



6351-01-P

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 4

RIN 3038-AE-76-P

Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (CFTC or Commission) is adopting certain amendments containing the regulations applicable to commodity pool operators (CPOs) and commodity trading advisors (CTAs). The amendments (Final Rules) are consistent with and/or expand upon no-action and exemptive letters issued by the Commission's Division of Swap Dealer and Intermediary Oversight (DSIO). In particular, the Commission intends to increase regulatory certainty by amending two regulations. In the first, the Commission is providing clarification that the exclusion from the CPO definition currently provided for a registered investment company (RIC) should be claimed by the entity most commonly understood to solicit for or "operate" the RIC, *i.e.*, its investment adviser, and is adding an exclusion for the investment advisers of business development companies (BDCs), which share many operational similarities with RICs. In the second, the Commission is adopting amendments to the "Reporting Person" definition that would eliminate the filing

requirements for Forms CPO-PQR and CTA-PR for certain classes of CPOs and CTAs.

DATES: *Effective date:* The effective date for this final rule is **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Compliance date: Compliance with Regulation 4.5(c)(5) (17 CFR 4.5(c)(5)) by registered investment advisers with respect to RICs affected by the amendment to Regulation 4.5(a)(1) (17 CFR 4.5(a)(1)) shall be required by March 1, 2021.

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I. Background

a. Statutory and Regulatory Background

i. Existing Statutory and Regulatory Authorities

Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)¹ established a statutory framework to reduce risk, increase transparency, and promote market integrity within the financial system by regulating the swaps market. As amended by the Dodd-Frank Act, section 1a(11) of the Commodity Exchange Act (CEA or the Act) defines the term “commodity pool operator,” as any

¹ Pub. L. 111-203, 124 Stat. 1376 (2010), *available at* <https://www.govinfo.gov/content/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf> (last retrieved Jul. 17, 2019).

person² engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, with respect to that commodity pool, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests.³ CEA section 1a(12) defines a “commodity trading advisor,” as any person who, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in commodity interests.⁴ CEA section 4m(1) generally requires each person who satisfies the CPO or CTA definitions to register as such with the Commission.⁵ With respect to CPOs, the CEA also authorizes the Commission, acting by rule or regulation, to include within, or exclude from, the term “commodity pool operator” any person engaged in the business of operating a commodity pool, if the Commission determines that the rule or regulation will effectuate the purposes of the Act.⁶ CEA section 1a(12)(B) provides multiple exclusions from the CTA definition, and similarly affords the Commission the authority

² Regulation 1.3 defines “person” as including individuals, associations, partnerships, corporations, and trusts. 17 CFR 1.3. The Commission’s regulations are found at 17 CFR Ch. I (2019).

³ 7 U.S.C. 1a(11). The CEA is found at 7 U.S.C. 1, *et seq.* (2019). Both the Act and the Commission’s regulations are accessible through the Commission’s website, <https://www.cftc.gov>.

⁴ 7 U.S.C. 1a(12)(A)(i). The CTA definition also includes any person who for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning the value of or advisability of trading in commodity interests, and any person that is registered with the Commission as a CTA. 7 U.S.C. 1a(12)(A)(ii)-(iii).

⁵ 7 U.S.C. 6m(1).

⁶ 7 U.S.C. 1a(11)(B).

to exclude such other persons not within the intent of that provision as the Commission may specify by rule, regulation, or order.⁷

Part 4 of the Commission's regulations governs the operations and activities of CPOs and CTAs.⁸ Those regulations implement the statutory authority provided to the Commission by the CEA and establish multiple registration exemptions and exclusions for CPOs and CTAs.⁹ Part 4 also contains regulations that establish the ongoing compliance obligations applicable to CPOs and CTAs registered or required to be registered. These requirements pertain to the commodity pools and separate accounts that the CPOs and CTAs operate and advise, and among other things, provide customer protection, disclosure, and reporting to a registrant's commodity pool participants or advisory clients.

ii. The October 2018 Proposal

In response to information received from members of the public, as well as CFTC staff's own internal review of the Commission's regulatory regime, the Commission published for public comment in the *Federal Register* on October 18, 2018, a Notice of Proposed Rulemaking (NPRM, or the Proposal), proposing several amendments to the

⁷ 7 U.S.C. 1a(12)(B)(vii). The Commission most recently relied on the authority in this provision in issuing an Order excluding Farm Credit System institutions from that definition, due to their similarities to banks, a type of entity that is already excluded by CEA section 1a(12)(B)(i). See Order Excluding Farm Credit System Institutions From the Commodity Exchange Act's Definition of "Commodity Trading Advisor," 81 FR 89447 (Dec. 12, 2016). CEA section 1a(12)(C) requires that the exclusions in CEA section 1a(12)(B) only apply, if the furnishing of such excluded CTA services by such persons is solely incidental to the conduct of their business or profession. 7 U.S.C. 1a(12)(C).

⁸ See 17 CFR part 4, generally.

⁹ See, e.g., 17 CFR 4.13 and 4.14 (providing multiple registration exemptions to qualifying persons meeting the CPO and CTA definitions, respectively).

regulations applicable to CPOs and CTAs.¹⁰ Specifically, the Commission proposed regulatory amendments that would add to 17 CFR part 4:

- 1) An exemption from registration in Regulation 4.13 for CPOs that is generally consistent with the terms of Staff Advisory 18-96;¹¹
- 2) A requirement in Regulation 4.13 that any person claiming or affirming an exemption from CPO registration pursuant to Regulations 4.13(a)(1)-(a)(5) certify that neither the claimant nor its principals are statutorily disqualified pursuant to CEA Sections 8a(2) or 8a(3);
- 3) An exemption from the recordkeeping requirements in Regulation 4.23 for U.S.-based CPOs of offshore commodity pools that permits the CPO to maintain the pool's original books and records in the pool's offshore location;
- 4) An exemption from registration in Regulations 4.13 and 4.14 for persons acting as CPOs or CTAs for family offices and/or their family clients, as those terms are defined in regulations adopted by the Securities and Exchange Commission (SEC);
- 5) A clarification that the exclusion from the CPO definition currently provided by Regulation 4.5(a)(1) for a RIC should be claimed by the

¹⁰ See Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018) (Proposal).

¹¹ 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 Books and Records Requirement of Rule 4.23, Commodity Futures Trading Commission, Division of Trading & Markets (Apr. 11, 1996), available at <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm> (last retrieved Oct. 10, 2019) (Staff Advisory 18-96).

entity most commonly understood to solicit for or “operate” the RIC,
i.e., the RIC’s investment adviser;

- 6) An exclusion in Regulation 4.5 from the CPO definition for the investment advisers of BDCs;
- 7) Relief permitting general solicitation in commodity pools offered by CPOs pursuant to exemptions in Regulations 4.7 and 4.13(a)(3), consistent with the Jumpstart Our Business Start-ups Act of 2012 (JOBS Act); and
- 8) Amendments to the “Reporting Person” definition in Regulation 4.27 that would eliminate the filing requirements for Forms CPO-PQR and CTA-PR for certain classes of CPOs and CTAs.¹²

Several of the proposed amendments are consistent with, or expansions of, relief that is currently available through a staff advisory or through no-action and exemptive letters issued over the years by staff of the Commission’s DSIO and its predecessors. The Commission proposed these amendments intending to simplify the regulatory landscape for CPOs and CTAs without reducing the protections or benefits provided by those regulations, to increase public awareness about available relief by incorporating commonly relied upon no-action or exemptive relief in Commission regulations, and to generally reduce the regulatory burden without sacrificing the Commission’s customer protection and other regulatory interests.

b. Public Comments and *Ex Parte* Meetings

¹² Proposal, 83 FR 52903-04.

The Commission requested comment generally on all aspects of the Proposal, and also solicited comment through targeted questions about each of the proposed amendments. Overall, the Commission received 28 individual comment letters responsive to the NPRM: six from legal and market professional groups; 13 from law firms; seven from individual family offices; one from a government-sponsored enterprise (GSE) actively involved in the housing industry; and one from the National Futures Association (NFA), a registered futures association,¹³ who through delegation by the Commission, assists Commission staff in administering the CPO and CTA regulatory program.¹⁴ Additionally, Commission staff participated in multiple *ex parte* meetings concerning the Proposal.¹⁵

¹³ See CEA section 17, 7 U.S.C. 21.

¹⁴ Comments were submitted by the following entities: Alscott, Inc.* (Dec. 7, 2018); Alternative Investment Management Association (AIMA) (Letter 1: Dec. 17, 2018, and Letter 2: Oct. 7, 2019); Buchanan, Ingersoll, and Rooney, PC* (Dec. 12, 2018); Commodore Management Company* (Dec. 12, 2018); Dechert, LLP (Dechert) (Dec. 17, 2018); Freddie Mac (Dec. 17, 2018); Fried, Frank, Harris, Shriver, & Jacobson, LLP (Fried Frank) (Dec. 17, 2018); Investment Adviser Association (IAA) (Dec. 17, 2018); Kramer, Levin, Naftalis, & Frankel, LLP* (Dec. 17, 2018); LBCW Investments* (Dec. 5, 2018); Managed Funds Association (MFA) (Dec. 14, 2018); Marshall Street Capital* (Dec. 13, 2018); McDermott, Will, & Emery, LLP* (Dec. 17, 2018); McLaughlin & Stern, LLP* (Dec. 5, 2018); Moreland Management Company* (Dec. 13, 2018); Morgan, Lewis, & Bockius, LLP* (Dec. 18, 2018); NFA (Dec. 17, 2018); New York City Bar Association, the Committee on Futures and Derivatives (NYC Bar Derivatives Committee) (Jan. 4, 2019); Norton, Rose, Fulbright US, LLP* (Dec. 17, 2018); Perkins Coie, LLP* (Dec. 17, 2018); the Private Investor Coalition, Inc. (PIC) (Nov. 28, 2018); Ridama Capital * (Dec. 13, 2018); Schiff Hardin, LLP (two offices)* (Dec. 13 and 17, 2018); the Securities Industry and Financial Management Association Asset Management Group (SIFMA AMG) (Letter 1: Dec. 17, 2018, and Letter 2: Sept. 13, 2019); Vorpai, LLC* (Dec. 17, 2018); Willkie, Farr, and Gallagher, LLP (Willkie) (Dec. 11, 2018); and Wilmer Hale, LLP (Wilmer Hale) (Dec. 7, 2018). Those entities marked with an “*” submitted substantively identical, brief comments, specifically supporting the detailed comments and suggested edits submitted to the Commission by PIC.

¹⁵ See “Comments for Proposed Rule 83 FR 52902,” available at <https://comments.cftc.gov/PublicComments/CommentList.aspx?id=2925> (last retrieved Oct. 15, 2019).

This is the second of two *Federal Register* releases the Commission is publishing, finalizing amendments from the Proposal. In particular, this release adopts amendments seeking to add to 17 CFR part 4 items 5, 6, and 8 from the list of the Proposal initiatives above.¹⁶ For the reasons stated in the Proposal, and in light of comments received, the Commission is adopting these amendments with modifications and an interpretation of the notice requirements in Regulations 4.5(c) and (d).

II. Final Rules

a. Regulation 4.5: Amendments to the CPO Exclusion

i. Background and Proposed Rules

In the Proposal, the Commission proposed two specific amendments to paragraphs (a)(1) and (b)(1) of Regulation 4.5, which, together, provide an exclusion from the CPO definition for the operators of RICs. First, the Commission proposed amendments clarifying that the investment adviser, registered as such (RIA) under the Investment Advisers Act of 1940, as amended (IA Act),¹⁷ would be the person required to claim the CPO exclusion on behalf of a particular RIC.¹⁸ Even though the Commission previously determined that a RIC's RIA, as the principal sponsor and entity managing the

¹⁶ The Commission notes that items 4 and 7 in the Proposal above are further discussed and addressed by the Commission in a separate *Federal Register* release. Concurrent with the adoption of these final rule amendments, the Commission adopted final amendments completing those initiatives. See Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the *Federal Register*.

¹⁷ 15 U.S.C. 80b-1, *et seq.*

¹⁸ The Commission notes that neither this proposed amendment nor the final amendment adopted herein are intended to substantively affect the CPO exclusion for RICs in Regulation 4.5.

operations of a RIC, is the appropriate person to serve as the CPO for regulatory purposes, the RIC had been listed as both the excluded CPO and the “qualifying entity” covered by the exclusion in Regulation 4.5.¹⁹

The second amendment proposed by the Commission was intended to extend the exclusionary relief of Regulation 4.5 to also cover the RIAs of BDCs, consistent with relief provided through a no-action letter issued by DSIO staff in 2012.²⁰ BDCs are a category of closed-end investment company established by Congress for the purpose of making capital more readily available to small, developing, and financially troubled companies that do not have ready access to the public capital markets or other forms of conventional financing.²¹ Due to their limited purpose, BDCs generally use and trade commodity interests for hedging or managing investment and commercial risks of the operating companies in which they invest.²² Consequently, the types of commodity interests BDCs use are typically limited to interest rate and currency swaps, with some limited use of credit default swaps and other commodity interests.²³

¹⁹ See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 FR 11252 (Feb. 24, 2012); correction notice published at 77 FR 17328 (Mar. 26, 2012) (CPO CTA Final Rule) (“The Commission agrees that the [RIA] is the most logical entity to serve as the [RIC]’s CPO. To require a member or members of the [RIC]’s board of directors to register would raise operational concerns for the [RIC] as it would result in piercing the limitation on liability for actions undertaken in the capacity of a director. Thus, the Commission concludes that the [RIA] for the [RIC] is the entity required to register as the CPO.”).

²⁰ CFTC Letter No. 12-40, *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/12-40.pdf> (Dec. 4, 2012) (last retrieved Oct. 8, 2019) (BDC No-Action Letter).

²¹ *Securities Offering Reform for Closed-End Investment Companies*, 84 FR 14448, 14449 (Apr. 10, 2019).

²² BDC No-Action Letter, at 2.

²³ BDC No-Action Letter, at 2. *See also* *Use of Derivatives by Registered Investment Companies*, U.S. Securities and Exchange Commission, Division of Economic Risk and Analysis, *available at* <https://www.sec.gov/files/derivatives12-2015.pdf> (Dec. 2015) (last

As the Commission emphasized in the Proposal, and as discussed by DSIO staff in the BDC No-Action Letter, BDCs operate in a manner similar to closed-end RICs, despite not being registered as such, and are subject to many of the same provisions of the Investment Company Act of 1940, as amended (ICA).²⁴ In fact, the list of legal and operational similarities between BDCs and RICs is quite long.²⁵ Although BDCs meet the definition of an “investment company” under section 3 of the ICA,²⁶ they are exempt from registration as such by virtue of filing, pursuant to ICA section 54, an election to be subject to various ICA provisions.²⁷ Prior to the issuance of the BDC No-Action Letter, BDC operators were required to register with the Commission as CPOs, due to their inability to claim or rely upon the CPO exclusion for RICs, the original language of

retrieved Oct. 8, 2019) (Use of Derivatives by RICs). The SEC’s Division of Economic Risk and Analysis pulled a random sample of RICs, including BDCs, to examine the use of derivatives by such entities. Use of Derivatives by RICs, at 1. Within the sampled BDCs, none had exposure to derivatives, which appears to be consistent with assertions from industry members that BDCs’ usage of derivatives is generally very limited. *Id.* at 3.

²⁴ 15 U.S.C. 80a-1, *et seq.*; *see, e.g.*, 15 U.S.C. 80a-18 (providing asset coverage requirements among others subject to certain limitations) and 15 U.S.C. 80a-60 (making ICA section 18 applicable to BDCs with certain modifications).

²⁵ Most BDCs, like RICs, have external investment advisers, which generally must be registered with the SEC under the IA Act. BDCs are also subject to periodic examination by the SEC. 15 U.S.C. 80a-63. Further, BDCs must either have a class of equity securities that is registered under, or have filed a registration statement for a class of equity securities pursuant to, the Securities Exchange Act of 1934, as amended, which, in turn, requires multiple regular filings with the SEC: Annual reports on Form 10-K; quarterly reports on Form 10-Q; current reports on Form 8-K; and proxy solicitation statements in connection with annual stockholder meetings. Additionally, many BDCs are listed for trading on national securities exchanges, and thus, are subject to exchange rules governing listed companies. *See, e.g.*, NYSE Listed Company Manual, *available at* <https://nyseguide.srorules.com/listed-company-manual> (last retrieved Oct. 8, 2019). Finally, BDCs are also subject to certain regulations and corporate governance guidelines under the Sarbanes-Oxley Act of 2002. P.L. 107-204, 116 Stat. 745 (Jul. 30, 2002) (codified in U.S.C. Titles 15, 18, 28, and 29).

²⁶ 15 U.S.C. 80a-3.

²⁷ 15 U.S.C. 80a-53 and 80a-6(f).

which did not contemplate relief for entities similar to, but not registered as, investment companies.²⁸

Pursuant to the BDC No-Action Letter, operators of BDCs have received no-action relief from CPO registration, provided that: (1) the entity has elected to be treated as a BDC under ICA section 54 and will remain regulated as such; (2) the operator has not marketed and will not market participations in the BDC to the public as an investment in a commodity pool, or otherwise as an investment in a vehicle for the trading of commodity interests; (3) the operator represents that it limits its use of commodity interests in the BDC, consistent with the trading thresholds in Regulation 4.5(c)(2)(iii)(A)-(B); and (4) the operator files an electronic notice with DSIO staff.²⁹ Since its issuance, DSIO staff has received 65 filings by operators of BDCs claiming this no-action relief.³⁰

For the purpose of providing a regulatory exclusion for CPOs of BDCs, the Commission proposed amending Regulation 4.5 in a manner largely consistent with the legal analysis and conditions of the BDC No-Action Letter.³¹ The Commission explained, “because BDCs are subject to oversight by the SEC that is comparable to the regulation of RICs ... the Commission has determined to exercise its authority to propose

²⁸ See 17 CFR 4.5(a)(1) and (b)(1) (excluding from the CPO definition “an investment company registered as such under the Investment Company act of 1940,” with respect to “an investment company registered as such under the Investment Company Act of 1940”). For additional background and history on this regulation, see *Commodity Pool Operators; Exclusion for Certain Otherwise Regulated Persons From the Definition of the Term “Commodity Pool Operator”; Other Regulatory Requirements*, 50 FR 15868, 15871 (Apr. 23, 1985).

²⁹ BDC No-Action Letter, at 3-4.

³⁰ This figure is accurate, as of July 26, 2019.

³¹ Proposal, 83 FR 52912.

to amend § 4.5 to provide IAs of BDCs with comparable exclusionary relief.”³²

Specifically, the proposed amendments would permit an RIA of a BDC to claim the exclusion provided by Regulations 4.5(a)(1) and (b)(1), with respect to the operation of that BDC. This was proposed to be accomplished by, as discussed above, amending Regulation 4.5(a)(1) to provide an exclusion from the CPO definition to an RIA, with respect to the operation of a “qualifying entity,” and amending Regulation 4.5(b)(1) to specifically include BDCs as a “qualifying entity” for which an exclusion may be claimed.³³

ii. Comments Received

The Commission requested comment on all aspects of the Proposal generally and received two comments regarding the proposed amendments to Regulation 4.5. NFA supported the proposed amendments, stating that they, along with the other amendments in the Proposal “will bring greater transparency to the CPO registration framework by including all registration exemptions (including those currently in staff no-action letters and guidance) in the Commission’s regulations.”³⁴ Although NFA offered no objections to the amendments as proposed, it sought “clarification regarding how this change impacts those entities that have previously filed a notice of exclusion in the name of the investment company.”³⁵ Furthermore, NFA requested that “the Commission provide

³² *Id.*

³³ Proposal, 83 FR 52925 (proposing to amend, among others, Regulations 4.5(a)(1) and (b)(1)). The Commission also proposed several conforming or technical changes to Regulation 4.5(c)(2) for the purpose of accommodating this more substantive proposed amendment and improving readability and/or clarity. *Id.*

³⁴ NFA Letter, at 3.

³⁵ NFA Letter, at 3.

NFA with sufficient time to make changes to its Electronic Filing System,” reflecting these amendments.³⁶

Dechert also provided specific comments on the amendments to Regulation 4.5(a)(1), *i.e.*, the removal of the RIC as an excluded CPO and its replacement with the RIA. Dechert stated that this proposed amendment “leads to a logical conclusion,” but nonetheless, Dechert pointed out the “practical implications involved... and the cost of compliance” with this proposed amendment.³⁷ Dechert stated that the proposed amendment would require numerous exclusion claims to be transferred from the RIC to the RIA,³⁸ and according to Dechert, there is no simple or streamlined process within NFA’s Electronic Filing System to accomplish this.³⁹ Additionally, Dechert noted that changing the excluded CPO from the RIC to the RIA could be considered a material change that “necessitates making an off-cycle amendment to their registration statements,” the costs of which would be ultimately borne by the RIC and its participants.⁴⁰ As a result, Dechert suggested foregoing identifying the RIA as the excluded CPO in Regulation 4.5(a)(1), or alternatively, requested that the Commission

³⁶ *Id.*

³⁷ Dechert Letter, at 15.

³⁸ Dechert Letter, at 15. Dechert stated additionally that, under existing Regulation 4.5, RICs “tend to identify the excluded CPO as the multi-series Delaware or Massachusetts business trust or Maryland corporation in which each commodity pool is a series and identify the individual series as the commodity pools for which the CPO was excluded. Where funds are housed in a single-series trust such as for example closed-end mutual funds, the fund is both the excluded CPO and the commodity pool.” *Id.*

³⁹ *Id.* at 15. Dechert stated that, currently, each CPO exclusion notice filing “involves creating a co-CPO relationship with the new CPO, and then emailing the NFA Exemptions Staff to request that the previous relationship be terminated.” *Id.*

⁴⁰ Dechert Letter, at 16.

work with “NFA to help affected entities move their exclusion notices... in an efficient manner.”⁴¹

iii. Responding to Comments and the Final Rules

After considering the public comments, the Commission is adopting the amendments to Regulation 4.5, generally as proposed,⁴² and a Commission interpretation designed to address commenters’ concerns. 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 RIA is the most appropriate person to register as a CPO of a RIC that exceeds the trading thresholds in Regulation 4.5,⁴³ the Commission believes it appropriate to specify the RIA as that excluded person, instead of the RIC.

Also, as stated in the Proposal, the Commission believes that because BDCs are subject to SEC oversight comparable to that of RICs, operators of BDCs, *i.e.*, their RIAs, should be subject to the same operational requirements as the operators of RICs.⁴⁴ Because of their similarities, the Commission believes further that RIAs of BDCs should also be required to affirm their exclusion claims on an annual basis, which is consistent with the existing requirements under Regulation 4.5(c)(5) applicable to persons excluded from the CPO definition with respect to RICs.⁴⁵ The Commission recognizes

⁴¹ Dechert Letter, at 17.

⁴² The Final Rule amendments remove the phrase “as such” in Regulations 4.5(a)(1) and (b)(1).

⁴³ See CPO CTA Final Rule, 77 FR 11259.

⁴⁴ Proposal, 83 FR 52912 and 52916.

⁴⁵ Under the Final Rules, the person excluded from the definition of CPO with respect to a RIC, or a BDC, will be its RIA.

commenters' concerns about the compliance issues resulting from amending Regulation 4.5(a)(1), especially for the 11,220 RICs that have claimed relief under this exclusion.⁴⁶

To address these initial compliance burdens identified in the comments, the Commission has determined to provide the following interpretation of Regulations 4.5(c) and 4.5(d), with respect to this regulatory transition and future compliance with the notice filing requirement in Regulation 4.5(c). Specifically, if 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.⁴⁷ 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),⁴⁸ 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.

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

⁴⁶ As discussed above, the Commission further understands from commenters that persons other than the RIC have also claimed the exclusion with respect to a RIC. These include the RIA and, where the RIC is a series, the umbrella entity. Dechert Letter, at 15.

⁴⁷ 17 CFR 4.5(d)(1)-(d)(2).

⁴⁸ The Commission recognizes that Regulation 4.5(c)(5) has typographical errors that reference the annual affirmation of the notice of exclusion as being a "notice of exemption," rather than a "notice of exclusion." The Commission intends to address this in a future rulemaking, along with other technical changes.

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.

Finally, the Commission also recognizes Dechert's 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."⁴⁹ The Commission is not in a position to make a determination as to whether this is, in fact, a material change; each RIC must make that determination. The Commission notes, however, that despite the change in regulatory text, the intent behind Regulation 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 such RIC, provided that the requirements and conditions in the applicable provisions of Regulation 4.5 are also satisfied.⁵⁰ Therefore, from the Commission's perspective, there is no substantive change with respect to the RIC's legal posture under the Commission's regulations.

iv. The Effect of the Final Amendments on CFTC Staff Letter 12-40: the BDC No-Action Letter

The Commission intends the Final Rules, which are effective 30 days after publication in this *Federal Register* release, and which expand an existing CPO exclusion to also exclude RIAs operating BDCs, to supersede the staff no-action relief provided by the BDC No-Action Letter. Therefore, RIAs of BDCs should file a notice to claim the

⁴⁹ Dechert Letter, at 16.

⁵⁰ See 50 FR 15871.

amended exclusion, pursuant to Regulation 4.5(c), as soon as practicable after these amendments go into effect.

b. Regulation 4.27: Excluding Certain Classes of CPOs and CTAs from the Definition of “Reporting Person”

The Commission also proposed to revise the definition of “Reporting Person,” in Regulation 4.27, which defines what types, classes, or categories of CPOs and CTAs are required to file Forms CPO-PQR and CTA-PR, respectively.⁵¹ The proposed amendments would revise the definition by excluding certain registered CPOs and CTAs from the “Reporting Person” definition in Regulation 4.27(b), consistent with exemptive relief provided by DSIO through CFTC Letter Nos. 14-115 and 15-47.⁵² The proposed amendments were designed to further expand that relief to additional categories of CTAs, whose Form CTA-PR filings have limited utility for the Commission, as described below.⁵³

Specifically, CFTC Letter No. 14-115 provides exemptive relief from the obligation to file Form CPO-PQR to CPOs that operate only pools for which the CPO has claimed either a definitional exclusion under Regulation 4.5, or an exemption from CPO registration under Regulation 4.13.⁵⁴ Similarly, CFTC Letter No. 15-47 provides

⁵¹ See 17 CFR 4.27(b).

⁵² CFTC Letter No. 14-115, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-115.pdf> (last retrieved Oct. 10, 2019); CFTC Letter No. 15-47, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/15-47.pdf> (last retrieved Oct. 10, 2019).

⁵³ Proposal, 83 FR 52913.

⁵⁴ CFTC Letter No. 14-115, at 2.

exemptive relief from the obligation to file Form CTA-PR to CTAs that are registered as such, yet do not direct client accounts.⁵⁵

In the Proposal, the Commission sought to also exclude CTAs that comply with the terms of the registration exemptions contained in Regulations 4.14(a)(4) or (a)(5), yet are nevertheless registered as CTAs, from the definition of “Reporting Person” in Regulation 4.27(b). Under Regulation 4.14(a)(4), the CTA in question is registered as the CPO of a pool, and therefore, already has an obligation to file a Form CPO-PQR with respect to that pool. As noted in the Proposal, Form CPO-PQR requires the reporting of substantially similar information when compared to Form CTA-PR.⁵⁶ As such, the Commission posited that there would be very little value in any data that would be collected by requiring that same Reporting Person to also file a Form CTA-PR, and that any value would be outweighed by the burden to that entity of the extra filing.

Further, Regulation 4.14(a)(5) exempts from CTA registration any person that is exempt from CPO registration, if that person’s commodity trading advice is directed solely to the pool for which it is exempt.⁵⁷ Consistent with the relief provided in CFTC Staff Letter 14-115, such an exempt CPO would not be required to report on a Form CPO-PQR.⁵⁸ The Commission preliminarily concluded in the Proposal that it would therefore be incongruent to require the same person to report on Form CTA-PR, with respect to the operation of a pool for which it is not required to file a Form CPO-PQR.

The Commission received two comments on this aspect of the Proposal. The first was received from NFA, which supported all of the proposed amendments to Regulation

⁵⁵ CFTC Letter No. 15-47, at 2.

⁵⁶ See 17 CFR part 4, App. A and App. C.

⁵⁷ 17 CFR 4.14(a)(5).

⁵⁸ See CFTC Letter No 14-115, at 2.

4.27.⁵⁹ In the second, Willkie requested confirmation from the Commission that the CPO of an exempt pool or CTA of an exempt account would not be required to report on Forms CPO-PQR and CTA-PR with respect to the exempt pool or the exempt account, in the event the CPO operates a non-exempt pool or the CTA advises a non-exempt account.⁶⁰ In support of that request, Willkie states that such a conclusion would be consistent with the operation of other Commission regulations, like Regulations 4.13(e) and 4.14(c).⁶¹

In response, the Commission notes that these questions have already been addressed by Commission staff in FAQs related to Forms CPO-PQR and CTA-PR.⁶² Specifically, FAQ 11 of the CPO Guidance provides that any pools operated pursuant to an exemption under Regulation 4.13(a)(3) be excluded from reporting on Form CPO-PQR.⁶³ The FAQs also address the Willkie question regarding CTA reporting. Specifically, FAQ 9 of the CTA Guidance provides that a CTA should exclude the assets

⁵⁹ NFA Letter, at 4.

⁶⁰ Willkie Letter, at 8.

⁶¹ Willkie Letter, at 8.

⁶² CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CPO-PQR (CPO Guidance), *available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpocta110515.pdf (last retrieved Oct. 11, 2019).

⁶³ *Id.* Similarly, Question 19 of the CPO Guidance asks, “If a CPO operates Pools pursuant to CFTC Regulation 4.7 and operates Pools pursuant to CFTC Regulation 4.13(a)(3), should the CPO count the Regulation 4.13(a)(3) exempt Pools in determining the CPOs ‘Total Assets Under Management’ [(Total AUM)]? Or should the CPO exclude such Pools from the threshold calculation and only consider the Total AUM of the CPO with respect to all other non-exempt/non-excluded Pools?” Commission staff responded: “For purposes of determining the reporting threshold and CPO and Pool reporting, including the CPO’s [Total AUM]... the CPO must exclude those Pools for which it is not required to be registered (*i.e.*, Pools operated pursuant to an exclusion under CFTC Regulation 4.5 or an exemption under CFTC Regulation 4.13(a)(3)). Under this scenario, the CPO would only be required to count Pools operated pursuant to CFTC Regulation 4.7.” *Id.* at Question 19.

of the pool operated pursuant to Regulation 4.13(a)(3) when reporting on Form CTA-PR.⁶⁴ Accordingly, the Commission adopts the amendments to the definition of “Reporting Person” in Regulation 4.27(b) as proposed.

III. Related Matters

a. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) requires that Federal agencies, in promulgating regulations, consider whether the regulations they propose will have a significant economic impact on a substantial number of small entities, and if so, to provide a regulatory flexibility analysis regarding the economic impact on those entities.⁶⁵ Each Federal agency is required to conduct an initial and final regulatory flexibility analysis for each rule of general applicability for which the agency issues a general notice of proposed rulemaking. As noted in the Proposal, the regulations adopted herein affect only persons registered or required to be registered as CPOs and CTAs, persons claiming exemptions from registration as such, and certain persons excluded from the CPO definition. With respect to CPOs, the Commission previously has determined that a CPO is a small entity for purposes of the RFA, if it meets the criteria

⁶⁴ CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions Regarding Commission Form CTA-PR (CTA Guidance), *Available at* https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/faq_cpoc110515.pdf (last retrieved Oct. 11, 2019) (stating that “Pool assets should be included ... for Pools that the CTA does not operate as a CPO and for which the CPO must be registered”). Therefore, “[a] CTA should include the assets of [Pools] operated pursuant to CFTC Regulation 4.7, but exclude the assets of [Pools] operated pursuant to Regulation 4.13(a)(3).” *Id.* at Question 9.

⁶⁵ 5 U.S.C. 601, *et seq.*

for an exemption from registration under Regulation 4.13(a)(2).⁶⁶ Because the regulations amended by the Final Rules generally apply to persons registered or required to be registered as CPOs with the Commission, amend and provide an exclusion from the CPO definition to qualifying persons, and extend relief from related compliance burdens, the RFA is not applicable with respect to CPOs impacted by these regulatory amendments.

Regarding CTAs, the Commission has previously considered whether such registrants should be deemed small entities for purposes of the RFA on a case-by-case basis, in the context of the particular Commission regulation at issue.⁶⁷ As certain of these registrants may be small entities for purposes of the RFA, the Commission considered whether this rulemaking would have a significant economic impact on such registrants.⁶⁸ The only portion of the Final Rules adopted herein directly impacting CTAs amends the definition of “Reporting Person,” in Regulation 4.27(b) to effectively carve out specific classes of CTAs from the Form CTA-PR filing requirement. These amendments will not impose any new burdens on market participants or Commission registrants. Rather, the Commission finds that these amendments will make compliance and operational costs less burdensome than the full costs of CTA registration and compliance for those classes of CTAs. The amendment impacting CTAs not dually

⁶⁶ Policy Statement and Establishment of Definitions of “Small Entities” for Purposes of the Regulatory Flexibility Act, 47 FR 18618, 18619-20 (Apr. 30, 1982). Regulation 4.13(a)(2) exempts a person from registration as a CPO when: (1) None of the pools operated by that person has more than 15 participants at any time, and (2) when excluding certain sources of funding, the total gross capital contributions the person receives for units of participation in all of the pools it operates or intends to operate do not, in the aggregate, exceed \$400,000. See 17 CFR 4.13(a)(2).

⁶⁷ See 47 FR 18620.

⁶⁸ Proposal, 83 FR 52917.

registered or exempt as CPOs provides relief for CTAs that are registered, but do not direct commodity interest accounts. As a result, the Commission concludes that, given the limited nature of such Form CTA-PR filings, while there is a reduction in costs, this amendment does not produce a significant economic impact on a substantial number of small entities. Additionally, the Commission received no comments on any aspects of the Proposal's RFA discussion.

Therefore, the Commission concludes that, to the extent the regulations adopted herein affect CTAs, the Final Rules will not create a significant economic impact on a substantial number of small entities. Accordingly, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the regulations adopted by the Commission in the Final Rules will not have a significant economic impact on a substantial number of small entities.

b. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) imposes certain requirements on Federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA.⁶⁹ Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number from the Office of Management and Budget (OMB). The regulations adopted in the Final Rules would result in a collection of information within the meaning of the PRA, as discussed below. The Commission is therefore submitting the Final Rules to OMB for approval.

⁶⁹ See 44 U.S.C. 3501, *et seq.*

As discussed in the Proposal, the Commission's proposed regulations would have impacted or amended two collections of information for which the Commission has previously received control numbers from OMB. The first collection of information the Commission believed could be impacted by the Proposal is, "Rules Relating to the Operations and Activities of Commodity Pool Operators and Commodity Trading Advisors and to Monthly Reporting by Futures Commission Merchants, OMB control number 3038-0005" (Collection 3038-0005). Collection 3038-0005 primarily accounts for the burden associated with part 4 of the Commission's regulations that concern compliance obligations generally applicable to CPOs and CTAs, as well as certain enumerated exemptions from registration as such, exclusions from those definitions, and available relief from compliance with certain regulatory requirements. The Commission had proposed to amend this collection to reflect: (1) the notices proposed to be required to claim certain of the CPO registration exemptions and the CPO exclusion proposed therein; and (2) an expected reduction in the number of registered CPOs and CTAs filing Forms CPO-PQR and CTA-PR, pursuant to the proposed revisions to Regulation 4.27.⁷⁰

The Commission also proposed to amend a second collection of information entitled, "Part 3 – Registration, OMB control number 3038-0023" (Collection 3038-0023), which pertains to the registration of intermediaries generally, to reduce the number of persons registering as CPOs and CTAs as a result of the regulatory amendments in the Proposal. The responses to these collections of information are mandatory.

The collections of information in the Proposal would have made available to eligible persons: (1) an exemption from CPO registration based upon Commission Staff

⁷⁰ Proposal, 83 FR 52918-19.

Advisory 18-96; (2) recordkeeping location relief for qualifying, registered CPOs, also based upon Commission Staff Advisory 18-96; (3) exemptions from CPO and CTA registration for qualifying Family Offices; (4) an expanded exclusion under Regulation 4.5 for RIAs of BDCs; and (5) exemptive relief made available through amendments to the definition of “Reporting Person,” in Regulation 4.27(b), such that qualifying CPOs and CTAs no longer have to file Forms CPO-PQR or CTA-PR.⁷¹ In the instant *Federal Register* release, the Commission is adopting final amendments expanding the exclusion under Regulation 4.5 to cover RIAs of BDCs, and exempting from the Form CPO-PQR or CTA-PR filing requirements certain classes of CPOs and CTAs, consistent with relief letters previously issued by Commission staff.⁷²

i. Revisions to the Collections of Information

1. OMB Control Number 3038-0005

Collection 3038-0005 is currently in force with its control number having been provided by OMB, and it was renewed recently on March 14, 2017.⁷³ As stated above,

⁷¹ The Proposal also included amendments to Regulations 4.7(b) and 4.13(a)(3), expanding the availability of relief under those provisions to include registered and exempt CPOs issuing, offering, selling, or reselling securities with general solicitation, pursuant to the JOBS Act. Those amendments, adopted in a companion *Federal Register* release published elsewhere in this issue of the *Federal Register*, do not impact or change the number of CPOs registered or exempt from such registration, but rather affect their ability to broadly solicit the public for investment.

⁷² The Commission also considered in the Proposal the impact that an exemption based on Commission Staff Advisory 18-96, as well as related proposed amendments to Regulation 4.23, might have on these collections and the number of persons responding thereunder. Proposal, 83 FR 52918. Because the Commission is not pursuing or finalizing those proposed amendments, the Commission no longer believes any modifications to these collections on those bases are necessary.

⁷³ See Notice of Office of Management and Budget Action, OMB Control No 3038-0005, available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201701-3038-005 (last retrieved Oct. 11, 2019).

Collection 3038-0005 governs responses made pursuant to part 4 of the Commission’s regulations, pertaining to the operations of CPOs and CTAs. Generally, under Collection 3038-0005, the estimated average time spent per response will not be altered; however, the Commission has made adjustments, discussed below, to the collection to account for new and/or lessened burdens expected under the Final Rules, due to persons claiming the amended CPO exclusion and the exemptive relief from part 4 filing requirements.⁷⁴ For instance, the Commission proposed an increase to the number of respondents under Regulation 4.5, which it thought necessary to account for the number of RIAs of BDCs that would seek to claim that exclusion from the CPO definition expanded here by the Final Rules.⁷⁵ With regard to the Regulation 4.27 amendments, the Commission proposed reducing the number of persons filing all schedules of Forms CPO-PQR and CTA-PR to reflect the categories of registered CPOs and CTAs proposed to be excluded from the “Reporting Person” definition in Regulation 4.27(b). Because there was no notice filing associated with this compliance relief, the Commission proposed no new burden associated with the actual claiming of the relief provided by the revisions to Regulation 4.27(b).

The currently approved total burden associated with Collection 3038-0005, in the aggregate, is as follows:

⁷⁴ The Proposal further discussed modifications to Collection 3038-0005 based on the proposed amendments to Regulations 4.7 and 4.13. *Id.* Each of those amendments is being finalized and adopted by the Commission in a *Federal Register* release, published elsewhere in this issue of the *Federal Register*, containing the pertinent Preamble and administrative law discussions, as well as those final amendments.

⁷⁵ The Commission believes there is no increase in burden resulting from transitioning the claiming entity under Regulation 4.5(a) to the RIA with respect to RICs, because this change does not result in any filing requirement, beyond that which is already required to operate pursuant to Regulation 4.5.

Estimated number of responses: 45,270.

Annual responses for all respondents: 129,042.

Estimated average hours per response: 2.83.⁷⁶

Annual reporting burden: 365,764.

The Commission now estimates that the exclusion for RIAs of BDCs under Regulation 4.5 will result in 65 additional notice filings under Regulation 4.5.⁷⁷ Therefore, the Commission is increasing the burden associated with Regulation 4.5 to be as follows:

Estimated number of respondents: 7,955.

Annual responses by each respondent: 1.

Estimated average hours per response: 0.5.

Annual reporting burden: 3,978.

In the Proposal, the Commission also sought to update the number of respondents to this collection, in accordance with the proposed amendments to Regulation 4.27. Specifically, the Commission proposed to modify the number of respondents to better reflect the average number of CPOs registered with the Commission, less those CPOs that will be eligible for the relief provided by the amendments to the “Reporting Person” definition in Regulation 4.27(b). The Commission estimated that it has historically averaged 1,800 registered CPOs. Based on the number of claims filed by CPOs pursuant to Regulations 4.5 and 4.13, the Commission estimated further that approximately 100 of

⁷⁶ The Commission rounded the average hours per response to the second decimal place to reflect the lack of significant digits.

⁷⁷ At the time of the Proposal, the Commission had estimated 50 additional notice filings. Proposal, 83 FR 52919. It is hereby increasing the number of BDCs expected to file a claim of exclusion to reflect the number of BDC No-Action Letter claims DSIO staff has received, as of July 26, 2019.

those CPOs would be eligible for relief from filing Form CPO-PQR under the proposed amendments. Therefore, the Commission proposed setting the number of respondents filing Schedule A of Form CPO-PQR at 1,700. The total respondents for this revised collection were further broken out into two categories, based on the size of the CPO and whether the CPO files Form PF: 1,450 respondents on Schedule A of Form CPO-PQR for non-large CPOs and Large CPOs filing Form PF, and 250 respondents on Schedule A of Form CPO-PQR for Large CPOs not filing Form PF. Given that the proposed amendments to Regulation 4.27 are being adopted as proposed, the Commission continues to believe these adjustments are accurate and necessary.

The Commission similarly considered the number of registered CTAs with respect to the filing of Form CTA-PR, and then reduced the number of filers by the number of CTAs the Commission anticipated would be eligible for the proposed relief.⁷⁸ Specifically, the Commission estimated that it has historically averaged approximately 1,600 registered CTAs. Based on the information collected on Form CTA-PR, the Commission estimated that 720 registered CTAs would be eligible for relief made available by the proposed amendments, resulting in a difference of 880 CTAs still being required to file Form CTA-PR. Given that the proposed amendments to Regulation 4.27 are being adopted as proposed, the Commission continues to believe these adjustments are accurate and necessary.

Therefore, the Commission estimates that the total burden associated with the amendments to Regulation 4.27 adopted by the Final Rules, reflecting the revised average number of CPOs and CTAs registered with the Commission, to be as follows:

⁷⁸ Proposal, 83 FR 52919.

For Schedule A of Form CPO-PQR for non-Large CPOs and Large CPOs filing Form PF:

Estimated number of respondents: 1,450.

Annual responses by each respondent: 1.

Estimated average hours per response: 6.

Annual reporting burden: 8,700.

For Schedule A of Form CPO-PQR for Large CPOs not filing Form PF:

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 6.

Annual reporting burden: 6,000.

For Schedule B of Form CPO-PQR for Mid-size CPOs:

Estimated number of respondents: 400.

Annual responses by each respondent: 1.

Estimated average hours per response: 4.

Estimated average hours per response: 4.

Annual reporting burden: 1,600.

For Schedule B of Form CPO-PQR for Large CPOs not filing Form PF:

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 4.

Annual reporting burden: 4,000.

For Schedule C of Form CPO-PQR for Large CPOs not filing Form PF:

Estimated number of respondents: 250.

Annual responses by each respondent: 4.

Estimated average hours per response: 18.

Annual reporting burden: 18,000.

For Form CTA-PR:

Estimated number of respondents: 880.

Annual responses by each respondent: 1.

Estimated average hours per response: 0.5.

Annual reporting burden: 440.

The total new burden associated with Collection 3038-0005, in the aggregate, reflecting the regulatory amendments adopted herein,⁷⁹ is as follows:

Estimated number of respondents: 43,397.

Annual responses for all respondents: 112,024.

Estimated average hours per response: 3.16.

Annual reporting burden: 354,367.

2. OMB Control Number 3038-0023

In the Proposal, the Commission explained further its expectation that persons that are currently counted among the estimates for Collection 3038-0023 with respect to CPO and CTA registration will deregister as such, due to the future availability of the proposed registration exemptions and the proposed expansion of the CPO exclusion.

⁷⁹ These burden totals include adjustments made to Collection 3038-0005 to reflect the Final Rule amendments contained in this *Federal Register* release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Regulations and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the *Federal Register*.

Therefore, the Commission proposed to deduct the expected claimants of that relief from the total number of persons required to register with the Commission as CPOs and CTAs.

The currently approved total burden associated with Collection 3038-0023, in the aggregate, excluding the burden associated with Regulation 3.21(3), is as follows:

Respondents/Affected Entities: 77,857.

Estimated number of responses: 78,109.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 7,029.8.

Frequency of collection: Periodically.

The currently approved total burden associated with Regulation 3.21(e) under Collection 3038-0023, which remains unchanged under the Proposal and the amendments adopted herein, is as follows:

Respondents/Affected Entities: 396.

Estimated number of responses: 396.

Estimated average hours per response: 1.25.

Estimated total annual burden on respondents: 495.

Frequency of collection: Annually.

The Commission proposed to reduce the number of registrants by the estimated number of claimants with respect to each of the proposed CPO and CTA registration exemptions, as well as the proposed expansion of the CPO exclusion for RICs to include BDCs. The amendments adopted by the Commission in the Final Rules include clarification that the RIA of a RIC is the appropriate entity to claim the CPO exclusion, expansion of that exclusion to also provide relief for RIAs of BDCs, and the adoption of

multiple carve-outs from the “Reporting Person” definition in Regulation 4.27(b).⁸⁰

Given the amendments being adopted by the Final Rules,⁸¹ the Commission continues to believe that an adjustment to Collection 3038-0023, *i.e.*, a reduction in the amount of registrants, will be necessary to account for the 65 claims under the BDC No-Action Letter that the Commission, through DSIO, has received to date, each of which represents to the Commission a person likely to claim the expanded CPO exclusion for RIAs of BDCs. Therefore, the Commission is reducing the burden associated with Collection 3038-0023, such that the total burden associated with the collection, excluding the burden associated with Regulation 3.21(e), will be as follows:

Respondents/Affected Entities: 77,492.

Estimated number of responses: 77,492.

Estimated average hours per response: 0.09.

Estimated total annual burden on respondents: 6,974.

ii. Comments on the PRA Analysis

⁸⁰ In a companion *Federal Register* release published elsewhere in this issue of the *Federal Register*, the Commission also considered and adopted amendments to 17 CFR part 4 that add CPO and CTA exemptions for family offices, permit the use of general solicitation in certain pools by CPOs exempt under Regulations 4.7 or 4.13(a)(3), and explicitly permit non-U.S. person participants in pools exempt under Regulation 4.13(a)(3). The Commission performed and discussed the appropriate RFA, PRA, and cost-benefit considerations for those amendments in that release.

⁸¹ As discussed above, these burden totals include adjustments made to Collection 3038-0023 to reflect the Final Rule amendments contained in this *Federal Register* release, as well as Final Rule amendments concurrently adopted and published through a second release by the Commission. *See also* Amendments to Regulations and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs published elsewhere in this issue of the *Federal Register*.

In the Proposal, the Commission invited the public and other Federal agencies to comment on any aspect of the information collection requirements discussed therein.⁸²

The Commission did not receive any such comments.

c. Cost-Benefit Considerations

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA.⁸³ Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the CEA section 15(a) considerations.

i. General costs and benefits

The baseline for the Commission's consideration of the costs and benefits of the Final Rules is the regulatory status quo, as determined by the CEA and the Commission's existing regulations in 17 CFR part 4. The Commission recognizes, however, that to the extent that market participants have relied upon relevant Commission staff action, the actual costs and benefits of the Final Rules, as realized in the market, may not be as significant. Because each amendment addresses a discrete issue, which impacts a unique subgroup within the universe of entities captured by the CPO and CTA statutory definitions, the Commission has determined to analyze the

⁸² Proposal, 83 FR 52920.

⁸³ 7 U.S.C. 19(a).

costs and benefits associated with each amendment separately, as presented below. The Commission has endeavored to assess the costs and benefits of the amendments adopted by the Final Rules in quantitative terms wherever possible. Where estimation or quantification is not feasible, however, the Commission has provided its assessment in qualitative terms.

The Commission notes that the consideration of costs and benefits below is based on the understanding that the markets function internationally, with many transactions involving U.S. firms taking place across international boundaries; with some Commission registrants being organized outside of the United States; with leading industry members commonly following substantially similar business practices wherever located. Where the Commission does not specifically refer to matters of location, the below discussion of costs and benefits refers to the effects of the Final Rules on all activity subject to the amended regulations, whether by virtue of the activity's physical location in the United States or by virtue of the activity's connection with or effect on U.S. commerce under CEA section 2(i). In particular, the Commission notes that some entities affected by the Final Rules are located outside of the United States.

ii. Summary of the Amendments

As discussed in greater detail below, and in the foregoing preamble, the Commission believes that the amendments adopted by the Final Rules enable the Commission to perform its regulatory oversight function with respect to the commodity interest markets and particularly, with respect to CPOs and CTAs, while reducing the potential burden on persons whose commodity interest activities may subject them to

the Commission's jurisdiction for CPOs and CTAs. The Commission is adopting regulatory amendments consistent with the BDC No-Action Letter, through certain revisions to the exclusion from the CPO definition for RIAs of RICs in Regulation 4.5. Additionally, the Commission is incorporating relief provided by CFTC Letter Nos. 14-115 and 15-47 through amendments to the "Reporting Person" definition in Regulation 4.27(b) that exclude: (1) CPOs that only operate pools in accordance with Regulations 4.5 or 4.13, and (2) CTAs that do not direct trading in any commodity interest accounts. The Commission has further determined to extend this relief to registered CTAs that only advise commodity pools, for which the CTA is also the commodity pool's CPO.

iii. Benefits

1. Benefits Related to Expanding the CPO Exclusion to Cover RIAs of BDCs

The Commission believes that there will be several benefits arising from the amendments creating an exclusion from the CPO definition for RIAs of BDCs in Regulation 4.5.⁸⁴ First, the exclusion would enable RIAs of BDCs to continue to use commodity interests, consistent with the BDC No-Action Letter, as an economical option for reducing the risks related to BDCs' investments in eligible portfolio companies. The exclusion will permit this activity without subjecting BDCs to the costs associated with having its RIA registered as a CPO, and without requiring BDCs and their RIAs to

⁸⁴ As discussed above, the Commission has previously determined that a RIC's RIA is the appropriate person to serve as the CPO of a RIC for regulatory purposes, and consequently, the Commission is also amending Regulation 4.5(a)(1) to designate the RIA as the person excluded from the CPO definition. See CPO CTA Final Rule, 77 FR 11259. Due to the similarities between BDCs and RICs, the Commission believes that the RIA is also an appropriate selection as the excluded entity in the BDC context. See *supra* pt. II.a.iii for additional discussion.

comply with applicable provisions of part 4 of the Commission’s regulations. This should enable BDCs and their RIAs to deploy more of their resources in furtherance of their statutory purpose, investing in and providing managerial assistance to small- and mid-sized U.S. companies, which would thereby also further a statutory goal of the ICA.

As discussed more fully above, BDCs are subject to oversight by the SEC that is comparable to that agency’s oversight and regulation of RICs. Because of this similarity to a type of investment vehicle that is already listed in the universe of “qualifying entities,” under Regulation 4.5, the amendments adopted by the Final Rules treat substantively comparable entities in a consistent manner, thereby enabling members of the public and industry to better predict their regulatory obligations when establishing new investment vehicles. Absent these amendments, RIAs of BDCs wishing to avail themselves of the BDC No-Action Letter are required to prepare a notice filing containing specific representations and to submit the document electronically to a specific email inbox. The Commission anticipates that RIAs operating and advising BDCs will claim the expanded exclusion under Regulation 4.5 through NFA’s Online Registration System without having to create their own document to claim that relief.

The Commission further believes that the amendment requiring the RIA of the RIC to be the entity claiming the exclusion under Regulation 4.5(a) will provide an important benefit by aligning the terms of the CPO exclusion with the Commission’s understanding and public statements, as to which entity is most appropriate to register as a CPO with the Commission with respect to the operation of RICs.⁸⁵ This will enable the

⁸⁵ As stated above, the Commission has long understood this to be a RIC’s RIA, based on the RIA’s typical operational, solicitation, and trading responsibilities with respect to a RIC.

Commission to more easily determine which entity should bear the registration and compliance obligations with respect to a RIC, if the excluded CPO fails to reaffirm the claim of exclusion, or if the RIC otherwise no longer satisfies the terms of Regulation 4.5.

2. Benefits Related to the Relief under Regulation 4.27 for Certain CPOs and CTAs

The Commission believes that there will be several benefits associated with providing relief from the Form CPO-PQR and CTA-PR filings required by Regulation 4.27 to: (1) registered CPOs only operating pools pursuant to claims under Regulations 4.5 or 4.13; and (2) registered CTAs that, during the Reporting Period, either only advised pools for which they are also the registered or exempt CPO, or did not direct the trading of any commodity interest accounts whatsoever. Removing the reporting requirement for these registrants will eliminate the costs associated with the preparation and filing of Forms CPO-PQR and CTA-PR. The Commission believes that this will provide a significant cost savings for these persons, and ultimately, for their pool participants or advisory clients.

iv. Costs

1. Cost Related to Expanding the CPO Exclusion to Cover RIAs of BDCs

The Commission believes that there will be some costs associated with the expansion of the CPO exclusion to cover RIAs of BDCs. Generally, CPOs and CTAs are subject to comprehensive regulation under the Commission's part 4 regulations,

including disclosure, reporting, and recordkeeping requirements. Although RIAs of BDCs are subject to SEC oversight (as are RIAs of RICs), BDCs are not identical to RICs, and they could differ in respects that are relevant to the CPO regulatory scheme. For example, a required CPO disclosure might be more important when made by an RIA of a BDC, as compared to the RIA of a RIC. In this way, the expansion of the CPO exclusion to cover RIAs of BDCs could conceivably be detrimental to persons who relied on CPO regulation of such RIAs for some purpose. However, the Commission notes that, as explained above, BDCs are very similar to RICs (for which RIAs may be excluded from the CPO definition, and thus, not subject to registration), and their use of commodity interests is generally very limited and designed typically to manage the investment and commercial risks of a BDC's underlying operating companies. Therefore, any detriment resulting from the expansion of the CPO exclusion to cover RIAs of BDCs is expected to be small.

Persons claiming the new exclusion from the CPO definition with respect to the operation of BDCs under Regulation 4.5 will be required to file an annual notice affirming eligibility, consistent with that required of the RIAs of RICs. For purposes of calculating costs of the amendment, the Commission estimates that a person may require 0.5 hours per pool to complete and electronically file the notice with NFA at an average cost of \$57 per hour.⁸⁶ The Commission further estimates that at least 65 persons will be

⁸⁶ The Commission notes that the salary estimates are based upon the May 2017 National Occupational Employment and Wage Estimates from the Bureau of Labor Statistics at the Department of Labor. See Occupational Employment Statistics, Bureau of Labor Statistics, available at https://www.bls.gov/oes/2017/may/oes_nat.htm (last retrieved Nov. 25, 2019). The Commission's estimate incorporates the mean hourly wage of persons employed in the "Securities, Commodity Contracts and Other Financial Investments and Related Activities" Industry, under the following occupation codes:

affected by this amendment,⁸⁷ each with an average of 1 BDC subject to the notice requirement, based on the number of claims the Commission has received for relief provided by the BDC No-Action Letter. On this basis, the Commission anticipates an annual cost per entity of approximately \$29.⁸⁸ Across all affected entities, the Commission therefore estimates a total annual cost of approximately \$1,885.⁸⁹ Because the Commission received 65 claims under the BDC No-Action Letter since its issuance in 2012, averaging nearly ten claims annually, the Commission predicts that it may expect to receive up to ten claims each year going forward from RIAs of BDCs seeking to claim the expanded CPO exclusion; the Commission estimates that, consequently, future claims of the exclusion for RIAs of BDCs could cost up to an additional \$290 annually.⁹⁰

In addition to the costs associated with completing and filing the notice, RIAs of BDCs that claim the exclusion will also have to expend resources to monitor compliance with the applicable trading thresholds in Regulation 4.5(c)(2)(iii). The Commission believes that the initial year of compliance with those thresholds will likely be the most

Compliance Officers (13-1041) at \$43.27, Lawyers (23-2011) at \$94.20, and Paralegals and Legal Assistants (23-2011) at \$33.53. The Commission chose these occupational categories in recognition of the types of staff the Commission believes would most commonly be responsible for evaluating eligibility and filing claims for this CPO exclusion. The \$57 per hour wage estimate is derived from a weighted average, rounded to the nearest dollar, with the salaries attributable to each of the three occupation codes given equal weight.

⁸⁷ This figure is based on the number of claims DSIO has received pursuant to the BDC No-Action Letter, as of July 29, 2019, and constitutes an increase from the cost estimates in the Proposal, which were based on 50 previously received claims. See Proposal, 83 FR 52919.

⁸⁸ The Commission calculates this amount as follows: (1 pool/BDC per CPO/RIA) x (0.5 hours per pool/BDC) x (\$57 per hour) = \$29.

⁸⁹ The Commission calculates this amount as follows: (\$29 per CPO/RIA) x (65 CPOs/RIAs) = \$1,885.

⁹⁰ The Commission calculates this amount as follows: (\$29 per CPO/RIA) x (10 CPOs/RIAs) = \$290.

costly, as the RIAs may need to increase compliance staff and/or provide training for existing compliance staff to ensure effective monitoring of ongoing compliance with the exclusion's terms. The Commission anticipates that certain aspects of the compliance program might be automated to lower substantially the annual costs in subsequent years.⁹¹ The Commission continues to believe the costs of the filing and threshold monitoring discussed above are generally substantially lower than the costs an RIA of a BDC would incur, as a result of registering as a CPO and complying with all of the Commission's regulations.

The Commission also believes that there may be some costs associated with the amendment to Regulation 4.5(a)(1) establishing the RIA as the claiming entity for the CPO exclusion for RICs. For instance, the Commission believes that complex fund structures involving multiple related RICs and multiple RIAs, or series structures with multiple RICs under an umbrella entity, may incur some costs associated with determining which exclusion claims need to be corrected. As discussed in the Preamble above, the Commission is issuing an interpretation designed to streamline this transition to the RIA as the excluded CPO in an effort to reduce costs to RICs and their participants.⁹² Also, to clarify that RICs and their RIAs will not be expected to make this transition immediately, the compliance date for this change will not be until within 60

⁹¹ Costs to BDCs in monitoring compliance with these thresholds may also be lower, given the Commission's understanding of their limited use of commodity interests for hedging purposes. *See also supra* pt. II.a.i.

⁹² Where the RIA is already the claiming excluded CPO for a RIC, no change in filing or status is necessary. Where an entity other than the RIA claims the exclusion for a RIC, the Commission is interpreting the regulation to require that such RIC have its RIA file a new claim and to let the prior claim expire, pursuant to the annual affirmation requirements of Regulation 4.5(c)(5).

days of the 2020 calendar year-end, or by March 1, 2021. Thus, affected RICs and their excluded CPOs will have more than one filing cycle to prepare for this change.

The Commission considered whether RIAs of BDCs would incur any costs in determining whether or how to claim the exclusion for a BDC. The Commission believes that such costs would be minimal at most. The RIA of a BDC has, by definition, already settled the regulatory status of the BDC entity, and the Commission understands that BDCs use commodity interests rarely, and for very limited purposes. In the case where an RIA decides that a BDC should use commodity interests, the ensuing determination to claim the exclusion should not represent any significant additional cost.

2. Costs Related to the Relief under Regulation 4.27 for Certain CPOs and CTAs

The Form CPO-PQR and CTA-PR filings that will no longer be required by virtue of the Final Rules may have had minimal utility in limited situations. However, the Commission believes that, when viewed in the context of all applicable regulatory requirements, these filings become duplicative or unnecessary. Therefore, the Commission does not anticipate any significant costs associated with the Final Rule amendments to the “Reporting Person” definition in Regulation 4.27(b), which exempt CPOs and CTAs from the requirement to file those forms in certain situations. CPOs and CTAs qualifying for the exemptive relief added by the Final Rule will not have to take any action to claim an exemption from these filings, and therefore, will not experience costs as a result of claiming that relief.

v. Section 15(a) Considerations

1. Protection of Market Participants and the Public

The Commission considered whether the amendments adopted in the Final Rule will have any detrimental effect on the customer protections of the Commission's regulatory regime. The Commission believes that the expanded exclusion for RIAs of BDCs will not negatively impact the protection of market participants or the public. BDCs, as well as their RIAs, continue to be regulated by the SEC under the ICA, and pursuant to the terms of the exclusion, BDCs operated thereunder will continue to be limited in the extent to which they can use commodity interests by the trading thresholds described above. Similarly, the Commission does not believe that the transition of a RIC's excluded CPO from the RIC to the RIA will negatively impact the protection of market participants or the public. Such vehicles are already, and will continue to be after this transition, operated by excluded CPOs, and RICs and their RIAs will remain subject to oversight by the SEC under the ICA and the IAA. As noted above, the relevant entities will continue to operate and be regulated in substantially the same manner. Regarding the relief provided to certain CPOs and CTAs by the Final Rule amendments to Regulation 4.27, the Commission does not believe that eliminating reporting from those persons would have a deleterious impact on the Commission's protection of market participants and the public because of such persons' extremely limited activity in the commodity interest markets.

2. Efficiency, Competitiveness, and Financial Integrity of Markets

Section 15(a)(2)(B) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of efficiency, competitiveness, and financial integrity considerations. As noted above, the Final Rules provide a CPO exclusion for a relatively small number of BDCs, change the entity designated as the CPO for an excluded RIC to

its RIA, and relieve certain filing requirements for certain classes of CPOs and CTAs.

The Commission believes that these amendments constitute minor changes to regulatory processes and filings that will not have a significant impact on the efficiency, competitiveness, and financial integrity of markets.

3. Price Discovery

Section 15(a)(2)(C) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of price discovery considerations. For the reasons noted above, the Commission believes that the Final Rules generally consist of minor changes to regulatory processes and filings that will not have a significant impact on price discovery.

4. Sound Risk Management

Section 15(a)(2)(D) of the CEA requires the Commission to evaluate a regulation in light of sound risk management practices. The Commission believes that the Final Rules will not have a significant impact on the practice of sound risk management because the manner in which various funds, operators, and advisors organize, register, or claim exclusion from such regulation has only a small influence on how market participants manage their risks overall.

5. Other Public Interest Considerations

Section 15(a)(2)(E) of the CEA requires the Commission to evaluate the costs and benefits of a regulation in light of other public interest considerations. The Final Rules adopted herein reflect the Commission's determination that such amendments harmonize Commission regulations with other federal laws, where appropriate, to reduce the

regulatory burden on certain entities. Additionally, the exclusion from the CPO definition for RIAs of BDCs in Regulation 4.5 will not subject BDCs to the costs associated with having its RIA registered as a CPO, and the corresponding costs of complying with applicable provisions of the Commission's part 4 regulations. This amendment should enable BDCs and their RIAs to deploy more of their resources in furtherance of their statutory purpose, investing in and providing managerial assistance to small- and mid-sized U.S. companies, and thereby also furthering a statutory goal of the ICA.

d. Anti-Trust Considerations

Section 15(b) of the CEA requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the purposes of the CEA, in issuing any order or adopting any Commission rule or regulation (including any exemption under CEA section 4(c) or 4c(b)), or in requiring or approving any bylaw, rule, or regulation of a contract market or registered futures association established pursuant to section 17 of the CEA.⁹³ The Commission believes that the public interest to be protected by the antitrust laws is generally to protect competition. The Commission requested comment on whether the Proposal implicated any other specific public interest to be protected by the antitrust laws and received no comments addressing this issue.

The Commission has considered the Final Rules to determine whether they are anticompetitive and has identified no anticompetitive effects. Because the Commission has determined the Final Rules are not anticompetitive and have no anticompetitive

⁹³ 7 U.S.C. 19(b).

effects, the Commission has not identified any less anticompetitive means of achieving the purposes of the CEA.

List of Subjects in 17 CFR Part 4

Advertising, Brokers, Commodity futures, Commodity pool operators, Commodity trading advisors, Consumer protection, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, the Commodity Futures Trading Commission amends 17 CFR part 4 as follows:

PART 4—COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

1. The authority citation for part 4 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6(c), 6b, 6c, 6l, 6m, 6n, 6o, 12a, and 23.

2. In § 4.5, revise paragraphs (a)(1), (b)(1), (c)(2) introductory text, (c)(2)(i) and (ii), and (c)(2)(iii) introductory text to read as follows:

§ 4.5 Exclusion for certain otherwise regulated persons from the definition of the term “commodity pool operator.”

(a) * * *

(1) An investment adviser registered under the Investment Advisers Act of 1940, as amended;

* * * * *

(b) * * *

(1) With respect to any person specified in paragraph (a)(1) of this section, an investment company registered under the Investment Company Act of 1940, as amended,

or a business development company that elected an exemption from registration as an investment company under the Investment Company Act of 1940;

* * * * *

(c) * * *

(2) The notice of eligibility must contain representations that such person will operate the qualifying entity specified therein in the following ways, as applicable:

(i) The person will disclose in writing to each participant, whether existing or prospective, that the qualifying entity is operated by a person who has claimed an exclusion from the definition of the term “commodity pool operator” under the Act and, therefore, is not subject to registration or regulation as a pool operator under the Act; Provided, that such disclosure is made in accordance with the requirements of any other federal or state regulatory authority to which the qualifying entity is subject. The qualifying entity may make such disclosure by including the information in any document that its other Federal or State regulator requires to be furnished routinely to participants or, if no such document is furnished routinely, the information may be disclosed in any instrument establishing the entity’s investment policies and objectives that the other regulator requires to be made available to the entity’s participants; and

(ii) The person will submit to such special calls as the Commission may make to require the qualifying entity to demonstrate compliance with the provisions of this paragraph (c); Provided, however, that the making of such representations shall not be deemed a substitute for compliance with any criteria applicable to commodity futures or commodity options trading established by any regulator to which such person or qualifying entity is subject; and

(iii) If the person is an investment adviser claiming an exclusion with respect to the operation of a qualifying entity under paragraph (b)(1) of this section, then the notice of eligibility must also contain representations that such person will operate that qualifying entity in a manner such that the qualifying entity:

* * * * *

3. Amend § 4.27 by revising the section heading and paragraph (b) to read as follows:

§ 4.27 Additional reporting by commodity pool operators and commodity trading advisors.

* * * * *

(b) *Persons required to report.* (1) Except as provided in paragraph (b)(2) of this section, a reporting person is:

(i) Any commodity pool operator that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder; or

(ii) Any commodity trading advisor that is registered or required to be registered under the Commodity Exchange Act and the Commission's regulations thereunder.

(2) The following categories of persons shall not be considered reporting persons, as that term is defined in paragraph (b)(1) of this section:

(i) A commodity pool operator that is registered, but operates only pools for which it maintains an exclusion from the definition of the term "commodity pool operator" in § 4.5 and/or an exemption from registration as a commodity pool operator in § 4.13;

(ii) A commodity trading advisor that is registered, but does not direct, as that term is defined in § 4.10(f), the trading of any commodity interest accounts;

(iii) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is registered as a commodity pool operator and, though registered, complies with § 4.14(a)(4); and

(iv) A commodity trading advisor that is registered, but directs only the accounts of commodity pools for which it is exempt from registration as a commodity pool operator, and though registered, complies with § 4.14(a)(5).

* * * * *

Issued in Washington, DC, on November 27, 2019, by the Commission.

Robert Sidman,

Deputy Secretary of the Commission.

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendices to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person—

Commission Voting Summary and Commissioner’s Statement

Appendix 1—Commission Voting Summary

On this matter, Chairman Tarbert and Commissioners Quintenz, Behnam, Stump, and Berkovitz voted in the affirmative. No Commissioner voted in the negative.

Appendix 2—Statement of Commissioner Dan M. Berkovitz

I am voting in favor of today's rule adopting three amendments to Regulations 4.5 and 4.27, addressing certain exemptions for commodity pool operators (CPOs) and filing requirements for CPOs and commodity trading advisors (CTAs). These three amendments are in largely identical form to those proposed last fall, which I voted for because they codify no-action and exemptive letters and simplify our registration framework, without compromising customer protection or the integrity of our derivatives markets.

The first amendment is to Regulation 4.5(a)(1), which currently excludes an investment company (RIC) registered under the Investment Company Act of 1940 (1940 Act) from the definition of a CPO. Today's amendment confirms the Commission's understanding that an investment adviser registered under the Investment Advisers Act of 1940 is the entity that operates the RIC and therefore is the appropriate person to claim the CPO exclusion for the RIC. I note that this revision neither broadens the category of persons currently claiming the RIC exclusion, nor changes the current requirements that qualifying entities claiming the exclusion must file annual notices with the CFTC and make disclosures to pool participants.

Today's final rule also amends Regulation 4.5(b)(1) to include business development companies (BDCs), defined in the 1940 Act, as persons excluded from the CPO definition.¹ BDCs are a type of closed-end investment company, but are exempt from registering as a RIC under the securities laws. A BDC therefore is not a "qualified entity" under 4.5(a)(1). On this basis, in 2012 CFTC staff provided no action relief to BDCs that meet the conditions of Regulation 4.5(c), which include significant caps on the

¹ CFTC Letter No. 12-40 (Dec. 4, 2012), available at <https://www.cftc.gov/csl/12-40/download> ("BDC No-Action Letter").

BDC's use of derivatives and require notice to the CFTC and disclosures to investors.²

To date, 65 entities have claimed this relief. By codifying the exclusion through this amendment, we also harmonize our regulations relating to BDCs with those of the Securities and Exchange Commission (SEC).

Finally, today's rule amends the definition of "Reporting Person" in Regulation 4.27 to exempt certain classes of CPOs and CTAs, consistent with exemptive relief currently provided at the request of the National Futures Association (NFA).³ Under these amendments, certain CPOs and CTAs are not required to file Forms CPO-PQR and CTA-PR, respectively, where such filing would provide limited additional information about the reporting person beyond what is already available to the Commission. Notice and filing requirements are critical to performing effective market oversight, but where the information received by the Commission is largely duplicative, these requirements do not materially advance the interests of the Commission or its registrants and are therefore unnecessary.

It is good government to periodically assess our regulations and make improvements where appropriate. In this context, improving the clarity and transparency of our rules and harmonizing them with those of the SEC are worthy objectives, but without more, do not justify a change.⁴ The primary objective in evaluating and

² BDC No-Action Letter at 3.

³ CFTC Letter No. 14-115 (Sept. 8, 2014), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-115.pdf>; CFTC Letter No. 15-47 (July 21, 2015), available at <https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-47.pdf>.

⁴ See, e.g., *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-78 (D.C. Cir. 2010) ("The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule.")

considering amendments to our regulations is whether and how they will improve the Commission's ability to protect customers and police our markets.

Here, the NFA—the front-line self-regulatory organization responsible for member registration—has noted that these amendments will bring transparency to the CPO registration framework by incorporating CPO and CTA no-action and exemptive relief into the Commission's regulations. I agree with the NFA that today's proposed amendments will benefit both the Commission and its registrants, and in my view, they will not impact our mission to safeguard the markets and its participants. I therefore support these narrow revisions to Regulations 4.5 and 4.27 and thank the staff of the Division of Swap Dealer and Intermediary Oversight for their work on this rule.

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