INVESTMENT ADVISER ASSOCIATION

December 11, 2023

Via Electronic Filing

Mr. Christopher Kirkpatrick
Secretary
U.S. Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools: 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 (RIN 3038–AF25)

Dear Mr. Kirkpatrick:

The Investment Adviser Association (**IAA**)[1] appreciates the opportunity to comment on the Commodity Futures Trading Commission's (**Commission's**) proposal to amend Regulation 4.7 (**the Proposal**).[2] Generally, the Proposal would make three main changes to Regulation 4.7: (i) increase the "Portfolio Requirement" monetary thresholds of the "Qualified Eligible Person" (**QEP**) definition; (ii) impose additional disclosure requirements for commodity pool operators (**CPOs**) and commodity trading advisors (**CTAs**) of Regulation 4.7 pools and trading programs; and (iii) allow the monthly distribution of account statements by CPOs of funds of funds that rely on Regulation 4.7 within 45 days of the month-end.

[1] The IAA is the leading organization dedicated to advancing the interests of investment advisers. For more than 85 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $35 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 www.investmentadviser.org.

[2] Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools: 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, 88 Fed. Reg. 70852 (Oct. 12, 2023), available at https://www.cftc.gov/sites/default/files/2023/10/2023-22324a.pdf.

We make the following comments and recommendations:

We do not object to the Commission's updating the financial thresholds of the Portfolio Requirement within the QEP definition. We understand that the Commission has concerns regarding increasingly complex investment products that may be offered to QEPs that are natural persons. We do not object to the Commission's proposal to update the Portfolio Requirement thresholds for QEPs to adjust for inflation. We believe that raising these thresholds should be sufficient to address the Commission's concerns, and that the additional proposed disclosures are not necessary.

The Commission should not impose additional disclosure requirements on CPOs and CTAs of Regulation 4.7 pools and trading programs. Because, in our view, the additional proposed disclosures for CPOs and CTAs will not be necessary for natural persons if the QEP thresholds are increased, and is unwarranted for QEPs that are not subject to the Portfolio Requirement, we strongly oppose these disclosures. We are also concerned that these disclosures will cause unintended negative consequences for CPOs and CTAs in the form of increased regulatory burdens and costs. Investors will also be harmed by having to bear unnecessary additional costs and potentially having fewer offerings in which to invest. The Commission has not shown that the limited potential benefits justify these costs.

As described below, QEP investors already receive robust disclosures and are not requesting or indicating a need for this information. In addition, the Commission has not made clear what problems additional disclosures will solve, and why increasing the QEP thresholds would not adequately address the Commission's concerns.

If, despite our significant concerns, the Commission nonetheless believes that additional disclosures are necessary, we recommend that at a minimum, it exclude certain disclosures that are especially problematic. We also recommend that, before proceeding, the Commission consider the potential benefits of the Securities and Exchange Commission's (**SEC's**) recent Private Fund Quarterly Statement Rule.

Should the Commission identify specific concerns not addressed by our recommendations, such as the rise of novel financial products like digital assets or voluntary carbon credit derivative contracts, it could consider proposing for comment bespoke disclosure guidelines for these products.[3]

The Commission should permit CPOs of Regulation 4.7 pools that are funds of funds to distribute monthly account statements within 45 days of the month-end. We are in favor of the Commission's codification of exemptive letters issued to CPOs of Regulation 4.7 pools that are funds of funds to distribute account statements monthly, within 45 days of the

[3] For example, the Commission could consider guidelines similar to those adopted by the National Futures Association (**NFA**) in the virtual currency context. *See* NFA Interpretive Notice 9073, available at https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9073.

month-end, rather than quarterly, within 30 days, as currently required by Regulation 4.7. Indeed, we encourage the Commission, for clarity, consistency, and regulatory certainty, to codify longstanding staff policy on this issue that exists through staff letters, no-action, and interpretive guidance.

We discuss each of these comments and recommendations below.

A. We do not object to the Commission's updating the financial thresholds of the Portfolio Requirement within the QEP definition

CPOs and CTAs are subject to extensive disclosure, reporting, and recordkeeping requirements with respect to their pools and trading programs under part 4 of the Commission's regulations unless they can rely on an exemption under Regulation 4.7. The Regulation 4.7 exemption is available to CPOs and CTAs that offer their pools or trading programs only to investors that are QEPs. Certain investors, including natural persons, must meet a "Portfolio Requirement" to qualify as a QEP.[4] To meet this requirement, a person must either satisfy the "Securities Portfolio Test"[5] or the "Initial Margin and Premium Test,"[6] or must own a portfolio comprising a combination of the funds or property in both tests.

The Commission is proposing to increase – indeed, the Proposal would double – the thresholds in both of these tests. For the Securities Portfolio Test, the aggregate market value of securities and other investments a person must own to qualify as a QEP would increase from $2 million to $4 million; and for the Initial Margin and Premium Test, the deposit a person must have with an FCM for its own account at any time within the six months before investing in a pool or opening a trading account would increase from $200,000 to $400,000.

We believe that an increase in the monetary thresholds for QEP qualification should be an effective and sufficient way to address the problems identified by the Commission as having arisen due to the rapid pace of innovation in the commodity interest markets. Thus, we do not object to raising the financial thresholds of both tests under the Portfolio Requirement, as proposed. Doing so will allow access to Regulation 4.7 pools and trading programs to investors that the Commission believes have "the experience, acumen, and resources necessary … to be

[4] Other investors, such as qualified purchasers, are not required to satisfy the Portfolio Requirement to qualify as a QEP. We understand that most investors in Regulation 4.7 pools and trading accounts operated by IAA members are qualified purchasers. A qualified purchaser is defined in section 2(a)(51)(A) of the Investment Company Act of 1940.

[5] The Securities Portfolio Test requires a person to own securities and other investments with an aggregate market value of at least $2 million.

[6] The Initial Margin and Premium Test requires a person to have at least $200,000 on deposit with an FCM for the person's own account at any time during the six months preceding either the date of sale to the person of a pool participation or the date the person opens an exempt account with the CTA.

considered QEPs eligible to invest in complex commodity interest products without receiving the full panoply of information otherwise required under part 4."[7]

B. The Commission should not impose additional disclosure requirements on CPOs and CTAs of Regulation 4.7 pools and trading programs

The additional proposed disclosures are unwarranted and unnecessary and should not be adopted

As noted above, Regulation 4.7 provides exemptions to CPOs and CTAs from certain compliance and disclosure requirements for their pools and trading programs, provided their pool participants and advisory clients are restricted to QEPs. Specifically, Regulation 4.7(b)(2) provides exemptions for CPOs with respect to their Regulation 4.7 pools from having to (i) deliver a disclosure document pursuant to Regulation 4.21, (ii) include general disclosures in the disclosure document pursuant to Regulation 4.24, (iii) provide specific performance disclosures pursuant to Regulation 4.25, and (iv) meet the use and amendment requirements of Regulation 4.26. Regulation 4.7(c)(1) similarly provides exemptions for CTAs with respect to their trading programs from having to (i) deliver a disclosure document pursuant to Regulation 4.31, (ii) include general disclosures in the disclosure document pursuant to Regulation 4.34, (iii) provide specific performance disclosures pursuant to Regulation 4.35, and (iv) meet the use and amendment requirements of Regulation 4.36.

The Proposal would significantly narrow the relief currently provided in the Regulation 4.7 exemption by imposing new disclosure requirements on CPOs and CTAs, even though their pools and trading programs are only offered to QEPs. Specifically, the Commission is proposing to amend Regulations 4.7(b)(2)(i) and (ii) to require CPOs to deliver to their prospective pool participants a disclosure document, such as an offering memorandum, that contains descriptions of: (i) the principal risk factors of participating in the pool, including volatility, leverage, liquidity, and counterparty creditworthiness; (ii) the pool's investment program, use of proceeds, and the custodians of such proceeds; (iii) fees and expenses; (iv) conflicts of interest; (v) certain performance disclosures, including past performance of exempt pools; and (vi) a disclosure that the exempt pool's offering memorandum is not filed with the Commission and the Commission has not evaluated the materials.

Similarly, the Commission is proposing to amend Regulation 4.7(c)(1) to require CTAs to deliver to their prospective QEP clients a brochure or other disclosure document that contains descriptions of: (i) certain persons to be identified pursuant to Regulation 4.34(e), including the principals of the CTA, any FCM and/or retail foreign exchange dealer, and any introducing broker; (ii) principal risk factors of the trading program, including volatility, leverage, liquidity, and counterparty creditworthiness; (iii) the CTA's trading program, particularly its approach to offsetting positions; (iv) each fee the CTA will charge to the client; (v) conflicts of interest; (vi) certain performance disclosures, including past performance of exempt accounts; and (vii) a

[7] Proposal at 70854.

disclosure that the CTA's trading program brochure or account document is not filed with the Commission and the Commission has not evaluated the materials.

We oppose the adoption of the Proposal's additional disclosure requirements for CPOs and CTAs of Regulation 4.7 pools and trading programs because they are unnecessary to achieve the Commission's policy goals and will be unduly costly and even counterproductive. We are concerned that the additional burdens and costs could also cause CPOs and CTAs to reduce or limit their offerings, or the additional costs could cause investors to forgo using futures, swaps, or options to hedge risk effectively.[8]

As an initial matter, we understand that IAA members are not aware that prospective or current QEP investors or clients in pools and trading accounts operated by these members, virtually all of which are qualified purchasers not subject to the Portfolio Requirement, have requested or otherwise indicated a need for such additional disclosure. This is not surprising given the robust disclosures that these investors currently receive. The proposed additional disclosures would be duplicative of these offering documents. While we appreciate that CTAs do not distribute offering documents, CTAs that are SEC-registered investment advisers, like CPOs that are SEC-registered investment advisers, already distribute regulatory disclosures to investors, such as Form ADV, making it unnecessary for these CTAs to create new disclosure documents. Moreover, in the case of both CPOs and CTAs, the proposal would result in unnecessary costs that will likely be passed down to QEP investors.

It is also unclear what problems these additional disclosures will address. Prospective QEP clients of CTAs already have the right, under existing regulations, to decline to have their accounts treated as exempt accounts under Regulation 4.7.[9] In these circumstances, a QEP client would receive a disclosure document from its CTA that fully meets part 4 of the Commission's regulations, which eliminates some of the policy concerns identified by the Commission in the Proposal.

For these reasons, we believe that the proposed disclosure requirements are unwarranted for QEPs that are not subject to the Portfolio Requirement.

The Commission's concerns relating to natural persons should also be sufficiently addressed by increasing the QEP thresholds. It is not clear why the Commission believes that it must *both* increase the QEP thresholds *and* require additional disclosures, given its statement that these investors do not need "the full panoply of information otherwise required under part 4."[10]

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[8] This concern is magnified for registered CTAs with *de minimis* trading. Unlike CPOs, which have a *de minimis* exemption under Regulation 4.13, registered CTAs must rely on Regulation 4.7 for relief from part 4 requirements, even for small trading accounts (where reliance on Regulation 4.14(a)(8) is not possible for accounts that are not structured as pools). Thus, CTAs would have to provide the proposed disclosures even where their trading accounts have *de minimis* exposure.

[9] 17 C.F.R. § 4.7(c).

[10] Proposal at 70854.

Doubling the thresholds will reduce the number of natural persons that qualify for QEP status which should further address the Commission's concerns. These persons typically have the resources and sophistication to conduct their own analysis related to doing business with any CPO or CTA and, as noted above, do not need expanded disclosures, especially since these onerous requirements will increase their costs.

At a minimum, the Commission should wait to assess whether increasing the QEP thresholds sufficiently alleviates its concerns regarding natural persons before proceeding with onerous and expensive additional disclosure requirements.

The Commission should address any specific concerns through a more tailored approach

If the Commission has identified specific issues it believes will not be addressed through doubling the QEP thresholds, for instance if it is seeking to address the complexity and rapidly changing nature of digital assets and innovative technologies, it should first determine whether these concerns are already addressed in other manners, such as through NFA's interpretive notice regarding virtual currencies. If, after analysis, the Commission identifies a specific area where new, bespoke disclosures should be required, it should then seek comment on an approach to disclosure tailored to that product, such as similarly targeted guidance. However, as currently constructed, the overbroad proposed amendments to a generalized disclosure framework are unwarranted and without any articulated commensurate benefit.

If the Commission nevertheless proceeds, it should exclude especially problematic disclosures

While the IAA opposes this part of the Proposal, should the Commission proceed with additional disclosures, we strongly recommend that the Commission exclude the following problematic disclosures, which will be especially difficult for CPOs and CTAs to implement.

Performance Disclosures. First, the performance disclosures contemplated by the Proposal involve complex timing requirements, *i.e.*, that performance information is current as of a date not more than three months preceding the date of the disclosure document.[11] Moreover, the amendments would subject CTAs of Regulation 4.7 trading programs to Regulation 4.35(b), which requires the disclosure of the performance of *all* accounts directed by such CTAs, regardless of whether these accounts follow a similar trading program as the account being offered to the QEP client receiving the disclosure. These requirements will be difficult and costly to operationalize, and any limited benefits for QEPs – which are not asking for this information in the first place – will be significantly outweighed by the increased regulatory burden and costs. Such disclosure may also be more misleading than helpful to QEP clients if not specific to the trading program being considered by the QEP.

[11] 17 C.F.R. § 4.25(a)(7)(i).

Break-even Disclosure. Second, the proposed mandatory disclosure in a tabular format of how the break-even point for a Regulation 4.7 pool was calculated is overly prescriptive, difficult to prepare, even more challenging to maintain and, to our knowledge, also not sought by QEP investors.

Before proceeding, the Commission should consider the potential benefits of the SEC's recent Private Fund Quarterly Statement Rule

Before imposing additional disclosure obligations on CPOs and CTAs, the Commission should assess the potentially beneficial impact on QEP investors of the SEC's new Private Fund Quarterly Statement Rule, which also imposes performance reporting requirements. We recommend that the Commission evaluate the Proposal in light of that rule, and determine whether compliance with that rule can substitute compliance with the proposed performance disclosures of the Proposal.

The IAA has long supported the efforts of both the SEC and Commission to harmonize regimes for dually-registered entities, and we believe that more can be done in this context before the Commission moves forward with an unnecessary, duplicative, and potentially conflicting disclosure regime.

C. The Commission should permit CPOs of Regulation 4.7 pools that are funds of funds to distribute monthly account statements within 45 days of the month-end

Currently, Regulation 4.7(b)(3) provides an exemption from the requirement in Regulations 4.22(a) and (b) that CPOs distribute to each pool participant monthly account statements containing specific information. Instead, CPOs must distribute such account statements no less frequently than quarterly, within 30 days after the end of the reporting period. The Commission is proposing to amend Regulation 4.7(b)(3) to permit CPOs of Regulation 4.7 pools that are funds of funds to distribute monthly account statements within 45 days of the month-end. This proposed amendment appropriately recognizes the difficulties these CPOs face in receiving financial information from the underlying funds in a timely manner. Indeed, the Commission staff regularly grants exemptive requests for alternate distribution schedules.

We support the codification of these exemptive letters for CPOs of Regulation 4.7 pools that are funds of funds, which allow them to distribute monthly, rather than quarterly, account statements within 45, rather than 30, days from month-end. We encourage the Commission to continue its work to incorporate longstanding Commission staff positions requested by numerous CPOs and CTAs into the Commission's regulations. Doing so will streamline the relief and make it more widely and consistently available to CPOs and CTAs that meet the same conditions as the parties to which the exemptive relief was given.

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We appreciate the Commission's consideration of our comments and recommendations and stand ready to provide any additional information that may be helpful. Please contact the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/ Gail C. Bernstein

Gail C. Bernstein
General Counsel

/s/ Monique S. Botkin

Monique S. Botkin
Associate General Counsel

cc: The Honorable Rostin Behnam, Chair
The Honorable Kristin N. Johnson, Commissioner
The Honorable Christy Goldsmith Romero, Commissioner
The Honorable Summer K. Mersinger, Commissioner
The Honorable Caroline D. Pham, Commissioner
Amanda Olear, Director, Market Participants Division