep and maintain the records in accordance with Regulation 1.31; and (iii) agree to keep the books and records open to inspection by the CFTC or the U.S. Department of Justice under Regulation 1.31 and to make them available to pool participants.

[42] Although we urge the CFTC to treat CPOs and CTAs like other registrants regarding where they keep their records, if the CFTC decides not to do so, we ask that, at a minimum, it seek to codify the recordkeeping relief provided by Staff Letters 14-114 (CPOs) and 17-24 (CTAs). In addition, we suggest that the CFTC remove the condition relating to U.S. federal income taxation from the proposed amendment to Regulation 4.23(c). This proposed amendment would permit registered CPOs with a main business office in the United States operating a pool that has its main business office outside of the United States to keep records at the pool's main business office. Since this condition is no longer relevant, it should be removed. *See* supra n.18.

[43] Regulation 4.14(a)(8) provides an exemption from registration as a CTA to persons that are SEC- or state-registered investment advisers, subject to certain conditions, one of which is that the CTA's commodity interest trading advice is solely incidental to its business of providing securities or other investment advice advice to certain types of collective investment vehicles listed in paragraph (a)(8)(i).

Staff Letters 14-69 and 14-126,[44] and (ii) delete the reference to vacated Regulation 151.5 in the release accompanying the Proposal (footnote 135). Although the CFTC states that it will fix this aspect of the regulations when it adopts new position limits, it is confusing to continue to refer to a vacated regulation.

Staff Letters Relating to CPOs and CTAs. We reiterate comments in our 2017 Letter to codify or address letters that the CFTC staff has issued to CPOs and CTAs in recent years. These letters that were issued in response to numerous inquiries have broad application beyond a single firm. We continue to believe it is appropriate and useful to the industry and legal counsel for the CFTC to codify these letters, or at a minimum streamline and synthesize them in guidance (*e.g.*, in FAQs). This will help persons that are new to the commodity interest industry or are newly subject to the CEA and regulations thereunder to access requirements and exemptions by reviewing Part 4 regulations instead of locating guidance from staff letters. In this regard, we recommend the CFTC address the following staff letters:

- 13-51 - Consolidated financial reports for controlled foreign corporations
- 14-112 - Consolidated financial reports for parent pools and trading subsidiaries
- 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 - Recordkeeping relief for CTAs
- 17-36 - Transaction-level requirements for non-U.S. swap dealers and
- 17-37 - Position aggregation requirements

The substantive decisions and underlying rationales are included in the letters. Some of these letters are the product of extensive discussions between industry representatives and CFTC staff.

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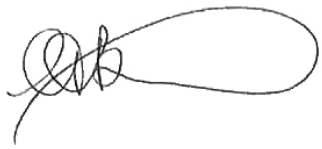
[44] The IAA also believes that the relief recently provided by the DSIO staff, in Staff Letters 17-38, 17-39 and 17-40, to eliminate the common control requirement between the delegating CPO and the delegated CPO, should also be made available generally and codified in the CFTC's Part 4 regulations.

The IAA strongly supports the CFTC's efforts to streamline regulation and reduce the costs and burdens of the CFTC's regulations on CPOs and CTAs. We appreciate the opportunity to offer the views of our members on the Proposal and would be happy to discuss our comments or concerns if that would be helpful. If you have any questions, please do not hesitate to contact the undersigned at 202.293.4222.

Respectfully Submitted,



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