

CFTC Seeks to Amend Commodity Pool Regulations

The CFTC's proposal would largely codify existing exemptive, interpretive, and no-action relief in response to Project KISS market feedback.

The US Commodity Futures Trading Commission (CFTC) has proposed amendments to its regulations in order to ease the registration and compliance burdens placed on certain commodity pool operators (CPOs) and commodity trading advisors (CTAs) (the Proposal).¹ If finalized, the Proposal would:

- Permit CPOs to claim an exemption from CPO registration under CFTC Rule 4.13 if they solicit and accept funds from non-US persons for participation in offshore commodity pools
- Permit CPOs claiming a registration exemption under CFTC Rule 4.13(a)(3) to solicit and accept funds from non-US persons, notwithstanding the participant's sophistication level
- Prohibit reliance on a CPO registration exemption by persons that are statutorily disqualified from registering as a CPO
- Provide relief from registration as a CPO or CTA, as applicable, for advisors to and operators of family offices and advisers of business development companies
- Allow qualifying CPOs to engage in general solicitation as contemplated by the Jumpstart Our Business Startups Act (JOBS Act)
- Allow offshore commodity pools that have a US-based CPO and US participants to maintain the pool's books and records offshore at the pool's location
- Reduce Form CPO-PQR and Form CTA-PR filing requirements for certain CPOs and CTAs, respectively

The Proposal was issued in October 2018, and the public comment period has since closed. The CFTC is expected to address finalization of these proposed rules in Q1 2019.

Proposed CPO/CTA Registration Amendments

If finalized, the proposed amendments would increase the number of CPOs and CTAs qualifying for an exemption from registration as such with the CFTC.²

Exemption From Registration Under CFTC Rule 4.13 for Offshore Commodity Pools

The Proposal would permit CPOs to claim a CPO registration exemption under CFTC Rule 4.13 if they solicit and accept funds solely from non-US persons for participation in offshore commodity pools.

Qualification Requirements

If finalized, the Proposal would amend CFTC Rule 4.13 to permit a CPO to claim a registration and compliance exemption if that CPO only solicited or accepted funds from non-US persons for participation in offshore commodity pools (the 18-96 Exemption). This proposed amendment to CFTC Rule 4.13 is based largely on existing Staff Advisory 18-96, which currently offers both registration and compliance relief similar to that being proposed, and focuses mainly on the pool's connection to the United States.³ The 18-96 Exemption would be available to CPOs that satisfy the following requirements with respect to the pool in question:⁴

- The pool is, and will remain, organized and operated outside of the US.
- The pool will not hold meetings or conduct administrative activities within the US.
- No shareholder or participant in the pool is or will be a US person.
- The pool will not receive, hold, or invest any capital directly or indirectly contributed from sources within the US.
- The CPO, the pool, and any person affiliated with the pool will not market the pool to, or solicit funds from, US persons.

Unlike Staff Advisory 18-96, the proposed 18-96 Exemption would apply on a pool-by-pool basis, meaning that a CPO could claim the 18-96 Exemption with respect to one qualifying pool while simultaneously registering as a CPO for pools that require registration and/or do not otherwise qualify for a registration exemption.⁵

The CPO registration relief under the proposed CFTC Rule 4.13(a)(4) would not be self-executing, and the Proposal would require that claimants relying upon the 18-96 Exemption file notice of such reliance with the National Futures Association (the NFA) in accordance with CFTC Rule 4.13(b).⁶

Anti-manipulation and Records Requirements

Under the Proposal, CPOs qualifying for and relying upon the proposed 18-96 Exemption would still be required to both:

- Comply with the anti-fraud and anti-manipulation provisions under the Commodity Exchange Act, as amended (the CEA)
- Satisfy the recordkeeping requirements that apply to all persons claiming an exemption from CPO registration under CFTC Rule 4.13,⁷ including the requirement to both:
 - Make and keep all records prepared in connection with its CPO activities for five years
 - Keep such records readily accessible for the first two years of the five-year period⁸

Additionally, CPOs claiming the proposed 18-96 Exemption would be required to submit to special calls made by the CFTC to demonstrate eligibility and compliance.⁹

Solicitation of Non-US Person Participants Under 4.13(a)(3) Exemption

Consistent with Interpretive Letter 04-13,¹⁰ the CFTC has also proposed to expand the number of CPOs that would qualify for the *de minimis* exemption from CPO registration (the 4.13(a)(3) Exemption)¹¹ by amending the 4.13(a)(3)(iii) Requirement¹² to expressly permit non-US person participants, “regardless of their financial sophistication.”¹³

Prohibition for Statutorily Disqualified Exempt CPOs

Current regulations permit a person who is statutorily disqualified from registering with the CFTC as a CPO¹⁴ to nonetheless claim an exemption from CPO registration. A proposed amendment would close this loophole (and align with the CFTC’s analogous CTA rules) by requiring any person claiming an exemption under CFTC Rules 4.13(a)(1)-(5) to represent that neither the person nor any of the person’s principals is subject to any statutory disqualification under Sections 8a(2) or 8a(3) of the CEA, other than for a disqualification arising from a matter which was previously disclosed in connection with a previous application, if such registration was granted, or which was disclosed more than 30 days prior to the claim of this exemption.¹⁵

Importantly, this proposed amendment would affect currently exempt CPOs filing annual renewals under CFTC Rule 4.13. Therefore, statutorily disqualified CPOs that have previously relied upon an exemption from CPO registration (notwithstanding being statutorily disqualified under Section 8a(2) or (3) of the CEA) would not be “grandfathered in” under the Proposal, and could no longer qualify for and rely upon such exemption.

Family Office Registration Relief

Consistent with existing relief currently available under No-Action Letters 12-37¹⁶ and 14-143,¹⁷ the CFTC has also proposed to relieve Family Offices from CPO/CTA registration requirements, as set forth below:¹⁸

- **CPO Registration Exemption.** If adopted, proposed CFTC Rule 4.13(a)(8) would exempt an operator of a Family Office from the requirement to register with the CFTC as a CPO (the Family Office Exemption) if, with respect to such Family Office:
 - Interests in the pool are exempt from registration under the Securities Act of 1933, as amended (the Securities Act) and are offered and sold only to Family Clients.
 - The operator reasonably believes, at the time of investment (or, in the case of an existing pool, at the time of conversion to a pool meeting the criteria in proposed CFTC Rule 4.13(a)(8)), that each person who participates in the pool is a Family Client of a Family Office.

The CPO registration relief under proposed CFTC Rule 4.13(a)(8) would not be self-executing, and the Proposal would require that claimants relying upon the Family Office Exemption file notice of such reliance with the NFA in accordance with CFTC Rule 4.13(b).¹⁹

- **CTA Registration Exemption.** If adopted, proposed CFTC Rule 4.14(a)(11) would exempt a person from the requirement to register with the CFTC as a CTA if such person’s commodity trading advice is solely directed to, and is for the sole use of, Family Clients.

The CTA registration relief under proposed CFTC Rule 4.14(a)(11) would be self-executing.²⁰

Business Development Company Registration Relief

CFTC Rule 4.5 excludes certain otherwise regulated persons from the CPO definition with respect to the operation of a qualifying entity (the 4.5 Exclusion).²¹ Firms qualifying for the existing 4.5 Exclusion include operators of certain registered investment companies (RICs), state-regulated insurance companies, US banks, trusts and other federal depository institutions, and certain trustees.²²

The Proposal would amend CFTC Rule 4.5(b) to exclude investment companies from the CPO definition with respect to their operation of business development companies (BDCs) that have elected an exemption from registration as an investment company under the Investment Company Act of 1940, as amended (the BDC Exclusion). Because BDCs are similarly situated to RICs, the CFTC has stated that operators of BDCs should benefit from the same relief afforded to operators of RICs.²³ The CFTC's proposed BDC Exclusion is consistent with existing no-action relief issued by the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) in No-Action Letter 12-40.²⁴

CPO Exemptive Notice Filing Requirements

CPOs relying on relief from registration under the 4.5 Exclusion, CFTC Rule 4.7,²⁵ the 4.13(a)(3) Exemption must — and, if the Proposal is adopted, under the proposed BDC Exclusion, 18-96 Exemption, and Family Office Exemption would be required to — file notice of eligibility for such relief with the NFA, and affirm its eligibility for and reliance upon such relief on an annual basis, in accordance with the following table (proposed requirements in italics):

Relief	Timing of Notice Filing	Annual Affirmation?
4.5 Exclusion (<i>including the proposed BDC Exclusion</i>)	Prior to the date upon which the CPO intends to operate the qualifying entity pursuant to an exclusion provided by CFTC Rule 4.5 (<i>including the proposed BDC Exclusion</i>)	Yes
CFTC Rule 4.7	In general: (i) If relief is limited to CFTC Rules 4.7(b)(2)-(4): ²⁶ Before the date the commodity pool enters into a commodity interest ²⁷ transaction (ii) If relying on relief under CFTC Rule 4.7(b)(1): ²⁸ Prior to any offer or sale of any participation in the exempt pool If pool interests have been offered or sold in full compliance with Part 4, notice filing may be made at any time, subject to certain requirements.	No
4.13(a)(3) Exemption	In general, by no later than the time the CPO delivers a subscription agreement for the pool to a prospective pool participant ²⁹	Yes
18-96 Exemption (<i>Proposed</i>)	<i>Within 30 days of registering as a CPO, or claiming the 18-96 Exemption with respect to pools marketed to US persons, containing funds belonging to US persons, or otherwise operated in the United States, US territories, or US possessions (i.e., within 30 days of engaging in CPO activity that would make relief under CFTC Rule 3.10(c)(3)(i)³⁰ unavailable to such CPO³¹</i>	Yes
Family Office Exemption (<i>Proposed</i>)	<i>In general, by no later than the time the CPO delivers a subscription agreement for the pool to a prospective pool participant</i>	Yes

Proposed CPO/CTA Compliance Amendments

If finalized, the Proposal could reduce the regulatory compliance burden for many registered CPOs and CTAs.

General Solicitation by CPOs

The CFTC has proposed to remove the prohibition on general solicitation and marketing under CFTC Rules 4.7 and 4.13(a)(3). The Proposal would permit CPOs relying on either the “lite” CPO registration regime under CFTC Rule 4.7³² or CPO registration exemption under CFTC Rule 4.13(a)(3),³³ as applicable, to engage in general solicitation or marketing, if otherwise permitted under the JOBS Act securities law exemptions.³⁴ DSIO has previously provided exemptive relief under Exemptive Letter 14-116 for CPOs who may be soliciting or marketing to the general public in reliance upon the JOBS Act amendments to securities laws.³⁵ Subject to certain conditions, Exemptive Letter 14-116 provides relief for claimants from the general solicitation provisions under CFTC Rules 4.7 and 4.13(a)(3) to ensure relief provided by these provisions is compatible with the amended Regulation D and Rule 144A promulgated as a result of the JOBS Act. The Proposal would further harmonize the CFTC regulations with the JOBS Act amendments and codify this relief in the interest of legal certainty.

Relief From Periodic CPO/CTA Filing Requirements

In an effort to decrease the amount of data that the CFTC receives which does not provide meaningful information to assess systemic risk, the Proposal would both codify and extend the exemptive relief previously issued by DSIO under Exemptive Letters 14-115³⁶ and 15-47.³⁷ These proposed amendments would exclude certain categories of registered CPOs and CTAs from the requirement to file a Form CPO-PQR (for CPOs) or Form CTA-PR (for CTAs), as applicable. Specifically, the Proposal would exclude the following CPOs and CTAs from the definition of “Reporting Person” under CFTC Rule 4.27(b) and, accordingly, relieve them from the Form CPO-PQR and Form CTA-PR filing requirements under CFTC Rule 4.27(c), respectively:³⁸

- Relief from Form CPO-PQR filing requirement:
 - Registered CPOs that operate only pools for which they maintain and rely upon either (i) the 4.5 Exclusion or (ii) an exemption from CPO registration under CFTC Rule 4.13
- Relief from Form CTA-PR filing requirement:
 - Registered CTAs that do not direct the trading of any commodity interest accounts
 - Registered CTAs that direct only the accounts of commodity pools for which they (i) are registered as a CPO and (ii) comply with CFTC Rule 4.14(a)(4)³⁹
 - Registered CTAs that direct only the accounts of commodity pools for which they (i) are exempt from CPO registration and (ii) comply with CFTC Rule 4.14(a)(5)⁴⁰

Offshore Recordkeeping

If finalized, the Proposal would amend CFTC Rule 4.23⁴¹ to permit a US-based CPO that manages an offshore pool with US person participants to maintain the offshore pool’s original books and records at such pool’s main office (*i.e.*, outside of the US), rather than requiring the CPO to maintain such books and records at its main business office in the US.⁴² This proposed amendment is consistent with Staff Advisory

18-96 and replaces the aspect of the Staff Advisory 18-96 that addresses an offshore pool's recordkeeping requirements.⁴³

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Endnotes

¹ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (proposed Oct. 18, 2018) (to be codified at 17 C.F.R. pt. 4), <https://www.gpo.gov/fdsys/pkg/FR-2018-10-18/pdf/2018-22324.pdf> (Proposal).

In May 2017, the CFTC voted to seek public input on simplifying and modernizing the CFTC's rules, regulations, and practices to identify those areas that could be simplified to make them less burdensome and less costly. This CFTC initiative was called Project KISS, for "Keep It Simple, Stupid." The amendments set out in the Proposal are a product of the CFTC's Project KISS initiative. Proposal, 83 Fed. Reg. at 52903-52904; see Project KISS, 82 Fed. Reg. 21494 (May 9, 2017),

<https://www.govinfo.gov/content/pkg/FR-2017-05-09/pdf/2017-09318.pdf> (amended by Project KISS, 82 Fed. Reg. 23765 (May 24, 2017)), <https://www.govinfo.gov/content/pkg/FR-2017-05-24/pdf/2017-10622.pdf>).

- ² Absent an applicable exemption, Section 4m(1) of the Commodity Exchange Act, as amended (the CEA), and the CFTC regulations promulgated thereunder require operators of and advisors to commodity pools to register with the CFTC as CPOs or CTAs, respectively. 7 U.S.C. § 6m(1). Firms registered with the CFTC as CPOs and/or CTAs, as applicable, are subject to reporting, disclosure, recordkeeping, and other compliance obligations under Part 4 of the CFTC's regulations.

Exemptions from the CPO/CTA registration requirement are described in CFTC Rules 4.5, 4.13, and 4.14. 17 C.F.R. §§ 4.5, 4.13, 4.14; see also 7 U.S.C. §§ 1a(11)(B), 1a(12)(B) (providing that the CFTC may promulgate regulatory exclusions from the CPO and CTA definitions, respectively).

Unless an exclusion is otherwise available, a "commodity pool" is any collective investment vehicle, trust, or similar enterprise that invests in commodity interests. 7 U.S.C. § 1a(10); 17 C.F.R. § 1.3.

CFTC Rule 1.3 and Section 1a(11) of the CEA define "commodity pool operator" as a person who operates a commodity pool and solicits funds, securities, or property for participation in that pool. 7 U.S.C. § 1a(11); 17 C.F.R. § 1.3.

CFTC Rule 1.3 and Section 1a(12) of the CEA define "commodity trading advisor" as a person who engages in the business of advising others as to the sale of a commodity or promulgating analysis concerning the sale of a commodity. 7 U.S.C. § 1a(12); 17 C.F.R. § 1.3.

- ³ In 1996, the CFTC's Division of Trading and Markets (a predecessor of today's Division of Swap Dealer and Intermediary Oversight [DSIO]) published CFTC Advisory No. 18-96, which provides relief for certain registered CPOs from both (i) location requirement for an offshore pool's original books and records under CFTC Rule 4.23³ and (ii) disclosure, reporting, and certain recordkeeping requirements in connection with the operation of offshore commodity pools under CFTC Rule 4.21, 4.22, and 4.23(a)(10)-(11).

In order to qualify for the relief under Staff Advisory 18-96 from the covered CPO disclosure, reporting, and recordkeeping requirements, a registered CPO must file an exemptive notice with the CFTC setting forth the following representations:

- (i) The CPO is registered with the CFTC as a CPO
- (ii) The commodity pool in question:
 - a. Is, and will remain, organized and operated outside of the US
 - b. Will not hold meetings or conduct administrative activities within the US
 - c. Will not receive, hold, or invest any capital directly or indirectly contributed from sources within the US
- (iii) No shareholder of or other participant in such commodity pool is or will be a US person
- (iv) The CPO, commodity pool, and any person affiliated therewith will not undertake any marketing activity for the purpose, or that could reasonably be expected to have the effect, of soliciting participation from a US person

In order to qualify for the relief under Staff Advisory 18-96 from the books/records location requirement, a registered CPO whose main business office is within the US and who operates a commodity pool that has its main business office outside of the US must file an exemptive notice with the CFTC setting forth the following representations:

- (i) The CPO will both:
 - a. Maintain the commodity pool's original books and records at the pool's main office located outside of the US
 - b. Maintain duplicate books and records of such commodity pool at a designated office in the US
- (ii) Such CPO desires to maintain such books and records outside of the US in furtherance of compliance with US Internal Revenue Service (IRS) requirements for relief from US federal income taxation
- (iii) Within 72 hours following request by the CFTC, the US Department of Justice, or the National Futures Association (NFA), the original books and records will be provided at a specified location in the US

CFTC Advisory No. 18-96, Offshore Commodity Pools Relief for Certain Registered CPOs From Rules 4.21, 4.22 and 4.23(a)(1) and (a)(11) and from the Location of Books and Records Requirement of Rule 4.23 (April 11, 1996),

<https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm> (Staff Advisory 18-96).

⁴ See Proposal.

⁵ Proposal (to be codified at 17 C.F.R. § 4.13(e)(3)).

⁶ Proposal (to be codified at 17 C.F.R. § 4.13(b)).

⁷ 17 C.F.R. § 4.13(c).

⁸ 17 C.F.R. §§ 4.13(c)(i)-(ii).

⁹ 17 C.F.R. § 4.13(c)(iii).

¹⁰ In 2004, the CFTC's Division of Clearing and Intermediary Oversight (the predecessor to today's DSIO) issued an interpretive letter providing that the 4.13(a)(3)(iii) Requirement would not apply with respect to non-US person participants in a commodity pool for which the CPO is relying on the 4.13(a)(3) Exemption. CFTC Letter No. 04-13, Rule 4.13(a)(3) – Request for Interpretation Permitting Exempt CPOs to Admit Non-United States Persons That Are Not Accredited Investors (April 14, 2004), <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/04-13.pdf> (Interpretive Letter 04-13).

- ¹¹ CFTC Rule 4.13(a)(3) provides a *de minimis* exemption from CPO registration if the following conditions are satisfied in respect of the commodity pool in question:
- Interests in the pool are both:
 - Exempt from registration under the Securities Act of 1933, as amended (the Securities Act)
 - Offered and sold without public marketing in the US
 - After taking into account unrealized profits or losses of the pool's commodity interest positions, either:
 - The aggregate initial margin (IM) and premiums required to establish the positions do not exceed 5% of the liquidation value of the pool's portfolio
 - The aggregate net notional value of the positions do not exceed 100% of the liquidation value of the pool's portfolio
 - The CPO reasonably believes, at the time of the investment, that each pool participant is either (the 4.13(a)(3)(iii) Requirement):
 - An "accredited investor" (as defined in Regulation D under the Securities Act)
 - A trust that is not an accredited investor, but that was formed by an accredited investor for a family member's benefit
 - A "knowledgeable employee" (as defined in Rule 3c-5 under the Investment Company Act of 1940, as amended [the ICA])
 - A qualified eligible person (QEP)
 - The pool interests are not marketed as or in a vehicle for trading in the commodity futures, commodity options, or swaps markets
- 17 C.F.R. § 4.13(a)(3). "Qualified eligible persons" include, among others:
- (i) Registered futures commission merchants (FCMs), retail forex dealers, swap dealers, and broker-dealers (BDs)
 - (ii) Certain registered CPOs, CTAs, investment advisers (IAs), and trusts
 - (iii) Qualified purchasers
 - (iv) Knowledgeable employees
 - (v) Certain persons in respect of an exempt pool, including:
 - a. The CPO, CTA, or IA, or an affiliate thereof
 - b. A principal of the exempt pool, or its CPO, CTA, or IA (including affiliates thereof)
 - c. Certain employees and agents of the exempt pool, or of the CPO, CTA, or IA (or any of their affiliates) thereof
 - d. Certain family members of the foregoing
 - (vi) Non-US persons
- 17 C.F.R. § 4.7(a)(2)(viii)(A).
- ¹² See note 11 above.
- ¹³ Proposal (to be codified at 17 C.F.R. § 4.13(a)(3)).
- ¹⁴ Under Sections 8a(2)-(3) of the CEA, the CFTC may refuse to register a person if any of the following conditions (among others) are present:
- (i) The person has been temporarily or permanently enjoined by order not to act as a CFTC registrant, or to refrain from engaging in financially criminal activities.
 - (ii) The person has been convicted of a felony for criminal activities involving commodity interests or securities.
 - (iii) The person has been found by the CFTC or another governmental body or agency to have violated the CEA, CFTC regulations, or US securities laws.
- 7 U.S.C. §§ 12(a)(2)-(3).
- ¹⁵ See Proposal, 83 Fed. Reg. at 52914 (citing proposed 17 C.F.R. § 4.13(a)(6)).
- ¹⁶ In 2012, DSIO granted no-action relief from the CPO registration requirements for pool operators that are "family offices" under US Securities and Exchange Commission (SEC) Rule 275.202(a)(11)(G)-1 (Family Offices) (No-Action Letter 12-37), providing that DSIO would not recommend that the CFTC take enforcement action for failure to register as a CPO against a Family Office that remains in compliance with SEC Rule 275.202(a)(11)(G)-1 (regardless of whether such Family Office seeks to be excluded from SEC regulation under the Investment Advisers Act of 1940, as amended (the Advisers Act)).
- The CPO registration relief under No-Action Letter 12-37 is not self-executing, and claimants relying on No-Action Letter 12-37 must file notice of such reliance with DSIO. CFTC Letter No. 12-37, Family Offices (Nov. 29, 2012), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/12-37.pdf> (No-Action Letter 12-37).
- ¹⁷ In 2014, DSIO granted no-action relief from the CTA registration requirements for Family Offices in connection with advisory services provided to "family clients" as defined in SEC Rule 275.202(a)(11)(G)-1(d)(4) (Family Clients) (No-Action Letter 14-143), providing that DSIO would not recommend that the CFTC take enforcement action for failure to register as a CTA against

a Family Office that remains in compliance with SEC Rule 275.202(a)(11)(G)-1 (regardless of whether such Family Office seeks to be excluded from SEC regulation under the Advisers Act).

The CTA registration relief under No-Action Letter 14-143 is not self-executing, and claimants relying on No-Action Letter 14-143 must file notice of such reliance with DSIO. CFTC Letter No. 14-143, No-Action Relief from Registration as Commodity Trading Advisors for Family Offices (Nov. 5, 2014), <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/14-143.pdf> (No-Action Letter 14-143).

¹⁸ Proposal (to be codified at 17 C.F.R. § 4.13(a)(8)). “Family Office” is defined in SEC Rule 275.202(a)(11)(G)-1(b) as a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position/employment) that:

- (i) Has no clients other than family clients (subject to certain exceptions for clients of the family office resulting from a death of or other involuntary transfer by a family member or key employee)
- (ii) Is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities
- (iii) Does not hold itself out to the public as an IA

17 C.F.R. § 275.202(a)(11)(G)-1(b).

¹⁹ Proposal, 83 Fed. Reg. at 52909.

²⁰ Proposal (to be codified at 17 C.F.R. § 4.14(a)). “Family Client” is defined in SEC Rule 275.202(1)(11)(G)-1(d)(4) to mean, inter alia, any present or former family member, any key employee, certain trusts, and companies wholly owned and operated for the sole benefit of one or more family clients. 17 C.F.R. § 275.202(1)(11)(G)-1(d)(4).

²¹ CFTC Rule 4.5 provides relief from CPO registration to certain otherwise regulated persons, including:

- Registered investment companies meeting the following requirements:
 - Notice of eligibility must include representations that the investment company will enter into commodity interests for *bona fide* hedging purposes
 - Satisfy one of the two *de minimis* thresholds described in CFTC Rule 4.13(a)(3) for purposes of the 4.13(a)(3) Exemption, after taking into account unrealized profits/losses of its commodity interest positions
- State-regulated insurance companies
- US-regulated banks, trusts, or other financial depository institutions
- Trustees of, named fiduciaries of, and employers maintaining a pension plan that is subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA)

17 C.F.R. § 4.5(a).

²² Proposal, 83 Fed. Reg. at 52911.

²³ Proposal, 83 Fed. Reg. at 52911.

²⁴ In 2012, DSIO also granted no-action relief from the CPO registration requirement for operators of certain pooled investment vehicles organized as business development companies (BDCs) (No-Action Letter 12-40), providing that DSIO would not recommend that the CFTC take enforcement action against the operator of a BDC satisfying certain enumerated requirements, including:

- The BDC (i) has elected to be treated as a BDC under Section 54 of the ICA, with the SEC, and (ii) continues to be regulated by the SEC as a BDC.
- The BDC will not be, and has not been, marketing participations to the public as or in a commodity pool, or otherwise as or in a vehicle for trading in the commodity futures, commodity options, or swaps markets.
- The CPO limits its use of commodity interest transactions in the BDC consistent with the trading thresholds in CFTC Rules 4.5(c)(2)(iii)(A)-(B).

The CPO registration relief under No-Action Letter 12-40 is not self-executing, and claimants relying on No-Action Letter 12-40 must file notice of such reliance with DSIO. CFTC Letter No. 12-40, No-Action Relief from the Commodity Pool Operator Registration Requirement for Commodity Pool Operators of Certain Pooled Investment Vehicles Organized as Business Development Companies (Dec. 4, 2012), <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/12-40.pdf> (No-Action Letter 12-40).

²⁵ CFTC Rule 4.7 provides a less burdensome regulatory regime to certain CPOs not otherwise qualifying for an exemption from CFTC registration — namely, pool-level relief from certain financial reporting and disclosure requirements for pools in which all participants qualify as QEPs. 17 C.F.R. § 4.7(b).

CFTC Rule 4.7 also provides a less burdensome regulatory regime to certain CTAs not otherwise qualifying for an exemption from CFTC registration — namely, firm-level relief from certain financial reporting and disclosure requirements for with all QEP participants. 17 C.F.R. § 4.7(c).

²⁶ CFTC Rule 4.7(b)(2) provides an exemption from the specific periodic reporting requirements of CFTC Rules 4.22(a)-(b), CFTC Rule 4.7(b)(3) provides an exemption from the specific annual report requirements of CFTC Rule 4.22(c), and CFTC Rule

4.7(b)(3) provides an exemption from the specific recordkeeping requirements of CFTC Rule 4.23. 17 C.F.R. §§ 4.7(b)(2)-(4); see 17 C.F.R. §§ 4.22(a)-(c), 4.23.

²⁷ CFTC Rule 1.3 defines a “commodity interest” to be a contract that derives its value from the price, value, or other measurement related to a commodity, including (without limitation) futures, swaps, options, leveraged or margined contracts, and certain retail commodity or foreign exchange (FX) contracts. 17 C.F.R. § 1.3.

A “commodity” is any “thing” that is standardized and can trade in interstate commerce, and the statutory definition under the CEA includes a catch-all provision — though the statutory definition expressly excludes securities, individualized “things” (e.g., antiques, paintings), onions, and movie ticket receipts. 7 U.S.C. § 1a(9); 17 C.F.R. § 1.3.

²⁸ CFTC Rule 4.7(b)(1) provides an exemption from the specific disclosure requirements of CFTC Rules 4.21, 4.24, 4.25, and 4.26. 17 C.F.R. § 4.7(b)(1); see 17 C.F.R. §§ 4.21, 4.24-4.26.

²⁹ 17 C.F.R. § 4.13(b)(2)(i).

³⁰ CFTC Rule 3.10(c)(3) provides an exemption from CPO registration for firms located outside of the US that are engaged in intermediating commodity interest transactions on US designated contract markets (DCMs) only on behalf of persons located outside of the US. 17 C.F.R. § 3.10(c)(3); see Exemption from Registration for Certain Foreign Persons, 72 Fed. Reg. 63976 (Nov. 14, 2007), <https://www.govinfo.gov/content/pkg/FR-2007-11-14/pdf/E7-22110.pdf>.

³¹ Proposal (to be codified at 17 C.F.R. § 4.13(b)(2)(i)(A)). Importantly, if enacted as proposed, this notice requirement would apply to both new and existing pools alike — meaning that pools currently relying on Staff Advisory 18-96 would be required to file a separate exemptive notice of their reliance on the proposed 18-96 Exemption once enacted. Proposal, 83 Fed. Reg. at 52914.

³² The “lite” CPO registration regime under CFTC Rule 4.7(b) is available to a registered CPO that offers or sells participations in a pool solely to QEPs (4.7(b) QEP Requirement) in an offering which qualifies for an exemption from the registration requirements of the Securities Act pursuant to Section 4(a)(2) thereof (33 Act Requirement).

³³ As discussed above, the 4.13(a)(3) Exemption includes the 4.13(a)(3)(iii) Requirement, and is further conditioned upon the relevant pool’s interests being both (i) exempt from registration under the Securities Act and (ii) offered and sold without marketing to the public (4.13(a)(3)(i) Requirement).

³⁴ Proposal, 83 Fed. Reg. at 52910.

³⁵ Following the enactment of the JOBS Act in 2012 and the SEC rulemakings that followed, DSIO granted exemptive relief in 2014 from both:

- (i) The 4.13(a)(3)(i) Requirement under the 4.13(a)(3) Exemption
- (ii) The 33 Act Requirement under CFTC Rule 4.7(b)

(Exemptive Letter 14-116). In each case, such exemptive relief is subject to the requirement that a CPO relying on Exemptive Letter 14-116 is either (i) a 506(c) Issuer or (ii) using a 144A Reseller. CFTC Letter No. 14-116, Exemptive Relief from Provisions in Regulations 4.7(b) and 4.13(a)(3) Consistent with JOBS Act Amendments to Regulation D and Rule 144A (Sept. 9, 2014), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-116.pdf> (Exemptive Letter 14-116).

As used in Exemptive Letter 14-116:

- “506(c) Issuers” refers to issuers relying on the exemption from Security Act registration requirements under Rule 506(c) of Regulation D, which permits an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to SEC Rule 506, so long as certain enumerated conditions are satisfied. Exemptive Letter; see 17 C.F.R. § 230.506(c).
- “144A Resellers” refers to entities reselling securities in reliance on an exemption under SEC Rule 144A, which permits such entities to engage in general solicitation, so long as the securities are only resold to qualified institutional buyers (as defined in SEC Rule 144A(a)(1)) (QIBs) or persons reasonably believed to be QIBs. Exemptive Letter; see 17 C.F.R. § 230.144A.

The relief under Exemptive Letter 14-116 is not self-executing, and claimants relying on Exemptive Letter 14-116 must file notice of such reliance with DSIO. See Exemptive Letter 14-116.

³⁶ In 2014, DSIO granted exemptive relief from the Form CPO-PQR filing requirement for registered CPOs which only operate pools (i) pursuant to a claim of exemption from CPO registration under CFTC Rule 4.13, or (ii) for which they maintain and rely upon the 4.5 Exclusion (Exemptive Letter 14-115). CFTC Letter No. 14-115, Exemptive Relief from CFTC Regulation 4.27(c) with Respect to Certain Registered Commodity Pool Operators (Sept. 8, 2014), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-115.pdf> (Exemptive Letter 14-115).

³⁷ In 2015, DSIO likewise granted exemptive relief from the Form CTA-PR filing requirement for registered CTAs which do not direct trading for any commodity interest accounts (Exemptive Letter 15-47). CFTC Letter No. 15-47, Exemptive Relief from CFTC Regulation 4.27(c) with Respect to Certain Registered Commodity Trading Advisors (July 21, 2015), <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/15-47.pdf> (Exemptive Letter 15-47).

³⁸ Proposal (to be codified at 17 C.F.R. § 4.27(b)(2)).

CFTC Rule 4.27(c) mandates that “reporting persons” (which term is defined in CFTC Rule 4.27(b) to capture all registered CPOs and CTAs) (Reporting Persons) file with the National Futures Association (NFA) a report in the form of Form CPO-PQR

and Form CTA-PR, respectively, with respect to the directed assets of each pool under the advisement of such CPO/CTA. Absent applicable relief from the filing requirements under CFTC Rule 4.27:

- (i) Form CPO-PQR must be filed (a) quarterly, for registered CPOs with at least US\$1.5 billion in aggregated pool assets under management (AUM) as of the end of such quarter, and (b) annually for all other registered CPOs.
- (ii) Registered CTAs must file a Form CTA-PR annually.

17 C.F.R. § 4.27; see 17 C.F.R. pt. 4, apps. A, C.

- ³⁹ CFTC Rule 4.14(a)(4) provides an exemption from CTA registration for registered CPOs whose commodity trading advice is directed solely to, and for the sole use of, the pool(s) for which it is registered with the CFTC as a CPO. 17 C.F.R. § 4.14(a)(4).
- ⁴⁰ CFTC Rule 4.14(a)(5) provides an exemption from CTA registration for persons that are exempt from CPO registration and whose commodity trading advice is directed solely to, and for the sole use of, the pool(s) for which it is exempt from registration with the CFTC as a CPO. 17 C.F.R. § 4.14(a)(5).
- ⁴¹ CFTC Rule 4.23 provides that, if a US-based, registered CPO manages an offshore pool with US person participants, the CPO is required to maintain the pool's original books and records in the CPO's main business office. 17 C.F.R. § 4.23(a).
- ⁴² Proposal (to be codified at 17 C.F.R. § 4.23(c)).
- ⁴³ Proposal, 83 Fed. Reg. at 52915.