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

Submitted via CFTC Comments Portal

December 11, 2023

Dear Mr. Kirkpatrick:

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)

The Alternative Investment Management Association ("AIMA")[1] appreciates the opportunity to submit this response to the U.S. Commodity Futures Trading Commission's ("CFTC" or "Commission") proposed rule to amend certain provisions of its Part 4 regulations, including updating the thresholds within the "qualified eligible person" ("QEP") definition and requiring commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") operating pools and trading programs under Regulation 4.7 to make certain minimum disclosures to their prospective pool participants and

[1] AIMA, the Alternative Investment Management Association, is the global representative of the alternative investment industry, with around 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2.5 trillion in hedge fund and private credit assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. The ACC currently represents over 250 members that manage $1 trillion of private credit assets globally. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

advisory clients (the "Proposal").[2] AIMA's members include CPOs and CTAs that operate 4.7 pools or trading programs and would therefore be impacted by the Proposal.

At the outset, we broadly support, subject to certain caveats discussed further below, the Commission's proposed change to update the thresholds certain persons must satisfy to receive QEP status (the "Portfolio Requirement"). We also support the proposed amendments to Regulation 4.7 to permit CPOs to 4.7 funds that are funds of funds to distribute monthly account statements within 45 days of month-end.

However, we strongly disagree with the Commission's proposed changes to require CPOs and CTAs that operate 4.7 pools or trading programs to make new, universal disclosures to prospective QEPs. The Proposal would require our members that operate 4.7 pools or trading programs to make extensive, granular and, in our opinion, unnecessary disclosures to prospective QEP investors in these pools and trading programs. This requirement would essentially render the entire 4.7 regime, and the exemptions provided thereunder, moot.

With this Proposal, the Commission is forcing pools and trading programs reserved for sophisticated investors, i.e., QEPs, to conform with a retail-like framework that is unnecessary for these investment vehicles and their investors and contrary to the separate regulatory regimes designed for public and private funds. Furthermore, the Commission has issued the Proposal without citing any substantive support for such a marked change to a regulatory framework that has operated well and without any significant issues for decades nor without any indication from current QEPs that they need or want these new disclosures.

Therefore, we request that the Commission not adopt the proposed changes to Regulation 4.7 that would require universal disclosure requirements to QEPs. Instead, it should first assess and consider whether the proposed changes to the Portfolio Requirement render the contemplated changes to the exemptions under Regulation 4.7 unnecessary. In addition to this assessment, the Commission could host industry roundtables or publish a request for comment to determine whether there is a need to amend the Regulation 4.7 exemption framework. Accordingly, our support for the amendments to the Portfolio Requirement are contingent on the Commission **not** adopting the proposed changes to the Regulation 4.7 exemption framework.

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These comments are discussed in more detail in the attached Annex, and we would be happy to elaborate further on any of the points raised in this letter. For further information, please contact

[2] CFTC, "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) (the "Proposing Release").

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Yours sincerely,

Jiří Król
Deputy CEO, Global Head of Government Affairs
AIMA

Cc: The Honorable Rostin Behnam, Chairman
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

ANNEX

1. The Commission should not adopt the proposed changes to Regulation 4.7 exemptions and instead consider other means to address its concerns.

Regulation 4.7 divides QEPs into two different categories: (i) persons who do not need to satisfy an additional "Portfolio Requirement" to be considered a QEP and (ii) persons who do need to satisfy an additional Portfolio Requirement. Persons that fall into the latter of the two categories must meet both the Portfolio Requirement adopted by the CFTC and the "accredited investor" definition under the U.S. Securities and Exchange Commission's Regulation D under the Securities Act of 1933, as amended, applicable to private securities offerings exempt from registration.

The CFTC's Portfolio Requirement contains two thresholds, and if either (or some combination of the two) are satisfied, then a CPO or CTA may consider that person a QEP eligible to invest in the pool or trading program. The Proposal would double both thresholds to $4,000,000 and $400,000, and persons could still meet a combination of these two tests to satisfy the QEP Portfolio Requirement. The Proposal would also maintain the requirement under Regulation 4.7(a)(3) that CPOs must determine a person's QEP status, including satisfaction of the Portfolio Requirement, at the time of sale of any pool participation units, and CTAs must make a similar determination at the time a person opens an exempt account.

We broadly support the proposed changes to the Portfolio Requirement thresholds. As the Commission explains in the Proposal, the dollar thresholds have not been modified in more than 30 years and should be updated to reflect inflation. However, our support of the proposed changes to the Portfolio Requirement is contingent on the Commission not adopting the changes it has proposed to the exemption framework under Regulation 4.7.

One of the primary justifications upon which the Commission relies to propose the changes to Regulation 4.7 exemptions is that the existing framework "fails to ensure that all QEPs have the leverage and resources to demand the information necessary for QEPs to make informed investment decisions, or to engage in ongoing close monitoring to confirm that the information provided remains accurate and complete to facilitate their continued understanding of their investments"[3] and/or they have "limited ability to demand more, or analyze [the current disclosure for their] accuracy and completeness."[4]

If the Portfolio Requirement thresholds are adjusted appropriately, then there is no reason why the Commission should also eliminate the disclosure exemptions under Regulation 4.7. The Commission should first evaluate whether the changes to the Portfolio Requirement thresholds address and/or

[3] *Id.* at 70856.

[4] *Id.*

mitigate the Commission's perceived concerns about unequal bargaining or negotiating power among those QEPs that satisfy the new, higher standard.

During this period of evaluation, the Commission can utilize a variety of tools to determine if indeed any change to Regulation 4.7 exemptions is necessary. For example, the Commission could host a roundtable on the current 4.7 regulatory framework so that it can receive feedback from CPOs and CTAs that operate 4.7 pools and trading programs, QEPs and other market participants. After considering this input, the Commission could then publish an advanced notice of proposed rulemaking or a request for input/comments on Regulation 4.7, if and only if it has sufficient evidence that further rulemaking is necessary or appropriate. Only after these steps are taken should the Commission proceed with publishing proposed amendments to the exemption framework under Regulation 4.7.

2. The Commission fails to identify a sufficient justification for issuing the proposed changes to Regulation 4.7 exemptions.

Regulation 4.7 provides an exemption for registered CPOs with respect to their pools offered solely to QEPs regarding: (i) the requirement to deliver a disclosure document under Regulation 4.21; (ii) the general disclosures required in Regulation 4.24; (iii) the performance disclosures required by Regulation 4.25; and (iv) the use and amendment requirements in Regulation 4.26. To receive this exemption, registered CPOs must provide a form statement on the cover page of any offering memorandum it chooses to distribute to its prospective pool participants. A similar exemption exists for registered CTAs with respect to their trading programs offered solely to QEPs regarding the same four items discussed above[5] so long as the CTA includes a form statement on the cover page of any brochure or disclosure statement it chooses to distribute to its prospective advisory clients.

CPOs and CTAs that currently claim these exemptions are not required to deliver or disseminate any offering memoranda, brochures or disclosure statements to their prospective QEP pool participants or advisory clients ("QEP Disclosures"). Instead, they are required to ensure that any QEP Disclosures they may provide "include all disclosures necessary to make the information contained therein, in the context in which it is furnished, not misleading."[6]

The Commission assumes without any sufficient evidence that this current exemption framework "fails to ensure that all QEPs have the leverage and resources to demand the information necessary for QEPs to make informed investment decisions, or to engage in ongoing close monitoring to confirm that the information provided remains accurate and complete to facilitate their continued understanding of their investments."[7] The Commission assumes that natural persons who meet the QEP definition through the Portfolio Requirement are more likely to lack the ability to demand the

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5 Although under different Regulations 4.31, 4.34. 4.35 and 4.36, respectively.

6 The Proposal would retain this requirement. *See* Proposing Release, *supra* note 2, at 70855, 70860.

7 *Id.* at 70856.

same level of transparency afforded through the prospect of additional significant asset allocations and are therefore more likely reliant upon the information provided by the CPO or CTA with "limited ability to demand more, or analyze its accuracy and completeness."[8]

In light of the aforementioned concerns about the "unequal bargaining power of QEPs",[9] product innovation in commodity interest markets, the expansion of asset classes subject to the CFTC's jurisdiction and oversight and changes in market structure, the Proposal would require CPOs and CTAs that operate 4.7 pools and trading programs to provide specific minimum disclosures to prospective QEPs. The Commission explains that the Proposal is not intended to rescind the exemptions in their entirety or dissuade CPOs and CTAs from utilizing the exemptions in Regulation 4.7. Instead, the changes are intended to ensure "that QEPs consistently receive specific, baseline information with respect to their investment in the commodity interest markets."[10]

The Commission's reasoning is fundamentally flawed and its justifications insufficient for the proposed changes to the exemption regime under Regulation 4.7. In proposing these changes, the Proposal would – contrary to the Commission's stated belief – effectively rescind the exemptions under Regulation 4.7 and significantly dissuade CPOs and CTAs from utilizing whatever exemption framework remains.

First, Congress and federal financial regulators have historically recognized and distinguished between public and private funds. Public funds – in this case, non-4.7 pools and trading programs – are subject to a prescriptive regulatory framework, complete with detailed disclosure and reporting requirements because investors in these funds may not have the means or knowledge to protect themselves from potentially manipulative and deceptive practices. On the other hand, private funds – 4.7 pools and trading programs – by their nature are available only to sophisticated investors, like QEPs, because they have the necessary knowledge and resources to monitor their investments, negotiate certain terms and, broadly, protect themselves from the kinds of practices that retail investors may not.

With this Proposal, the Commission ignores the distinction between these investment vehicles and the reasons why they are subject to different regulatory regimes. The Proposal would transform 4.7 pools and trading programs into retail-like investment options, which essentially eliminates the 4.7 exemption framework altogether. Indeed, if QEPs want the disclosures contemplated in the Proposal – evidence the Commission fails to cite to, as discussed further below – they have the knowledge and bargaining power to request such information from their investment professionals. The rationale that existed three-plus decades ago for adopting the broad exemptions in Regulation 4.7 still holds true today, "QEPs are able to identify and obtain the information they deem necessary to evaluate the

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8 *Id.*

9 *Id.* at 70857.

10 *Id.* at 70858.

investment offered and [therefore] prescriptive rules imposing specific disclosures requirements are not essential."[11]

Second, the Commission concludes that the current exemption framework is insufficient because its fails to ensure that all QEPs (natural persons, specifically) can demand and receive the information necessary to make informed investment decisions and/or effectively monitor their investments. The Proposal, however, lacks a concrete example of any instance where this may be the case. Instead, the Commission relies upon mere assertion from a 2014 roundtable and a few citations of alleged wrongdoing to support its theory that there is a problem that needs to be addressed. Surely, if QEPs were clamoring for the extensive disclosures that would be required to be furnished to them pursuant to the Proposal, the Commission would have been able to cite to such requests, yet it fails to do so.

Third, the Commission believes that the expansion of asset classes – swaps and digital assets –subject to the CFTC's jurisdiction and oversight warrants the proposed changes to Regulation 4.7.[12] Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") more than 13 years ago, and, since then, the CFTC has fully implemented the swaps-related rules mandated in Title VII of Dodd-Frank. Over that period of time and through all of the CFTC's swaps-related rulemakings and the implementation thereof, none of them have demonstrated the need to facilitate changes to Regulation 4.7 exemptions. Moreover, the Commission fails to provide a sufficient example of QEPs' inability to appreciate or understand the nature of the risks associated with trading swaps. Finally, there is no language in Dodd-Frank nor indication that when Congress passed it, that it also intended for the CFTC to modify Regulation 4.7 exemptions, let alone for it do so more than a decade after the legislation was passed.

The Commission also cites the development of the digital assets market and the technological innovation therein as yet another example that justifies the proposed changes to Regulation 4.7.[13] Again, the Commission is relying upon mere speculation in advancing this justification.[14] The same argument applies here as with swaps: there have been a number of product developments and innovations in the derivatives markets since Regulation 4.7 was adopted, yet there has not been any suggestion that the exemptions thereunder need to be significantly narrowed as a result.

Finally, the Commission notes the evolution in market structure to support the proposed changes to the exemptions under Regulation 4.7. The Proposal does not cite a market failure or failure in market structure to support such a fundamental change to the Regulation 4.7 regime, relying only upon the limited example that 4.7 pools and trading programs may now access markets directly and therefore

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11 *Id.* at 70855.

12 *Id.* at 70857.

13 *Id.*

14 "Given the relatively recent development of digital assets, it remains unclear as to whether the underlying markets, to which the futures and other derivatives are tied, are subject to market fundamentals similar to those of the traditional commodities markets." *Id.* "The Commission expects to see continued development of novel investment products that . . . may in fact deviate from the typical operations of markets now subject to the Commission's oversight." *Id.*

without trading through a futures commission merchant ("FCM"). Although this may be the case, the Commission has not included in the Proposal any example(s) where QEPs need more information about the risks associated with direct participation by a pool or trading program or where more information is necessary based on developments in market structure.

3. **The Proposal's new disclosure requirements for CPOs and CTAs that operate 4.7 pools or trading programs are not appropriate for private funds and are therefore unnecessary because they would create or pose myriad problems for these market participants and their investors.**

The Proposal would amend the disclosure relief outlined in in Regulations 4.7(b)(2)(i) and (ii) to require registered CPOs to deliver to their 4.7 pools' prospective participants QEP Disclosures that contain certain types of disclosures. Specifically, Regulation 4.7(b)(2)(i) would no longer provide an exemption from Regulation 4.21 and instead of requiring compliance with Regulations 4.24 (general disclosures) and 4.25 (performance disclosures) in their entirety, enumerate specific disclosures the Commission believes prospective QEP pool participants should receive. These new disclosures would require granular information on the following: (i) principal risk factors; (ii) the investment program; (iii) the use of proceeds; (iv); custodians; (v) fees and expenses; (vi) conflicts of interest; and (vii) past performance of 4.7 pools.

The Commission is also proposing to specifically enumerate disclosure requirements for 4.7 trading programs in Regulation 4.7(c)(1); an exemption from Regulation 4.31 would no longer be provided. Proposed Regulation 4.7(c)(1)(i) would include, in lieu of requiring compliance with Regulation 4.34 (general disclosures) and 4.35 (performance disclosures) in their entirety, add new paragraphs that list the specific disclosure requirements the Commission is proposing to require for CTAs and their 4.7 trading programs. These new disclosures would include granular information on the following: (i) the CTAs' principal, its FCM and/or REFD and introducing broker; (ii) principal risk factors; (iii) a description of the 4.7 trading program; (iv) fees; (v) conflicts of interest; and (vi) past performance of 4.7 trading programs.

We do not believe that these extensive and overly prescriptive disclosures are appropriate for 4.7 pools and trading programs and their private fund structure and operation. Notwithstanding the fact that the Commission (i) ignores the longstanding distinction between private and public funds and their separate regulatory frameworks and (ii) fails to sufficiently justify the proposed changes, they are not appropriately tailored for private funds and would be costly, burdensome and unnecessary, which would have follow-on costs for investors. Furthermore, mandating the proposed disclosures would create several problems with existing pool or trading program operations and conflict with

existing practices that have operated well for both CPOs, CTAs and their QEP investors.[15] We have outlined several of these concerns and complications below.

Limiting Managers' Flexibility

Managers of 4.7 pools or trading programs currently have the discretion, consistent with the pool's or trading program's offering documents, to adjust the pool's or trading program's strategy and investments in the ordinary course of operations. Because of the many prescriptive representations outlined in the Proposal, a manager's flexibility to engage in this activity would effectively be eliminated. Regulations 4.26 and 4.36 require managers of 4.7 pools or trading programs, respectively, to update their offering documents within 21 calendar days of their disclosure document becoming materially inaccurate.

Therefore, if a manager of a 4.7 pool or trading program wishes to adjust a strategy or its investments, then it will be required to amend and re-deliver certain documents to its investors. This constant re-papering and re-delivery would be impracticable, costly for managers and unhelpful to and confusing for investors. It would also likely disincentivize managers from reacting to market dynamics that may necessitate a change in strategy or investment that would be in the best interests of the pool's or trading program's investors.

Description of Fees and Commissions

The Proposal would require CPOs of 4.7 pools to include a complete description of each fee, commission and other expense which the CPO knows or should know has been incurred by the pool for its preceding fiscal year and is expected to be incurred by the pool in its current fiscal year. This description must include the fees, commissions and expenses incurred in connection with the pool's participation in investee pools and funds.

CPOs to 4.7 pools are exempt from providing a number of required disclosures to investors because the persons investing in the pool have demonstrated their sophistication by satisfying the requirements to be deemed a QEP and therefore eligible to join a 4.7 pool. These pools may often have complex, multi-layered structures, which stands in contrast to non-4.7 pools that are primarily designed for "retail" investors and have simpler structures, with CPOs that are subject to CFTC Rule 4.24(i). The requirement to provide a description of the costs associated with the 4.7 pool's participation in investee pools and funds is not appropriately tailored to 4.7 pools that may have multi-layered structures and will therefore result in lengthy, and perhaps incomprehensible, disclosures to QEPs. For example, a CPO would need to dissect the fees and expenses paid by each sub-pool and

[15] Again, the existing 4.7 exemption framework has operated well, which is underscored by the Commission's inability to cite to an investor need for the enumerated disclosures contemplated under the Proposal.

investment vehicle, with each sub-pool perhaps having significantly different expenses depending on the types of commodity interests traded.

Break-Even Point

Within the proposed requirement for a CPO to a 4.7 pool to provide a complete description of each fee, commission and other expense, the CPO must set forth how the break-even point for a 4.7 pool was calculated. This requirement is unworkable and likely to be misleading for investors in the context of 4.7 pools.

For 4.7 pools that have variable expense models, the expenses will likely change from year to year. This is especially the case for pools that are structured to pass through certain fees or expenses to the pool, i.e., they do not charge a fee to manage the pool. The requirement to provide details on the break-event point, which is inherently a forward-looking concept based on historical expense data, will not be representative of future expenses, would likely not be useful to, and may even mislead, investors. Moreover, it is unclear why the Commission believes the reporting of the break-even point is necessary for 4.7 pools since this concept is designed for and geared towards non-4.7 pools (i.e., "retail" pools) with fixed-expense structures.

Pool's Investment Program

Finally, the Proposal would require that QEP Disclosures include the information mandated by Regulation 4.24(h), which addresses, among other things, disclosure requirements regarding a 4.7 pool's investment program. Specifically, Regulation 4.24(h)(1) requires that CPOs disclose information on the types of commodity interest and other interests that the pool will trade, including, as applicable, "the approximate percentage of the pool's assets that will be used to trade commodity interests, securities and other types of interests, categorized by type of commodity or market sector, type of swap, type of security (debt, equity, preferred equity), whether traded or listed on a regulated exchange market, maturity ranges and investment rating."[16] Regulation 4.24(h)(3)(ii) further requires that a CPO provide a summary description of the pool's major investee pools or funds, including "their respective percentage allocations of pool assets and a description of the nature and operation of such investee pools and funds, including for each investee pool or fund the types of interests traded, material information as to volatility, leverage and rates of return for such investee pool or fund and the period of its operation."[17]

Many 4.7 pools have multi-strategy mandates that provide their CPO with the discretion to pursue different strategies, while using different types of instruments, e.g., over-the-counter debt securities. This flexibility enables the CPO to adjust rapidly and change investment allocations in response to evolving market conditions. QEPs often seek out such multi-strategy pools specifically because the

[16] 17 CFR 4.24(h)(1).
[17] 17 CFR 4.24(h)(3)(ii).

CPO can quickly and efficiently reallocate capital if facilitated by market changes, a result that ultimately best serves the pool's investors.

Similar to our concerns described in our first point above in this section, subjecting CPOs to 4.7 pools to the requirements under Regulation 4.24(h) will only constrain the CPO from being able to respond to changing market conditions by reallocating capital across strategies. If these CPOs wanted to continue to reallocate capital, Regulation 4.24(h) would require them to constantly amend and re-deliver QEP Disclosures to reflect updated allocations. Alternatively, CPOs could draft the description of the 4.7 investment program with so much flexibility as to be rendered meaningless, a result the Commission is unlikely to welcome. In any of these instances, QEPs in 4.7 pools will not receive the information that the Commission believes is "necessary . . . to make investment decisions, or to engage in ongoing close monitoring to confirm that the information provided remains accurate and complete to facilitate their continued understanding of their investment."[18]

[18] Proposing Release, *supra* note 2, at 70856.