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CFTC Simplifies, Codifies and Harmonizes Part 4 Requirements for CPOs and CTAs

I. Introduction and Executive Summary

At an open meeting held on November 25, 2019, the Commodity Futures Trading Commission (the "**CFTC**" or the "**Commission**") adopted two sets of final rule amendments to its Part 4 regulations governing commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**").[1] These amendments finalize a subset of the Part 4 amendments the CFTC proposed last fall (the "**2018 Proposal**" or "**Proposal**").[2] The amendments are effective as of January 9, 2020 (the "**Effective Date**"). Required actions and compliance dates for each component are indicated below.

As described by CFTC Chairman Heath Tarbert in his opening remarks at the open meeting at which the amendments were adopted:

> Each amendment is designed to simplify the rules governing CPOs and CTAs, advancing our strategic goal of "encouraging innovation and enhancing the regulatory experience for market participants at home and abroad." In particular, today's amendments to Part 4 will also improve harmonization for market participants subject to concurrent CFTC and SEC jurisdiction.[3]

A. Overview of Final Amendments – Required Actions and Compliance Dates

The final rule amendments, which for the most part, codify and supersede existing relief granted in CFTC staff letters or provide clarification with respect to existing industry practices, comprise six separate components, which are summarized below. A more detailed discussion of the amendments is provided in Part III.

1. **Rule 4.5 Designation of the Adviser to a Registered Fund as the Excluded CPO**. Amendment of Rule 4.5(a) to designate the investment adviser to an SEC-registered investment company (a "**Registered Fund**" or "**RIC**"), rather than the RIC itself, as the person to claim the Rule 4.5 CPO exclusion for operation of the RIC (reflecting a practice currently permitted by National Futures Association ("**NFA**") guidance and used for many Registered Funds).[4]

   Required Actions and Compliance Date. As a result of the amendment, the investment adviser to a RIC, rather than the RIC, is now required to claim the Rule 4.5 CPO exclusion and to make the related notice filing under Rule 4.5(c). Many advisers to RICs already do so and will not need to take any action. Advisers to RICs for which the Rule 4.5 CPO exclusion was previously filed by the RIC will be required to make a new Rule 4.5 notice filing claiming the exclusion on behalf of the adviser. The compliance date for Rule 4.5 notice filings by advisers to RICs affected by the amendment (that is, where the claim was previously made by the RIC) is March 1, 2021, giving such advisers an extra year to make the filing. The compliance date for Rule 4.5 notice filings by advisers to new RICs is the Effective Date.[5]

2. **Business Development Company CPO Exclusion**. Amendments to Rule 4.5(a)(1) and (b)(1) that provide a new Rule 4.5 CPO exclusion for investment advisers to business development companies that engage in limited commodity interest activities ("BDCs") (codifying and superseding an existing no-action letter).

   Required Actions and Compliance Date. Advisers to BDCs seeking to rely on the new exclusion should file a notice to claim the exclusion with the NFA, pursuant to Rule 4.5(c), as soon as practicable after the Effective Date. The adviser should also put in place a process for annual reaffirmation of the claim (which was not required under the prior no-action letter).

3. **JOBS Act Harmonization**. Amendments to Rule 4.7(b) and Rule 4.13(a)(3) that permit CPOs relying on these rules to conduct general solicitation activities permitted by the Jumpstart Our Business Startups Act of 2012 ("JOBS Act") and related SEC rules (codifying and superseding an existing exemptive letter).

   Required Actions and Compliance Date. No additional filings are required beyond the notice filings already required for CPOs relying on either Rule 4.7(b) or Rule 4.13(a)(3).[6]

4. **Form CPO-PQR and CTA-PR Reporting Persons Relief**. Amendments to Rule 4.27 eliminating the requirement to file Forms CPO-PQR and CTA-PR for certain categories of registered CPOs and CTAs (generally CPOs and CTAs providing services only to exempt pools or accounts) (codifying and expanding existing exemptive letters).

   Required Actions and Compliance Date. No further action is required.

5. **Acceptance of Non-U.S. Persons and other Rule 4.7 "QEPs" in Rule 4.13(a)(3) Exempt Pools**. Amendments to Rule 4.13(a)(3) clarifying that all qualified eligible persons ("QEPs") as defined in Rule 4.7, including Non-U.S. Persons, are permissible participants in Rule 4.13(a)(3) "de minimis" pools (superseding prior staff interpretive relief).

   Required Actions and Compliance Date. No further action is required.

6. **Family Office Exemption**s. Exemptions from CPO and CTA registration for "family offices," as defined in Securities and Exchange Commission ("**SEC**") rules, adopted as new Rules 4.13(a)(6) (for CPOs) and 4.14(a)(11) (for CTAs) (codifying and superseding existing no-action letters).

   Required Actions and Compliance Date. Persons relying on the new family office exemptions should, as soon as practicable after the Effective Date, create and maintain an internal record documenting the relevant exemption they wish to claim, as well as their qualifications for that exemption. No filings are required.

B. Two Roads Not Taken – Withdrawal of the "18-96 Exemption" Proposal; Deferral of Consideration of the Proposed "Statutory Disqualification Bar" for Rule 4.13 Exemptions

The CFTC determined that it would not, at this time, adopt final rules relating to two components of the 2018 Proposal that had generated substantial concerns in the comment process: (1) the proposed "**18-96 Exemption**," a new exemption for CPOs of offshore funds modeled after existing CFTC Staff Advisory 18-96,[7] and (2) a proposal to add a "statutory disqualification bar" to a number of existing CPO exemptions, as well as to the proposed offshore CPO exemption.

The 18-96 Exemption Proposal. In light of the comments received, the Commission withdrew the 18-96 Exemption proposal.[8] Commenters raised concerns about both (1) the proposed criteria for claiming the new exemption and (2) the interaction of the proposed exemption with CFTC Rule 3.10(c)(3)(i), the Commission's existing exemption for offshore CPOs of offshore pools, on which offshore CPOs currently rely. Generally, these commenters expressed concerns that the criteria for claiming the exemption would be overly narrow and burdensome relative to the Commission's regulatory goals, as well as outdated and out of step with the realities of current global markets and global business practices. With respect to interaction with Rule 3.10(c)(3)(i), several commenters said that certain statements in the Proposing Release relating to the 18-96 Exemption proposal were inconsistent with widespread industry understanding, and would represent a departure from Commission precedent and its historic approach to application of CPO exemptions. The Adopting Release states that the Commission may undertake a more comprehensive review of the extraterritorial application of its regulation in the CPO-CTA space in the future.[9]

The statutory disqualification bar proposal. This proposal was intended to "provid[e] additional protection to members of the public by reducing the possibility of fraud and other illegal conduct in exempt pools offered by [unregisterable] persons."[10] Concerns about the proposal included logistical questions about how the prohibition would operate in the context of exempt CPOs, procedural and interpretive questions about the statutory disqualification provisions in Section 8a(2) and (3) based on the wording of the statute and the breadth of the conduct covered, concerns about procedural protections, and skepticism about whether the additional burdens of the condition were justified by the regulatory concerns. The Adopting Release states that the Commission believes that those comments require consideration and that it intends to reconsider these amendments in a future rulemaking.[11]

C. Open Meeting and Open Discussion – Food for Thought

The open meeting provided a forum for substantive discussion by all of the Commissioners on the matters before them, as well as more generally on the appropriate scope and manner of CFTC regulation of asset managers. The Commissioners participated actively in the open meeting, expressed their views and areas of concern, and asked a number of questions of DSIO staff, all of which indicated appreciation of the importance of CFTC regulation of the asset management industry and recognition of the related challenges.[12]

For market participants and practitioners that follow the CFTC's regulation of asset managers, and that may be interested in engaging with the Commission in this area, both Adopting Releases, the formal statements submitted, and the exchanges of views at the open meeting are all well worth careful review for possible indications of what can be expected on the CFTC's agenda, and in its approach for regulating asset managers, in the months to come. Additional suggestions of "food for thought" that may be found in these materials are noted in the last section of this Client Alert.

II. Discussion of the Amendments

A. Amendment of Rule 4.5(a)(1) to Designate the Investment Adviser to a Registered Fund as the Excluded CPO

The Commission amended Rule 4.5(a)(1), which provides an exclusion from the definition of CPO for operators of Registered Funds (investment companies registered with the SEC under the Investment Company of Act of 1940 (the "**ICA**")) that meet the commodity interest trading and marketing criteria in the rule. The amendment expressly designates the Registered Fund's investment adviser ("**RIA**") as the person excluded from the CPO definition.

In its current form, the terms of Rule 4.5 provide a CPO exclusion for the Registered Fund itself, rather than for the Registered Fund's RIA. The CFTC proposed this amendment in order to align the terms of Rule 4.5 with its determination in 2012 that, for Registered Funds that do not qualify for the Rule 4.5 CPO exclusion, the Registered Fund's RIA is the appropriate person to register and serve as the Fund's CPO for regulatory purposes.

The Adopting Release explains the Commission's reasoning as follows:

> Consistent with its prior statements concerning the person that should claim the CPO exclusion in Regulation 4.5 with respect to the operations of a RIC, and with the Commission's conclusion that the [RIC's] RIA is the most appropriate person to register as a CPO of a RIC that exceeds the trading thresholds in Regulation 4.5, the Commission believes it appropriate to specify the [RIC's] RIA as that excluded person, instead of the RIC.[13]

Notwithstanding the current wording of the rule, however, the NFA has provided guidance to the effect that it is permissible for either the Registered Fund or the RIA to claim the exclusion, and there are certain advantages to having the RIA, rather than the Registered Fund, claim the exclusion.[14] Accordingly, consistent with the NFA guidance, many fund groups already take the approach that is now reflected in the amended rule – the RIA rather than the Registered Fund claims the exclusion – and thus will not be affected by the amendment.

The Adopting Release addresses comments raised about logistical issues for RICs where the Rule 4.5 claim is currently filed by the RIC rather than the RIA, specifically practical implications and compliance costs involved in making the change and potential impact on fund disclosure. With respect to disclosure, Rule 4.5 requires a person claiming the exclusion with respect to a RIC to disclose reliance on the exclusion to Fund shareholders. This disclosure is typically made in the Fund's registration statement and would identify the person claiming the exclusion (either the Fund itself or the Fund's adviser).

One commenter noted that changing the excluded CPO from the Registered Fund to the RIA could be considered a material change that would necessitate an off-cycle amendment to the Fund's registration statement, the costs of which would be borne by the Fund and its shareholders.

In response to these comments, the Commission took two steps to mitigate these concerns regarding compliance transition. First, as indicated above, the Commission adopted a compliance date of March 1, 2021, for RIAs that will be affected by the amendment.[15]

> The Commission recognizes that it may be overly burdensome for RIAs of RICs to file the revised annual notices pursuant to Regulation 4.5(c)(5) when they are due in early 2020. Therefore, the Commission has determined that compliance with Regulation 4.5(c)(5) by RIAs with respect to RICs affected by the amendment to Regulation 4.5(a)(1) shall not be required until within 60 days of the end of the calendar year 2020, *i.e.*, March 1, 2021. The Commission believes this approach will minimize any inconvenience or cost associated with the transition to designating the RIA as the excluded CPO for the RIC.[16]

In addition, the Commission adopted an interpretation designed to address the regulatory transition and future compliance with the filing requirement in Rules 4.5(c) and (d). Rule 4.5(d) requires a person who has claimed an exclusion under Rule 4.5 to file an amended notice within 15 business days after certain events, including if the notice becomes inaccurate or incomplete. The interpretation adopted by the Commission clarifies that RIAs affected by the amendment are not, by virtue of the amendment, required to file an amended notice under Rule 4.5(d).

> [I]f a person other than a RIC's RIA has claimed the CPO exclusion with respect to such RIC through the required notice filing, the Commission interprets Regulations 4.5(d)(1)-(d)(2) not to apply in such a manner that an amended notice within 15 business days would be required to reflect changing the excluded CPO entity to the RIC's RIA. Rather, the Commission interprets Regulation 4.5(c)(5) to require that, when the excluded CPO of such RIC is required to annually reaffirm its notice of exclusion, (*i.e.*, within 60 days of the calendar year-end), the excluded CPO entity will simply allow the existing notice to expire, and the RIA of such RIC will file a new notice pursuant to Regulation 4.5(c), prior to the expiration of the other existing notice. Where an RIA has claimed the exclusion with respect to a RIC through a notice filing, the RIA will simply continue to affirm the notice as usual.[17]

With respect to the concern that changing the excluded CPO to the RIA could constitute a material change necessitating an "off-cycle" amendment to the RIC's registration statements, the Commission stated that it is not in a position to make a determination as to whether this is, in fact, a material change, and that the RIC must make that determination. The Adopting Release notes, however, that notwithstanding the change in the language of the rule, the intent behind Rule 4.5(a)(1) remains the same – no person acting as the CPO of a RIC is required to register as a CPO with respect to the operation of the RIC, provided that the applicable requirements and conditions of the rule are satisfied. Accordingly, from the Commission's perspective, "there is no substantive change with respect to the RIC's legal posture under the Commission's regulations."[18]

B. Adoption of CPO Exclusion for Investment Advisers to BDCs

The CFTC amended Rule 4.5 to provide a CPO exclusion for investment advisers to BDCs (as that term is defined in the ICA) that meet the same commodity interest trading and marketing restrictions imposed by the rule on Registered Funds. The proposed amendments would be consistent with no-action relief from the CPO registration requirement previously provided to investment advisers of BDCs (the "BDC No-Action Letter") and would impose the same operational conditions as the BDC No-Action Letter.[19] However, the relief provided by the amendment would be somewhat broader, in that it would provide an exclusion from the definition of CPO rather than, effectively, an exemption from registration. The Rule 4.5 amendment would also change the filing requirement for advisers to BDCs, from an initial notice to DSIO, as required by the BDC No-Action Letter, to a Rule 4.5 filing with NFA through its electronic filing system that would require annual reaffirmation.

C. JOBS Act Amendments – Harmonization with SEC JOBS Act Rules Permitting "General Solicitation"

The CFTC adopted amendments to Rules 4.7(b) and 4.13(a)(3) that will permit qualifying CPOs of private funds to engage in general solicitation in their pool offerings under the limited circumstances contemplated by Congress in adopting the JOBS

Act and as permitted by related SEC rules adopted in 2013.[20] In accordance with the JOBS Act, SEC Rules 506(c) and 144A permit persons relying on certain private offering exemptions from the SEC's registration requirements to engage in general solicitation, as long as the person takes reasonable steps to ensure that all purchasers in the offerings meet the investor qualification standards for the relevant exemption (accredited investor status for Rule 506(c) and qualified institutional buyer status for Rule 144A).

Prior to the new amendments, the terms of both Rule 4.7(b) and Rule 4.13(a)(3) imposed a restriction on marketing to the public, without an exception for general solicitation activities permitted by the SEC's JOBS Act rules.

The amendments generally codify a letter previously issued by DSIO that provides exemptive relief under both rules in order to achieve harmonization of CFTC and SEC rules in this respect.[21] In addition, the amendments include certain organizational changes to Rule 4.7(b)(1) and a minor amendment to Regulation 4.13(a)(3)(i), designed to clarify which exempt CPOs are eligible for relief from the offering restrictions pursuant to the JOBS Act amendments and to improve the readability and clarity of the Rules.

D. Forms CPO-PQR and CTA-PR Filing Relief for Certain Registered CPOs and CTAs

The Commission adopted amendments to Rule 4.27, the reporting rule requiring registered CPOs and CTAs to file with the NFA reports on Forms CPO-PQR and CTA-PR, respectively, that eliminate the relevant filing requirement for the following categories of registered CPOs and CTAs:

1. Registered CPOs that operate only pools for which they rely on the CPO exclusion provided by Rule 4.5 and/or the exemption from CPO registration under Rule 4.13 (collectively "**exempt pools**"); and

2. Registered CTAs that either (a) do not direct the trading of any commodity interest accounts or (b) direct only the accounts of commodity pools for which the CTA also serves as a registered or exempt CPO and relies on the CTA exemptions available for such CPOs.

The amendment revises the definition of "reporting person" in Rule 4.27, which identifies the types, classes, or categories of CPOs and CTAs that are required to file the forms, by excluding the types of CPOs and CTAs described above from the definition.

These amendments reflect the Commission's recognition that, for certain types of CPOs and CTAs, the filing of Form CPO-PQR or Form CTA-PR would provide limited additional information regarding the CPO or CTA beyond the information already available to the Commission (as part of the registration process and the CPO's or CTA's ongoing reporting and other obligations as registrants). Therefore, requiring these registrants to file Form CPO-PQR or Form CTA-PR, and to incur the related costs and burdens, would not further the purposes of the CFTC's regulations.[22]

E. Amendment to Rule 4.13(a)(3) to Clarify that all Rule 4.7 QEPs, Including Non-U.S. Persons, are Permitted Investors

The Commission adopted an amendment to Rule 4.13(a)(3), which provides an exemption for CPOs of pools that are sold in limited offerings and engage in only de minimis commodity interest trading activities, that clarifies the categories of permissible investors in these pools. Specifically, the Commission amended Rule 4.13(a)(3)(iii)(D) to clarify that all QEPs, as that term is defined in Rule 4.7, are permitted investors in Rule 4.13(a)(3) pools. As a result of this change, permitted investors in Rule 4.13(a)(3) pools expressly include both all Non-U.S. persons, as defined in Rule 4.7, regardless of whether they meet a financial sophistication test, and any other persons that qualify as QEPs under Rule 4.7.

Prior to the amendment, Rule 4.13(a)(3)(iii)(D) referred only to QEPs as defined in Rule 4.7(a)(2)(viii)(A), which does not refer to non-U.S. persons or types of QEPs described in other parts of Rule 4.7(a). With respect to permissible investors in rule 4.13(a)(3) pools, market participants historically have relied on relief in a staff interpretative letter (CFTC Letter 04-13) and guidance provided by DSIO in the form of frequently asked questions.[23]

In connection with this amendment, the Commission also rescinded Rule 4.13(a)(3)(iii)(E). This provision refers to investors permitted under Rule 4.13(a)(4), which the Commission rescinded in 2012.

F. Family Office Exemptions

The Commission adopted amendments to Rules 4.13 and 4.14 that provide new CPO and CTA registration exemptions for "**family offices**," as defined in rules adopted by the SEC under the Investment Advisers Act of 1940 ("**Advisers Act**"). The SEC family office rules exclude family offices from the definition of investment adviser under the Advisers Act ("**SEC Family Office Exclusion**").[24] The CFTC rule amendments codify and supersede registration relief previously provided in two DSIO no-action letters (the "**Family Office No-Action Letters**").[25] As of the Effective Date, persons that previously relied on the Family Office No-Action Letters will no longer be able to do so, and must instead rely on the new family office exemptions.[26]

1. The CPO Exemption

Under new Rule 4.13(a)(6) (originally proposed as Rule 4.13(a)(8)), a CPO is not required to register as such if, for each pool for which the person claims exemption from registration under the new rule:

(i) Interests in the pool are exempt from registration under the Securities Act of 1933 and such interests are offered and sold only to ''family clients'' as defined in the SEC Family Office Exclusion;

(ii) The person qualifies as a "family office," as defined in the SEC Family Office Exclusion; and

(iii) The person 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 of Rule 4.13(a)(6), that each person who participates in the pool is a "family client" of the "family office," as defined in the SEC Family Office Exclusion.

In a change from both the 2018 Proposal and the current no-action relief, the exemption in Rule 4.13(a)(6) is self-executing; persons claiming CPO registration relief under Rule 4.13(a)(6) will not be required to make a notice filing.[27]

A CPO relying on new Rule 4.13(a)(6) will be subject to the same recordkeeping requirements and CFTC special call authority that apply to other exempt CPOs. The final rule amendments include an amendment to Rule 4.13(c), which is intended to implement these recordkeeping requirements for persons relying on Rule 4.13(a)(6), as well as on other Rule 4.13(a) exemptions.[28]

2. The CTA Exemption

For CTAs, new Rule 4.14(a)(11) provides registration relief for any person whose commodity trading advice is solely directed to, and is for the sole use of, "family clients," as defined in the SEC Family Office Exclusion.[29] As proposed, reliance on Rule 4.14(a)(11) will be self-executing and will not require a notice filing.[30]

III. Outlook for Further CFTC Regulation of Asset Managers

The Commission's actions at the November 25, 2019, open meeting generally address codification and clarification of matters on which there is widespread consensus and that serve widely supported goals of transparency and certainty in regulation, as well as furthering goals of simplification and harmonization with SEC regulation in specific areas where investor protection is not compromised. The two most substantive and policy-driven components of the 2018 Proposal were withdrawn or withheld for further consideration in light of comments received.

Notwithstanding the limited impact of the specific actions the Commission took on most asset managers, however, there is much food for thought both in the Adopting Releases and the discussion at the open meeting. The open meeting itself showed a commitment to open regulatory dialogue and exchange of ideas, and provided a forum for substantive discussion by all of the Commissioners on the matters before them, as well as more generally on the appropriate scope and manner of CFTC regulation of asset managers. A number of themes reflected in the amendments – for example, the focus on "smart" data collection (elimination of reports with little or no utility); the CFTC's tailoring its regulation to the appropriate level of regulatory interest; harmonization of regulatory requirements for dual registrants; providing regulatory certainty and transparency; and improving the regulatory experience, in all cases without compromising the Commission's regulatory mission – can have relevance for a broader set of issues.

For these reasons, while the recent amendments may not, in themselves, have a significant impact, the actions taken and the accompanying process and exchange of views could be harbingers of more significant developments to come, and may provide valuable insight for market participants and practitioners as preparation for future engagement on those developments.

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[1] The amendments were adopted in two separate releases (collectively, the "**Adopting Release**"). See Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs, 84 Fed. Reg. 67,355 (Dec. 10, 2019) (the "**Family Office/JOBS Act Release**"); 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. 67,343 (Dec. 10, 2019) (the "**RIC/BDC/Reporting Person Release**").

[2] *See* Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors; Notice of Proposed Rulemaking, 83 Fed. Reg. 52,902 (Oct. 18, 2018). The term "**2018 Proposal**" will also refer to the Release promulgating the Proposal.

[3] *See* Statement of Chairman Heath P. Tarbert Before the Nov. 25, 2019, Open Commission Meeting (Nov. 25, 2019), https://www.cftc.gov/PressRoom/SpeechesTestimony/tarbertstatement112519 (quoting Remarks of Chairman Tarbert at the 2019 FIA Expo (Nov. 6, 2019), https://www.youtube.com/watch?v=HedqIdrZ2y0).

[4] The term "investment adviser" for this purpose refers to the Registered Fund's primary investment adviser; a sub-adviser to a Registered Fund would not be viewed as operating the Fund, and thus would address its status as a CTA rather than a CPO.

[5] In connection with revising an existing Rule 4.5 claim to reflect the adviser rather than RIC as the excluded CPO, the adviser must also ensure that the disclosure required by Rule 4.5(c)(2)(i), which is typically found in the RIC's Statement of Additional Information, is appropriately adjusted to correctly state the person making the claim. In addition, because the Rule 4.5 filing must be made by an individual duly authorized by the person making the claim, such a change may require the adviser to adopt appropriate corporate resolutions documenting such authority.

[6] CPOs currently relying on the existing JOBS Act exemptive relief are already required to file notices claiming an exemption under Rule 4.7 or Rule 4.13(a)(3), in order to rely on the exemptive relief provided by these rules. Accordingly, the Commission expects that such CPOs wishing to use general solicitation in their existing qualifying exempt pools may do so without further action. CPOs wishing to use general solicitation with respect to newly formed qualifying exempt pools (after the Effective Date) may do so by filing a notice of exemption as required under Rule 4.7(b) and Rule 4.13(b)(1).

[7] CFTC Staff Advisory 18-96 currently provides limited relief from the Part 4 requirements for registered CPOs, including U.S.-based CPOs, that operate offshore pools meeting the criteria set forth in the Advisory. See Offshore Commodity Pools - Relief for Certain Registered CPOs from Rules 4.21, 4.22, and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23, CFTC Staff Advisory 18-96, Comm. Fut. L. Rep. (CCH) ¶ 26,659 (April 11, 1996).

[8] *See* Family Office/JOBS Act Release, 84 Fed. Reg. at 67,356-57.

[9] At the open meeting, there were a number of questions about the impact of the withdrawal of the 18-96 Exemption proposal. In response to these questions, DSIO staff stated that until the Commission takes further action, CPOs and offshore pools can continue to rely on the relief provided by Staff Advisory 18-96 for registered CPOs and on Rule 3.10 for pools that can be exempt because, among other things, they have an offshore operator and trade in the U.S. on a cleared basis where required. DSIO staff further stated that the underlying concern with the proposal was that it articulated a viewpoint inconsistent with that of international and non-U.S. asset managers regarding exemptions for offshore funds. Thus, the idea was to withdraw the exemption and go back to the way it was before it was proposed, as the proposal had not become final and did not have any legal effect. DSIO will continue to review this area and is working on recommendations for the Commission.

[10] 2018 Proposal, 83 Fed. Reg. at 52,924.

[11] *See* Family Office/JOBS Act Release, 84 Fed. Reg. at 67,357.

[12] Three of the Commissioners (the Chairman, Commissioner Behnam, and Commissioner Berkovitz) submitted written statements that are posted on the CFTC's website. Commissioner Berkovitz submitted two statements that are part of the two Releases, including a dissenting statement in the Family Office/JOBS Act Release that explains in detail the reasons for his dissent.

[13] *See* RIC/BDC/Reporting Person Release, 84 Fed. Reg. at 67,346 (footnote omitted).

[14] The NFA guidance states: "You may also file a 4.5 notice with the adviser as claimant. If you file this way, you would make a separate filing for each series of a trust or corporation, with each series of the trust or corporation as the qualifying entity. If you file in this way, the adviser may be able to rely on the CTA exemption in Rule 4.6, which does not require a filing." The NFA guidance also states that the Registered Fund (which in the case of a series Fund would mean the corporation or trust) may file the rule 4.5 notice on behalf of the Fund, as long as a separate filing is made for each series. Where the Registered Fund claims the exclusion, Rule 4.6 would not be available to the RIA, which would have to rely on Rule 4.14(a)(8) for a CTA exemption. Unlike Rule 4.6, Rule 4.14(a)(8) is not self-executing and would require an additional filing.

[15] Rule 4.5 filings must be reaffirmed annually, within 60 days of year-end. See Rule 4.5(c)(5); Notices to Members, National Futures Association, Notice I-19-29 (Dec. 2, 2019).

[16] *See* RIC/BDC/Reporting Person Release, 84 Fed. Reg. at 67,346-47.

[17] *Id.* at 67,346 (footnotes omitted).

[18] *Id.* at 67,347.

[19] *See* CFTC Letter No. 12-40 (Dec. 4, 2012). The BDC No-Action Letter imposed conditions with substantially the same effect as the inclusion of BDCs and their advisers as eligible entities under Rule 4.5, except that the BDC No-Action Letter required a notice filing with DSIO staff instead of with the NFA, and did not require annual reaffirmation. The conditions included a prohibition on marketing based on the Rule 4.5 marketing test and a representation that the operator would limit the BDC's use of commodity interests consistent with the trading requirements of Rule 4.5 applicable to Registered Funds.

[20] *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, Release No. 33-9354, 77 Fed. Reg. 54,464 (Sept. 5, 2012) (Proposing Release), and Release Nos. 33-9415, 34-69959, IA-362478 Fed. Reg. 44,771 (July 24, 2013) (Adopting Release).

[21] *See* CFTC Letter No. 14-116 (Sept. 9, 2014).

[22] Discussion at the open meeting provided additional information about the limited utility of information provided by the affected CPOs and CTAs. As background, DSIO staff stated that the forms were adopted in 2012 and that after several filing cycles, it became clear that a number of entities were filing the forms without usable data. Subsequent consultation with the NFA revealed that these filers were registered with the Commission, and thus met the reporting person definition but did not operate any commodity pools or trade any client accounts. Accordingly, these filers correctly populated the forms mostly with zeroes, information that was neither of use to the Commission nor a productive use of these registrants' resources. This led to DSIO's issuance of the exemptive letters, and ultimately to the expanded relief that was part of the 2018 Proposal, which is intended to remove non-productive compliance costs from certain CPOs and CTAs and increase the quality of data that is collected by the Commission on Forms CPO-PQR and CTA-PR, respectively.

[23] *See* CFTC Staff Letter 04-13 (Apr. 14, 2004) (Non-U.S. persons are permissible investors in Rule 4.13(a)(3) pools, regardless of financial sophistication); DSIO Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations," at 3 (all QEPs are permissible investors in Rule 4.13(a)(3) pools).

[24] *See* SEC Investment Advisers Act Rule 202(a)(11)(G)-1. The SEC Family Office Exclusion provides that a family office, as defined in the Rule, shall not be considered to be an investment adviser for purpose of the Advisers Act. The SEC Family Office Exclusion defines a family office as "a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position or employment) that: (1) has no clients other than family clients; provided that if a person that is not a family client becomes a family client of the family office as a result of the death of a family member or key employee or other involuntary transfer from a family member or key employee, that person shall be deemed to a be a family client for purposes of this section for one year following the completing of the transfer of legal title to the assets resulting from the involuntary event; (2) is wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and (3) does not hold itself out to the public as an investment adviser." The SEC Family Office Exclusion generally defines "family client" as current and former family members, key employees, and certain trusts and other entities owned solely by and for the benefit of individual family clients.

[25] CFTC No-Action Letter No. 12-37 (Nov. 29, 2012) (registration relief for family office CPOs), and CFTC No-Action Letter No. 14-143 (Nov. 5, 2014) (registration relief for family office CTAs).

[26] As noted in the comment letters, some family offices and related parties rely on historic Commission staff letters providing interpretative relief to the effect that the vehicles involved are "not a pool." See e.g., CFTC Staff Interpretation 00-100 (Nov. 1, 2000); CFTC Staff Interpretation 97-98 (Sept. 24, 1997). The Commission confirmed in the Adopting Release that the new exemptions do not supersede the "not a pool" letters, and that appropriate parties may continue to rely on them, as permitted by Rule 140.99, provided that the family office has determined its own situation to be

substantively identical to the outlined facts and circumstances contained in the letter(s) relied on. See Family Office/JOBS Act Release, 84 Fed. Reg. at 67,360. The Adopting Release notes that under Rule 140.99(a)(3), an interpretative letter may be relied upon by persons other than the Beneficiary. *Id.* at 63,360 n.48.

[27] As proposed, the CPO family office exemption would have required any claimant to file an initial notice, as well as an annual notice reaffirming that the person remains exempt from registration. Commissioner Berkovitz disagreed with the decision to eliminate the filing requirement and dissented on the vote adopting the family office exemptions. Commissioner Berkovitz also disagreed with the decision not to include in the family office exemptions a statutory disqualification bar along the lines that had been proposed for certain other exemptions.

[28] Rule 4.13(c)(1) currently requires a person filing a claim for exemption under Rule 4.13 to make and keep books and records related to the person's CPO activities for five years, and to submit to such special calls as the Commission may make to demonstrate eligibility for and compliance with the applicable criteria of the claimed exemption. As part of the family office exemptions, the Commission amended Rule 4.13(c)(1) to impose these requirements on all persons relying on Rule 4.13 exemptions, regardless of whether a notice of exemption is required to claim such relief.

[29] As explained in the Adopting Release, the CTA exemption, both as proposed and as adopted, covers CTA advice provided to all family clients, including both individual family clients and pools comprised of family client assets. See Family Office/JOBS Act Release at 67,359. Accordingly, it would not be necessary for a CTA relying on Rule 4.14(a)(11) to also consider their status under Rule 4.14(a)(5) for pools for which they claim the CPO exemption under new Rule 4.13(a)(6).

[30] Interestingly, although the Commission clearly states that it is "adding the CPO and CTA exemptions for Family Offices," Rule 4.14(a)(11) does not expressly require a person claiming the CTA registration exemption to qualify as a family office, but rather only that such person's trading advice is solely directed to, and is for the sole use of, "family clients" as defined in Rule 202(a)(11)(G)-1.

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