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VIA CFTC COMMENTS PORTAL: HTTPS://COMMENTS.CFTC.GOV

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

Re: Commodity Pool Operators and Commodity Trading Advisors: Proposed Rule Amendments Related to Operation under CFTC Rule 4.7 [RIN 3038-AF25]

Dear Mr. Kirkpatrick:

Dechert LLP ("Dechert") welcomes the opportunity to comment regarding the proposed amendments to Part 4 of the Commodity Futures Trading Commission ("CFTC" or "Commission") regulations that would (1) update the financial thresholds in the Portfolio Requirement (defined below) of the Qualified Eligible Person ("QEP") definition in CFTC Rule 4.7(a); (2) establish certain minimum disclosure requirements for commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") operating under CFTC Rule 4.7(b) and (c), respectively; (3) permit CPOs operating commodity pools invested in other pools and funds ("fund-of-funds") additional time to circulate monthly account statements to commodity pool participants consistent with exemptive relief that the CFTC has regularly granted; and (4) make various technical amendments to CFTC Rule 4.7 designed to improve its efficiency and usefulness for market intermediaries and their prospective and actual QEP pool participants and advisory clients ("Proposal").[1] This comment letter focuses on the CFTC's proposals regarding the minimum disclosure requirements and the modifications to the time period in which CPOs of fund-of-funds have to distribute periodic pool account statements to participants.

We believe that Dechert is well situated to offer comments on the Proposing Release. Dechert is a global law firm with nearly 200 financial services attorneys practicing in 16 offices across the United States, Europe, Asia and the Middle East. Our clients include, among others, a wide variety of registered and unregistered investment companies (including mutual funds, closed-end funds and business development companies), private funds, investment advisers, broker-dealers and institutional investors. An extensive part of our services for these clients involves assistance with the federal securities laws in the organization, distribution and operation of investment funds. Our

[1] 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) ("Proposing Release").

funds team spans all five principal European fund centers—London, Luxembourg, Dublin, Frankfurt/Munich and Paris.

Dechert has represented a significant proportion of the U.S. asset management industry in connection with the CFTC's regulation of investment advisers as CFTC-registered and exempt CPOs and CTAs. Dechert has an extensive U.S. and non-U.S. commodity market buy-side practice through which we advise private funds, Undertakings for Collective Investments in Transferable Securities ("UCITS"), European Alternative Investment Funds, U.S. pension plans, insurance companies, investment advisers, broker-dealers and institutional investors, in many jurisdictions, with respect to matters involving both Securities and Exchange Commission ("SEC") and CFTC registration, exemptions and ongoing compliance matters. In the commodity interest markets, these matters also include rules of self-regulatory organizations, such as futures exchanges, swap execution facilities and the U.S. National Futures Association ("NFA"). We regularly advise buy-side swap market participants on the cross-border application of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act") and regulations thereunder, as well as European Market Infrastructure Regulation. We also assist clients with navigating the layers of U.S. and non-U.S. laws and regulations applicable to their businesses. Over the last decade plus, Dechert has actively engaged with the CFTC and its staff ("CFTC Staff") on numerous rulemakings related to its regulations affecting buy-side intermediaries and on industry-wide and individual client requests for no-action and exemptive relief where the CFTC's regulations have not quite fit legitimate CPO and CTA operations. Our comments reflect our own views and not necessarily those of our clients.

Introduction and Executive Summary

We welcome the opportunity to comment on the Commission's Proposal. Aside from the proposed update to the dollar thresholds of the Portfolio Requirement (defined below) to reflect thirty years of inflation, on balance we consider the elements of the Proposal regarding disclosure largely to be rule changes in search of a problem, and that the portions of the Proposal regarding disclosure and codification of certain periodic account statement timing relief should both be further studied before any final rulemaking.

The Commission's overall approach to the Proposal represents a departure from its past practice of closely considering and respecting other regulations to which buy-side market intermediaries it regulates are subject, and principles of international comity across all of its regulation. Our letter aims mainly to inform the Commission at a high-level on the blind-spots in its Proposal and encourage further industry engagement and study. Observing the operational relief available to CPOs and CTAs operating under CFTC Rule 4.7 in a regulatory vacuum does not provide a full picture of the other protections often in place for pool participants and separately managed account clients and does not account for needless duplication or potential conflicts with other applicable regulatory regimes.

Although the Proposal has sprawling potential implications, our comment letter focuses on a few aspects of it for which we consider Dechert especially well-position to remark. If the CFTC

proceeds without further study and industry input, (i) we propose that the CFTC maintains the distinction between QEPs that qualify under CFTC Rule 4.7(a)(2) and (a)(3) and not apply its proposed disclosure requirements to QEPs that can qualify under CFTC Rule 4.7(a)(2); (ii) we propose that the CFTC acknowledges that certain registered CTAs provide commodity interest trading advice in their registered CTA capacity under CFTC Rule 4.7 to pools for which they or an affiliate serve as CPO and not require such CTAs effectively to provide disclosure to themselves; (iii) we inform the Commission of issues related to SEC regulation of private funds advisers that often applies concurrently with CFTC rules; and (iv) we encourage the CFTC to take further action to harmonize commodity pool reporting requirements that it now proposes to modify.

Background

Generally, Commodity Exchange Act ("CEA") Section 4m(1) requires each person whose intermediary activities satisfy either the CPO or CTA definition to register as such with the CFTC. With respect to both CPOs and CTAs, the CEA also authorizes the Commission to include persons within, or exclude them from, such definitions, by rule, regulation, or order, if the Commission determines that such action will effectuate the purposes of the CEA.[2] The CFTC's Part 3 and 4 regulations provide various "full" exemptions from CPO and CTA registration[3] and make available exclusions from the definition of CPO and CTA for intermediaries whose operations are subject to other extensive regulation.[4] In addition, the CFTC makes available certain "operational" exemptions to registered CPOs and CTAs where the CPO or CTA must operate a pool or advise a client in its registered capacity, but is able to enjoy a lighter touch on the otherwise extensive disclosure, reporting and recordkeeping requirements set forth in the CFTC Part 4 regulations.[5] Since its adoption in 1992, CFTC Rule 4.7 has provided operational exemptions from certain of the CFTC Part 4 requirements regarding disclosure, periodic reporting to pool participants and recordkeeping where the pool participants in what the rule now refers to as an "exempt pool"[6] or

[2] CEA Section 4m(1).

[3] *See e.g.*, CFTC Rules 4.13 and 4.14.

[4] *See e.g.*, CFTC Rules 4.5 and 4.6. In addition, the CFTC Staff has made available industry-wide and individualized relief through the no-action and exemptive letter process to allow certain market intermediaries in the securitization and real estate investment trust industries that would otherwise be required to register because they cannot fit their operations squarely in an exemption or exclusion to avoid registration based on various theories.

[5] *See e.g.*, CFTC Rule 4.12.

[6] Defined under CFTC Rule 4.7(a)(1)(iii) as a pool that is operated pursuant to an effective claim for exemption under CFTC Rule 4.7.

the advisory client invested in an "exempt account"[7] are restricted to individuals and entities considered to be QEPs.[8]

A CPO operating an exempt pool ("CFTC Rule 4.7 CPO") is not required to provide a disclosure document to participants, but must deliver a prescribed disclaimer to a prospective participant, and if it does provide a disclosure document must ensure that the document's contents are not misleading. The requirement for a CTA operating an exempt account is similar. A CPO or CTA is always subject to CEA's anti-fraud provisions under CEA Sections 4b and 4o, and as a result, is required to disclose all material information. CPOs and CTAs also always remain subject to the prohibited activity provisions of CFTC Rule 4.20 and the CFTC's marketing requirements under CFTC Rule 4.41. A CFTC Rule 4.7 CPO enjoys a lighter touch on periodic account statements provided to participants and the content of the audited annual report for the exempt pool. Both CFTC Rule 4.7 CPOs and CFTC Rule 4.7 CTAs are still subject to quarterly risk reporting under CFTC Rule 4.27 on CFTC Form CPO-PQR/NFA Form PQR or CFTC Form CTA-PR/NFA Form PR, as applicable, as well as reporting on CFTC Form 40. CFTC Rule 4.7 CPOs operating exempt pools and CFTC Rule 4.7 CTAs operating exempt accounts ("CFTC Rule 4.7 CTA") are not subject to all of the enumerated recordkeeping requirements under CFTC Rule 4.23 and 4.33; but must still keep a more limited list of enumerated records and all records produced in connection with the operation of the exempt pool or exempt account, as applicable. Finally, CFTC Rule 4.7 CPOs and CFTC Rule 4.7 CTAs are required to become members of the National Futures Association ("NFA"), to be subject to the NFA's bylaws and rules and to submit to periodic NFA on-site audits.

In 1992, the CFTC stated that its intent in adopting CFTC Rule 4.7 was "to harmonize Regulation 4.7 with existing securities laws and regulations for sophisticated investors by incorporating the SEC's ''accredited investor'' definition into the QEP definition, which was intended to capture similarly experienced and sophisticated persons participating in the commodity interest markets. However, the Commission determined that an additional, higher standard of experience was necessary for certain natural and other persons, citing the differences between futures and securities investments." [9] To establish this heightened investor qualification standard, the Commission set forth two tiers of investor that can qualify as a QEP: those who can only qualify by meeting the "Portfolio Requirement" which involves holding a specified value in its portfolio of securities, having on deposit with a futures commission merchant a certain amount of margin for futures and options on futures trading, or a mix of both ("CFTC Rule 4.7(a)(3) QEPs"), and

[7] Defined under CFTC Rule 4.7(a)(1)(ii) as the account of a QEP that is directed or guided by a CTA pursuant to an effective claim for exemption under CFTC Rule 4.7.

[8] Exemption for Commodity Pool Operators with Respect to Offerings to Qualified Eligible Participants; Exemption for Commodity Trading Advisors with Respect to Qualified Eligible Clients, 57 Fed. Reg. 34853 (Aug. 7, 1992) ("1992 Adopting Release").

[9] Proposing Release, 88 Fed. Reg. at 70854.

those who can qualify without also meeting the Portfolio Requirement ("CFTC Rule 4.7(a)(2) QEPs").

In order to meet the goals and policy objectives that the Commission sets forth in the Proposing Release, the Commission is proposing to subject CFTC Rule 4.7 CPOs and CFTC Rule 4.7 CTAs to a requirement that they deliver a disclosure document to prospective participants and advisory clients and that those disclosure documents include many of the substantive disclosures that have historically only applied to "retail" commodity pools and separately managed accounts for "retail" advisory clients (each a, "CFTC Rule 4.7 Disclosure Document").[10] These disclosures would need to cover information about an exempt pool or exempt account's trading strategies, principal risk factors, fees and expenses, associated conflicts of interest and past performance over certain time periods.

I. The CFTC Proposed Disclosure Requirements Should Not Apply Where Exempt Pool Participants and Exempt Account Clients Qualify as QEPs under CFTC Rule 4.7(a)(2)

As adopted in 1992, the QEP and qualified eligible client ("QEC")[11] definitions under CFTC Rule 4.7 differentiated between professional investors and those who would need to satisfy the Portfolio Requirement to demonstrate their investment experience. From the start, the CFTC recognized two "tiers" of sophistication to qualify for investment in an exempt pool or to receive advice in an exempt account. The types of market participants that are currently categorized in each "tier" of the QEP definition in CFTC Rule 4.7(a)(2) and (a)(3) has changed over the last thirty years. For example, recognizing that the National Securities Markets Improvement Act of 1996 provided an additional exemption from the definition of the term "investment company" under Section 3(c)(7) of the Investment Company Act of 1940, as amended ("1940 Act"), for funds comprised exclusively of "qualified purchasers" and directed the SEC to promulgate rules that would permit "knowledgeable employees" of the issuer (or affiliate) of a fund's interests to invest in the fund without the loss of the fund's 1940 Act Section 3(c)(1) or 3(c)(7) exemption from the definition of "investment company," the CFTC added "qualified purchasers" and "knowledgeable employees" to the list of persons and entities qualifying as QEPs under CFTC Rule 4.7(a)(2).[12] This was a departure from the original limitation of the type of CFTC Rule 4.7(a)(2) QEPs to professional market intermediaries. However, the CFTC expressed no qualms about the expansion of the

[10] The term "retail" as used in this comment letter means an individual or entity that does not qualify as a QEP.

[11] Originally, CFTC Rule 4.7 differentiated between the qualifying investors in exempt pools (QEPs) and qualifying clients of CFTC Rule 4.7 CTAs (QECs). As the rule was amended in 2000, this distinction was dropped in favor of the use of the term QEP for use in each of the exempt pool and exempt account contexts. Exemption from Certain Part 4 Requirements for Commodity Pool Operators with Respect to Offerings to Qualified Eligible Persons and for Commodity Trading Advisors with Respect to Advising Qualified Eligible Persons, 65 Fed Reg. 47848 (Aug. 4, 2000) ("2000 Adopting Release"). The balance of this comment letter also does so.

[12] *See* 2000 Adopting Release, 65 Fed. Reg. at 47849-47850, 47852.

definition, and when it had various opportunities to reorganize the QEP definition, never collapsed the two "tiers" into one.

If the Commission proceeds with the disclosure-related portion of the Proposal and subject to our comments in Section III of this comment letter, we believe that the Commission should retain the distinction in levels of QEP sophistication and only apply its proposed additional CFTC Rule 4.7 Disclosure Document requirements to exempt pools and exempt accounts whose participants and clients can only qualify as QEPs by meeting the Portfolio Requirement, as proposed to be amended. In this regard, the Commission should *not* apply its proposed additional CFTC Rule 4.7 disclosure requirements to pools and accounts limited to QEPs who qualify as such under CFTC Rule 4.7(a)(2) – those it observes in the Proposing Release already have the leverage, resources and acumen to obtain and analyze the disclosures they need without the Commission setting that baseline for them through regulatory imprimatur. Our proposed approach would maintain a longstanding distinction that the Commission has made in this area while meeting the policy objectives the CFTC states in its Proposal and, at the same time, not unduly burdening all CFTC Rule 4.7 CPOs and CTAs, and by extension, their investors and clients who have not clamored for these changes, but will indirectly shoulder their cost.

The Commission opens its justification for its CFTC Rule 4.7 Disclosure Document proposal by observing that the number of CPOs and CTAs operating under CFTC Rule 4.7 have grown substantially.[13] The Commission articulates a concern that the definition of QEP encompasses a broad spectrum of market participants from large fund complexes and other institutional investors to individual investors and that not all of them are on the same footing with each other when it comes to insisting on information about their pool investment or trading program and evaluating that information. The Commission goes on to allude to the fact that its greater concern for protection is with regard to CFTC Rule 4.7(a)(3) QEPs and states: "[a]lthough the Commission expects QEPs meeting a properly calibrated Portfolio Requirement to generally possess the level of financial sophistication, as described by the Commission in 1992, the Commission preliminarily concludes in this proposal that current market conditions and industry practices support proposing an evolved disclosure regime in Regulation 4.7."[14] If the Commission feels compelled to provide additional protections to QEPs, it should be discerning amongst the categories of QEPs. A CFTC Rule 4.7(a)(2) QEP would still have the leverage and resources to obtain any information they

[13] We would note that the Commission made exactly the same observation in the 1992 Proposing Release, but acted in exactly the opposite direction than the Commission currently proposes. ("Part 4 of the Commission's regulations has not been extensively revised since the Commission's original CPO disclosure requirements were adopted in 1979. In the intervening years the number of registered CPOs has nearly doubled. Assets held under management by CPOs have grown dramatically and the range of available futures and option contracts has increased substantially. Many large money managers, in particular many managers for institutional investors, are now diversifying and hedging their portfolios by investing a portion of the assets under their management in the futures markets. As a result, the profile of commodity pool participants has evolved to include institutional participants and other highly capitalized and sophisticated participants.") Exemption for Commodity Pool Operators and Commodity Trading Advisors for Offerings to Qualified Eligible Participants, 57 Fed. Reg. 3147, 3150 (Jan. 28, 1992) ("1992 Proposing Release").

[14] Proposing Release, 88 Fed. Reg. at 70856.

need about their exempt pool or exempt account, notwithstanding the proposed Commission mandate that CPOs and CTAs serving CFTC Rule 4.7(a)(3) participants and clients provide them with additional disclosure.

Accordingly, we do not see any benefit under the proposed additional disclosure requirements to such CFTC Rule 4.7(a)(2) QEPs. Furthermore, we believe that it is a baseless assumption and makes bad policy to assume without investigation as the Commission does in the Proposal that a registered CPO or registered CTA would be incentivized to seek less sophisticated investors because those investors do not have the leverage and resources to demand additional information.[15] We think it is clear that more financially-sophisticated investors and clients make for more attractive prospects for an exempt pool or exempt account as such investors are likely to bring more assets under management for a CPO or CTA and have longer-term investment horizons which allow the CPO or CTA to seek the exempt pool or exempt account's investment objective more efficiently.[16] If the Commission believes that certain investors and clients must receive more regulatorily-mandated disclosure, the division in the QEP definition between subparts (a)(2) and (a)(3) is a logical place to draw the line as to the class of investors and clients that should receive such disclosure.

One final note that we would make regarding the Commission's overall justification for the proposed CFTC Rule 4.7 Disclosure Requirements is that citing cases of apparent CPO and CTA fraud does not logically justify increasing disclosure burdens across all CFTC Rule 4.7 CPOs and CTAs. To the extent that these cases involved fraudulent activity, that activity was already illegal without rule changes. Further, there will always be fraudulent actors in the financial services industry.[17] Needing to make additional disclosures, and in particular performance disclosures above and beyond the already-mandated pool account statements and audited annual reports, will not prevent certain market intermediaries from acting contrary to their disclosures and/or committing other types of fraud. To combat those types of situations, the CFTC and the NFA have other tools.[18] It would not be achieved to anyone's satisfaction through the enhanced disclosures the CFTC now proposes.

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[15] *Id*.

[16] Were the CFTC to convene a roundtable of registered CPOs and CTAs that would be affected by the substance of the Proposal—as we suggest further on in our comments—it would be able to be informed about this first-hand rather than needing to make assumptions. A roundtable that includes institutional and individual exempt pool participants and exempt account clients would also be forum for those market participants to inform the CFTC as to whether they would find the additional proposed disclosures—especially with regard to performance disclosure—more informative than what they already receive or can request.

[17] *See*, Proposing Release, 88 Fed. Reg. at 70856.

[18] *E.g.*, NFA Compliance Rule 2-9 and the NFA requirement thereunder that registered CPOs have an internal controls system. NFA Interpretive Notice No. 9074 – NFA Compliance Rule 2-9: CPO Internal Controls System (Apr. 1, 2019).

II. A CTA Advising a Commodity Pool Whose CPO is under Common Control with the CTA Should Not Have to Deliver a CFTC Rule 4.7-Compliant Disclosure Document to the Commodity Pool

As the CFTC is aware from previous recent rulemaking related to CFTC Rule 4.27 and CFTC Form CTA-PR, dually-registered CPO/CTAs often provide commodity interest trading advice to commodity pools for which they also serve as CPO in their registered CTA capacity under CFTC Rule 4.7(c).[19] The CTA may do this for a number of operational reasons even when another CTA registration exemption would be available to it in its capacity as CTA to the pool. Under current Rule 4.7(c), when that CTA provides commodity interest trading advice to any client that qualifies as a QEP, it is not required to provide a disclosure document to that client. However, under the Proposed Rule, CTAs would need to provide a CFTC Rule 4.7 Disclosure Document to all QEPs regardless of affiliation between the CPO and CTA. This would mean that the CTA would effectively be providing the regulatorily-mandated disclosures to itself. We would submit that this would be unnecessary and out-of-step with how the CFTC has approached a similar situation with regard to CPO disclosures.

In this regard, for purposes of CPO disclosure delivery requirements, under CFTC Rule 4.21, a commodity pool (investor commodity pool) whose CPO is the same as or is under common control with the CPO of an investee commodity pool is not considered a "prospective pool participant."[20] Generally, under CFTC Rule 4.10, the definition of a "participant" covers any direct investor in a commodity pool.[21] The effect of this carve-out from the definition of prospective pool participant is to allow the investee commodity pool's CPO to forego delivery of any disclosure to the investor commodity pool, whether that would be a disclosure document meeting all the requirements under the CFTC Part 4 rules as would be required to be provided to a retail pool participant ("CFTC Part 4-Compliant Disclosure Document") or the current CFTC Rule 4.7(b)(2) disclaimer. This definition allows the investee commodity pool CPO to avoid essentially providing disclosure to itself.[22] Currently, there is no parallel concept in the CFTC's disclosure rules as they apply to CTAs, but we see no reason why there should not be. This approach would also be in keeping with the original spirit of CFTC Rule 4.7.[23]

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[19] *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, 84 Fed. Reg. 67343 (Dec. 10, 2019) ("2019 Adopting Release").

[20] CFTC Rule 4.21(b).

[21] CFTC Rule 4.10(c).

[22] Under CFTC Rule 4.22(a)(4) and (c)(8), the carve-out from the definition of "participant" extends to periodic account statements and annual reports between investee and investor commodity pools operated by the same CPO or CPOs under common control.

[23] 1992 Adopting Release, 57 Fed. Reg. at 34857 ("The commenters contended that a CTA's relief under Rule 4.7 should be dependent upon whether the investment vehicle qualifies for 4.7 relief, without regard to whether the

The reason this issue does not generally arise in the context of CTAs providing commodity interest trading advice to their own commodity pools or pools whose CPOs are under common control with the CTA is that generally the "client" commodity pool would meet one of the current definitions of QEP under CFTC Rule 4.7(a)(2) or (a)(3), and thus would not be a "retail" client in need of a CFTC Part 4-Compliant Disclosure Document. "Client" commodity pools we see in this context are most often QEPs by merit of being qualified purchasers[24] or exempt pools.[25] As the CFTC has proposed that **all** QEP CTA clients would need to receive a CFTC Rule 4.7 Disclosure Document, this means of avoiding disclosure-to-self would be extinguished.

The relief should not be limited only to situations where the CPO and the CTA are the same entity. The carve-out from the definition of "prospective pool participant" in the CPO disclosure context recognizes that the CPO to a commodity pool may not be the same entity as the CTA, but may be under common control, and there is no reason not to extend this to CTAs under common control. This recognizes that asset managers may house their advisory market intermediary business in separate legal entities for a host of reasons (for example, tax), but that substantively, they are unified.

This modification of the CFTC Rule 4.7 Disclosure Document requirement would be especially needed if the CFTC does not accept our first proposal to limit the requirement that CTAs operating under CFTC Rule 4.7 need only provide a CFTC Rule 4.7 Disclosure Document to QEPs that cannot qualify under CFTC Rule 4.7(a)(2), again subject to our comments in Section III of this comment letter. But even if the CFTC accepts our first proposal, there could still be instances of unnecessary "self-disclosure" to a commodity pool where the commodity pool's CPO is the same or under common control with the CTA. Under CFTC Rule 4.21, there is no investor commodity pool sophistication requirement in order for the investor pool not to be considered a "prospective pool participant" in the investee pool. We see no policy reason why the CTA disclosure requirement should be any different.

operator actually claims such relief. The Commission agrees with this view and has modified the rule to permit CTAs to claim relief under Rule 4.7 for a pool or investment vehicle account regardless of whether the pool's CPO has elected to claim the corresponding relief.").

[24] CFTC Rule 4.7(a)(2)(vi).

[25] CFTC Rule 4.7(a)(2)(xii)(B).

III. CFTC Proposed Disclosure Requirements Create Conflicts and Duplicative Burdens for CPOs and CTAs Dually-Registered as Investment Advisers with the SEC When Operating Exempt Pools or Advising Exempt Accounts

As the CFTC has acknowledged, a substantial number of CPOs and CTAs are dually-registered with the SEC as investment advisers, and subject to substantive regulation under the Investment Advisers Act of 1940, as amended ("Advisers Act") and the rules thereunder.[26] Many aspects of the disclosure requirements in the Proposal are addressed in the SEC's recent amendments to Rule 206(4)-1 (the "Marketing Rule"). The CFTC acknowledged in the Proposing Release that existing regulations govern disclosures by SEC-registered investment advisers, but stated that it "does not expect the proposed amendments to conflict with those laws and regulations, based on its understanding of those disclosure requirements."[27] We believe this issue merits closer scrutiny, particularly with respect to the disclosure of investment performance.

The SEC and its staff traditionally viewed the presentation of past investment performance as introducing a significant risk of misleading prospective clients or investors. For many decades, the use of past investment performance in advertisements by investment advisers was considered by SEC staff to be misleading in all cases. More recently, the SEC reiterated in the Marketing Rule proposing release that "the presentation of performance could lead reasonable investors to unwarranted assumptions and thus would result in a misleading advertisement."[28] As the SEC has stated that the inclusion of investment performance in offering documents is subject to this rule,[29] the performance information mandated in a CFTC Rule 4.7 Disclosure Document should, at a minimum, be consistent with the requirements of the Marketing Rule.

The content requirements and prescribed time periods set forth in the relevant subparts of CFTC Rule 4.25 are inconsistent with many of the prescriptions in paragraph (d) of the Marketing Rule, but most of these inconsistencies represent duplicative requirements with different specific requirements (such as 5-year rather than 10-year lookbacks). However, certain requirements directly conflict or pose practical challenges that operate as conflicts. For example, the requirement

[26] In a footnote in the Proposing Release, the SEC acknowledges that many registered CPOs and CTAs are dually-registered as registered investment advisers ("RIAs") and/or as Exempt Reporting Advisers with the SEC. Proposing Release, 88 Fed. Reg. 70858 at n. 57. In rulemakings over the last several years, the CFTC has provided estimates that by proxy to the number of registered CPOs that are also SEC Form PF filings indicate that the number of dually-registered private fund advisers and registered CPOs is significant. *See, e.g.*, 2019 Adopting Release, 84 Fed. Reg. at 67349.

[27] Proposing Release, 88 Fed. Reg. at 70865.

[28] Investment Adviser Marketing, 86 Fed. Reg. 13024 (Mar. 5, 2021) (the "Marketing Rule Adopting Release") at 13068.

[29] *See* Marketing Rule Release, 86 Fed. Reg. 13040 at n. 194 ("…if a PPM contained related performance information of separate accounts the adviser manages, that related performance information is likely to constitute an advertisement.").

to present the performance of *all* accounts managed by a CTA appears to violate Marketing Rule requirements for the presentation of related performance, at least with respect to CTAs that manage multiple investment programs. Similarly, the requirement to present the performance of each of a CTA's trading principals may be inconsistent with the Marketing Rule's requirements related to predecessor performance to the extent that this requirement extends to the performance of a trading principal prior to employment by the CTA. As another example, the Proposal would require a CPO of a fund with less than a three-year operating history to present performance of all accounts and pools directed by a third-party CTA in the same investment program, and of any major investee pools. In this scenario, Advisers Act rules would require the CPO to retain records to substantiate this performance, and to demonstrate that all appropriate pools and accounts managed according to the investment program have been included (or that the exclusion of certain pools does not materially improve the performance presented). Obtaining data of this sort from third party fund managers will not be feasible in all cases.

The CFTC could, in theory, address these specific conflicts by carving out additional subparts of CFTC Rules 4.25 and 4.25, as applicable, from the performance presentations required in CFTC Rule 4.7 Disclosure Documents. We encourage the CFTC to instead harmonize any investment performance reporting requirements with the existing prescriptive regime set forth in paragraph (d) of the Marketing Rule to avoid duplicative and inconsistent reporting requirements for the substantial population of CPOs and CTAs that are dually-registered with the SEC.

IV. Codification of the Fund-of-Funds Relief for Account Statements is an Opportunity for Harmonization with SEC Private Fund Adviser Reporting Rules for Dually-Registered CPOs

Under CFTC Rule 4.7(b)(3), a CPO operating a pool under the operational exemption is permitted to provide participants in the exempt pool with periodic account statements on a fiscal quarter basis, within 30 days of the exempt pool's fiscal year-end. This provides relief from the otherwise applicable requirement that a CPO to a commodity pool with more than $500,000 in net assets provide those periodic account statements on a monthly basis within 30 days of month-end.[30] The CFTC is proposing to codify exemptive relief it has consistently provided to CPOs operating commodity pools that invest in other commodity pools or funds ("fund-of-funds"). This exemptive relief has provided CPOs of fund-of-funds an additional 15 days to distribute participant account statements, but has required that the CPO distribute the statements on a monthly basis. As a matter of practice, almost all CPOs we advise that operate under CFTC Rule 4.7 distribute monthly account statements to their QEP participants.

We applaud the CFTC for proposing to codify this common exemptive relief. Seeking and receiving the exemptive relief has come with a time and cost burden for CPOs faced with the situation of needing to wait for information from underlying commodity pools and funds in order to be able to provide accurate account statements to their pool participants. However, we would

[30] CFTC Rule 4.22(a) and (b).

argue that the CFTC could and should go farther in harmonizing periodic account statement requirements, especially when it comes to CPOs that are dually-registered with the SEC as investment advisers and subject to the new private fund adviser reporting rules.[31]

Under the SEC private fund adviser reporting rules, all RIAs to private funds, regardless of the fund's underlying investments, have 45 days to distribute quarterly account statements to private fund investors in the first three fiscal quarters of the private fund, and 75 days to distribute statements to investors in fund-of-funds for the first three fiscal quarters. These periods are extended to 90 days and 120 days, respectively, for distribution of quarterly statements after the end of the private fund's fiscal year. Even modified as proposed, the CFTC Rule 4.7(b)(3) requirements would still be drastically shorter than concurrently applicable SEC requirements, such that CPOs often cannot take advantage of those longer reporting periods.

Further, imposing CFTC account statement reporting periods that are out-of-step with the SEC's private fund adviser reporting periods will generate further need for exemptive relief for CPOs of fund-of-funds. As an illustration, take the CPO of a fund-of-funds that is invested in (i) underlying commodity pools whose CPOs operate those commodity pools under CFTC Rule 4.7(b) and (ii) underlying private funds whose RIAs are subject to the private fund adviser reporting requirement. Under the CFTC's Proposal, the CPO of the fund-of-funds will receive relevant account statements from the underlying commodity pools within 30 days of month or fiscal quarter-end, and the CFTC rule as proposed will give the CPO of the fund-of-funds an extra 15 days to prepare its statements, as intended. However, the CPO of the fund-of-funds will need to wait 45 days for account statements from its underlying private fund investments for the first three quarters of the underlying private funds' fiscal year (and 75 days for underlying private funds that are themselves funds-of-funds). This timing would put the CPO of the fund-of-funds it in the same position as under the current CFTC Rule 4.7(b)(3) requirements: receiving account statements from underlying private funds on or after the date that it must distribute its own statements. Similarly, the CPO of the fund-of-funds will be unable to distribute quarterly account statements for the fourth fiscal quarter without relief, as it will be waiting 75 days (in some cases 120 days) for statements from underlying private funds.

We believe there is an opportunity here for the CFTC and the SEC to continue their long tradition of cooperation and to harmonize the reporting periods for CPOs subject to both sets of reporting rules. We recognize that, as our proposal is not part of the CFTC's Proposal, that the CFTC likely could not finalize its rulemaking with regard to CFTC Rule 4.7(b)(3) to reflect our proposals without notice and comment. We would encourage the Commission to review the SEC private fund adviser reporting rule and consider how it layers with the Commission's current regulation and its Proposal for dually-regulated CPOs and RIAs.

[31] *See* supra footnote 26.

V. The CFTC Should Consider Raising the Portfolio Requirement as Proposed and Then Study if the Change Alleviates the CFTC's Stated Concerns

We note that the adoption of CFTC Rule 4.7 in 1992 was the result of the work of a working group that the Commission's Regulatory Coordination Advisory Committee ("RCAC"). The Commission had created the RCAC in April 1989 in accordance with the provisions of the Federal Advisory Committee Act. The purpose of the RCAC was to advise the Commission concerning, among other things ways "to improve coordination among domestic…regulatory structures to enhance operational efficiency and capabilities of users" and to "enable the Commission to assess possible statutory, regulatory or policy alternatives and practical considerations in a rapidly growing and changing industry and global marketplace."[32] That working group explicitly recognized the overlapping application to the same CPOs of the Securities Act of 1933, as amended, as well as state Blue Sky laws.[33]

In contrast, the current Proposing Release barely makes passing reference to otherwise potentially applicable laws and regulations, representing a departure for the Commission in rulemaking in this area. The CFTC's present proposal has not benefitted from the work of any targeted committee, working group or roundtable. Indeed, the only roundtable the Proposing Release cites is one related to CPOs' fund-of-funds operations, from which the CFTC crudely extrapolates information about certain limited types of institutional investors' investment in exempt pools to justify its revised treatment of those investors and other investors under the Proposal. Furthermore, the language the Commission uses in the Proposing Release—repeatedly stating that its positions are "preliminary" and various events "may" come to pass in the spot commodity and commodity interest markets—seems more appropriate to a concept release or advance notice of proposed rulemaking rather than a proposed rulemaking.[34]

As the Proposal represents the most significant change to the CFTC Part 4 regulations that the CFTC has taken since its recission in 2012 of the full CPO registration exemption then available under CFTC Rule 4.13(a)(4) and under which many CPOs of private funds had operated, we believe that the proposed changes are due a Commission working group study, convening of one or more industry roundtables and/or conference with the NFA and its CPO/CTA Committee. Although our comment letter has focused on issues that will arise for registered CPOs and CTAs that are also subject to SEC regulation, we understand from conferring with our colleagues in our non-U.S. offices, that there may also be conflicts between the CFTC's disclosure-related proposals and certain non-U.S. regulation that applies to CPOs and CTAs operating cross-border in multiple jurisdictions. These regulations have undergone considerable development over the last few years. Although it was beyond the scope of this comment letter to address these in detail, the Commission

[32] 1992 Proposing Release, 57 Fed. Reg. at 3150.

[33] *Id*.

[34] *E.g.*, Proposing Release, 88 Fed. Reg. at 70856, 70857, 70858, 70859, 70560, etc.

needs to take these into consideration after the affected market stakeholders have a chance to inform it of the issues.

As the CFTC states in the Proposing Release, much of the enforcement of the changes under the Proposal will fall to the NFA during its routine audit process, but we also understand that the NFA was not consulted on the Proposal. Where a proposal is not adequately studied ahead of implementation, it will create situations where market intermediaries need CFTC Staff no-action, interpretive and exemptive relief to carry-on legitimate operations for which there was not enough time or attention to contemplate in a 60-day comment period.[35] This could lead to additional disruptions of CPO and CTA activity, commodity interest market disruptions and a strain on the CFTC's limited resources as a small agency, in addition to the incurrence of unnecessary expenditures on legal and compliance services by the relevant CPOs and CTAs in connection with seeking such relief.

However, we do not have an issue with CFTC's proposal to increase the two thresholds in the Portfolio Requirement under CFTC Rule 4.7(a)(1)(v) from $2 million to $4 million for the securities portfolio test, and from $200,000 to $400,000 for the initial margin and premium test. The changes are intended to reflect the effect of inflation since the Portfolio Requirement was adopted with CFTC Rule 4.7 in 1992, as by various inflation index metrics the value of these two thresholds has been halved in the last thirty years. If the alternative approaches we articulate in this comment letter in response to the Proposal do not persuade the Commission, we would strongly counsel the Commission to limit the first stage of rulemaking in this area to the amendment of CFTC Rule 4.7 to increase the Portfolio Requirement to reflect inflation, as proposed, and then to study the effect that this change has on the types of QEPs the Commission seems most concerned about protecting (*i.e.*, those who only qualify as QEPs under CFTC Rule 4.7(a)(3)). In the meantime, we would encourage the CFTC to engage with the industry specifically on this rulemaking and to take the time to review the overlapping regulatory landscape to which CFTC Rule 4.7 CPOs and CFTC Rule 4.7 CTAs are subject today.

[35] For example, we note that the CFTC Part 4 rule changes in 2012 spawned a large need for industry-wide no-action relief and interpretive relief. *See e.g.*, CFTC No-Action Letter No. 12-40 (treating BDCs similarly as registered investment companies under CFTC Rule 4.5); CFTC No-Action Letter No. 12-38 (providing relief for CPOs operating fund-of-funds after previous Appendix A to the CFTC Part 4 rules was replaced by the text of CFTC Form CPO-PQR); CFTC No-Action Letter 13-51 (permitting registered investment companies to consolidate the financials of their controlled foreign corporations for reporting purposes); CFTC Interpretive Letter No. 12-13 (determining that certain vehicles organized as equity real estate investment trusts are not commodity pools) CFTC No-Action Letter No. 12-44 (providing CPO registration relief for operators of certain vehicles organized as mortgage real estate investment trusts); CFTC Interpretive Letter No. 12-14 (providing an exclusion from the regulation of certain securitization vehicles as commodity pools); CFTC No-Action Letter No. 12-45 (providing CPO registration relief for operators of certain other types of securitization vehicles), among other relief.

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Thank you for considering our comments. If you have questions or if we can provide additional information that may assist the CFTC or the CFTC Staff, please contact Audrey Wagner (audrey.wagner@dechert.com or +1 202.261.3365), Philip Hinkle (philip.hinkle@dechert.com or +1 202.261.3460), Michael McGrath on matters related to SEC regulation of private fund advisers (michael.mcgrath@dechert.com or + 1 617 728 7178), or Karen Anderberg on matters related to the potential overlap of U.S. securities regulation and regulation of European funds in their home jurisdictions (karen.anderberg@dechert.com or +44 20.7184.7313).

Respectfully submitted,

/s/ Audrey Wagner

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