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 December 11, 2023

Mr. Christopher Kirkpatrick

Secretary of the Commission

Commodity Futures Trading Commission

Three Lafayette Centre

1155 21st Street, N.W.

Washington, D.C. 20581

Re: RIN 3038-AF25: Updating the Qualified Eligible Person Definition; Adding Minimum Disclosure Requirements for Pools and Trading Programs; Permitting Monthly Account Statements for Funds of Funds; Technical Amendments

Dear Mr. Kirkpatrick:

 National Futures Association (NFA) appreciates the opportunity to comment on the Commodity Futures Trading Commission's (CFTC or Commission) proposed amendments regarding certain requirements related to commodity pools and managed account programs operated by registered commodity pools operators (CPOs) and commodity trading advisors (CTAs) pursuant to CFTC Regulation 4.7's exemption. Among other things, the proposed changes to Regulation 4.7 would increase the financial thresholds for the Portfolio Requirement in the Qualified Eligible Person (QEP) definition and impose new disclosure requirements related to 4.7 exempt commodity pools and managed account programs. Additionally, the proposal would establish a process for CPOs to elect an alternative account statement schedule for certain 4.7 pools, which is consistent with longstanding Commission issued exemptive letters.

The Commission's notice of proposed rulemaking (NPR) notes that Regulation 4.7's framework has not been materially reviewed since its adoption in 1992. NFA therefore supports the Commission's review of Regulation 4.7's exemptive framework to ensure that it remains fit for purpose and continues to provide appropriate customer protections. As the Commission notes in the preamble to its proposed changes, the 4.7 exemption afforded to registered CPOs and CTAs for commodity pools and managed account programs offered to QEPs is widely used.

In reviewing the Commission's proposed changes to the Portfolio Requirement's thresholds within the QEP definition and the disclosure requirements, NFA believes that they may significantly alter the current regulatory structure applicable to Regulation 4.7 exempt pools and managed account programs. While CPOs and CTAs operating 4.7 exempt pools and managed account programs have not been entirely without regulatory issues over the past thirty years, they also have not been a significant regulatory problem considering the substantial number of CPOs and CTAs offering these exempt pools and managed account programs, which combined number in the thousands. Therefore, NFA strongly encourages the Commission to carefully consider industry and investor comments as to whether the proposed changes are necessary to address a material regulatory problem.

As noted above, NFA supports the Commission's review of Regulation 4.7's exemptive framework to ensure that appropriate protections are in place for these offerings' institutional and sophisticated customers. We have concerns, however, regarding the methodology used to raise the Portfolio Requirement's financial standards required for certain persons, including natural persons, to meet the QEP definition in the future and the impact of the proposed prescriptive disclosure requirements on these pools' and programs' operating costs, which may be passed on ultimately to their participants and clients. Further, those investors that do not meet the QEP requirements will have fewer investment choices going forward.

*The QEP Definition*. NFA recognizes that the financial thresholds required for persons to meet the QEP definition has remained unchanged since 1992. NFA therefore supports reviewing these thresholds to determine if they remain appropriate. NFA strongly recommends, however, that the Commission utilize a slightly different methodology to do so, which we believe is more consistent with the Commission's original rationale for adopting Regulation 4.7's qualification requirements.

Specifically, as the Commission notes in the current release's preamble, in 1992 the Commission adopted a definition for QEPs that was designed to generally include persons who qualify as accredited investors under SEC Regulation D applicable to private securities offerings exempt from registration under the Securities Act. Additionally, the Commission required certain persons[[1]](#footnote-1), including natural persons, to satisfy additional financial qualification requirements—referred to as the Portfolio Requirement—to be QEPs. [[2]](#footnote-2)

The Commission's 1992 proposal stated that it used the accredited investor definition as a "foundation" to define categories of QEPs, and this definition provided objective indicia for determining that persons possess the investment expertise and experience necessary to understand the risks involved with these investments and the financial resources to withstand the risks. The Portfolio Requirement applicable to certain persons was designed to be a further indication of a person's degree of business acumen, resources and understanding of the risks associated with investing in commodity interest products.

 The Commission's current proposal seeks to double the Portfolio Requirement's financial thresholds and uses inflation since 1992 to determine the increased thresholds. If one of Regulation 4.7's objectives is for the CFTC to coordinate its rules with those of the SEC applicable to private offerings exempt from registration, then NFA is concerned that the proposed increase to the Portfolio Requirement's thresholds may have the opposite effect for the categories of persons identified in CFTC Regulation 4.7(a)(3). Specifically, in our view, any significant change to the Portfolio Requirement's financial standards may move certain persons that may desire to participate in a 4.7 pool or managed account program further away from the SEC's current accredited investor qualification standards for private offerings.

NFA recognizes that the SEC's accredited investor financial standards have remain unchanged since the Commission adopted Regulation 4.7's exemption in 1992. If the Commission believes that the current Regulation 4.7 qualification standards should be updated, NFA strongly recommends that the methodology to do so should first focus on a "foundation" of the QEP definition—the SEC's accredited investor definition. Specifically, NFA suggests that the Commission work with the SEC to review the accredited investor definition and determine if any changes are appropriate to that definition.

The SEC appeared to last make changes to the accredited investor definition in August 2020. Section 413(b)(2)(A) of the Dodd-Frank Wall Street Reform and Consumer Protection Act directs the SEC to review the accredited investor definition as it relates to natural persons every four years to determine whether the definition should be modified or adjusted for the protection of investors, in the public interest and in light of the economy. Given this Congressional directive, it appears that this may be an opportune time for the CFTC and SEC to jointly determine if the accredited investor definition's financial thresholds should be increased, particularly for natural persons. Afterwards, the CFTC should revisit whether any changes to the Portfolio Requirement's financial thresholds are necessary to achieve investor protection. If the CFTC determines to make a change, they should also ensure that any increase is consistent with the CFTC's 1992 stated objective to coordinate its rules with those of the SEC applicable to private offerings exempt from registration so that most qualifying offers may operate under an exemption from otherwise applicable requirements of both the Commodity Exchange Act and the securities laws.

*New Disclosure Requirements*. Regulation 4.7 is premised, in part, on the belief that QEPs can identify and obtain information they deem necessary to evaluate the investment offered and therefore prescriptive disclosure rules are unnecessary. The CFTC's rationale underlying the proposed mandated disclosures appears to be that an absence of minimal disclosure obligations and an ongoing requirement to keep them accurate fails to ensure that all QEPs have the leverage and resources to make informed investment decisions and closely monitor and understand their investments. As the Commission noted in adopting the 4.7 exemption in 1992, Regulation 4.7 does not preclude participants in an exempt pool from obtaining the information they require or excuse CPOs and CTAs from making such information available. Over the years, NFA has received few complaints from 4.7 exempt pool participants and managed account program clients that CPOs and CTAs have not provided them with information upon request.

NFA encourages the Commission to carefully evaluate the increased operational costs associated with requiring CPOs and CTAs offering 4.7 pools and managed account programs to provide the proposed additional disclosures and updating (either annually or sooner for material changes) expanded disclosure materials. These costs will almost certainly be passed on to the pools' participants and managed account programs' clients. Moreover, as the Commission notes in the proposal's preamble, the number of 4.7 pools continue to grow as a percentage of overall listed commodity pools. However, over the last 5 years, NFA has seen a meaningful decline in the overall number of CPO and CTA Members, as well as the number of CPOs and CTAs offering 4.7 products[[3]](#footnote-3). NFA is concerned that the additional costs associated with providing the mandated disclosure requirements may result in a further reduction of (and a barrier to entry for) registered CPOs and CTAs, and thus limit the investment options available to investors.

Moreover, we are concerned that the Commission's overall new proposed framework for Regulation 4.7 and its associated costs may be an impetus for currently registered CPOs to either cease using commodity interest products and deregister or if they have qualifying participants and a *de minimis* amount of commodity interest activity to file an exemption from CFTC registration pursuant to CFTC Regulation 4.13(a)(3). While the materiality of this potentiality is uncertain because it depends largely on registered CPOs' business calculations and trading decisions, we believe an undesirable outcome of the current proposed changes may be for CPOs to file a 4.13 exemption thereby falling outside the CFTC's and NFA's regulatory oversight, absent the CFTC's anti-fraud jurisdiction.[[4]](#footnote-4)

NFA also has a specific concern regarding the proposed past performance disclosures for 4.7 CTAs. The preamble seems to suggest that 4.7 CTAs only need to provide performance for their 4.7 trading programs, however, the rule text indicates 4.7 CTAs would have to provide performance for all their trading programs, including non-4.7 programs.  NFA requests that the Commission clarify the breadth of the disclosure requirement for 4.7 CTAs.  NFA is concerned however, that both a performance reporting requirement that requires 4.7 CTAs to report performance of all trading programs or even a more limited requirement to disclose all 4.7 trading programs is overly broad because it is our understanding that some larger 4.7 CTAs have bespoke or tailored programs for each of their clients.  Requiring that 4.7 CTAs disclose the performance of all their 4.7 trading programs to QEP clients would require 4.7 CTAs to disclose a significant amount of performance information that may not be relevant to a prospective or current client.  NFA recommends that the performance disclosure be limited to the performance of the program being offered to the prospective QEP client.

Finally, NFA supports the Commission's proposal to permit CPOs of 4.7 pools that are Funds of Funds to distribute monthly account statements within 45 days of month end, provided the CPO notifies a pool's participants. As the Commission notes, CPOs of Funds of Funds generally do not receive the information needed to prepare its account statements in time to meet the current 30-day deadline, which has resulted in the Commission issuing numerous exemptive letters providing relief from this requirement. NFA believes that this amendment will ease the burden on both CPOs operating Funds of Funds and Commission staff, without sacrificing any customer protections.

NFA appreciates the opportunity to comment on the Commission's proposal. If you have any questions concerning this letter, please do not hesitate to contact Kathleen Clapper, Managing Director, Compliance at kclapper@nfa.futures.org or Maria McHenry, Director, Compliance at mmchenry@nfa.futures.org.

 Respectfully submitted,

 

 Carol A. Wooding

 Senior Vice President

General Counsel and Secretary

1. See CFTC Regulation 4.7(a)(3). [↑](#footnote-ref-1)
2. See CFTC Regulation 4.7(a)((1)(v). In 1992, the Commission initially proposed thresholds of $5,000,000 for the Securities Portfolio Test and $1,000,000 for the Initial Margin and Premium Test and later adopted thresholds of $2,000,000 and $200,000, respectively. [↑](#footnote-ref-2)
3. For example, between 2017 and 2022, the number of CPOs and CTAs relying on a 4.7 exemption has each declined over 15%, and the number of 4.7 pools has declined over 6%.

 [↑](#footnote-ref-3)
4. Alternatively, CPOs with pool participants that no longer meet the QEP definition would likely have to convert that pool to a non-exempt pool, which would increase operational and compliance costs that would be passed on to investors. [↑](#footnote-ref-4)