

December 17, 2018

VIA CFTC COMMENTS PORTAL

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

Re: Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors [RIN3038-AE76]

Dear Mr. Kirkpatrick:

Dechert LLP (“Dechert”) welcomes the opportunity to comment regarding the proposed amendments to Part 4 of the Commodity Futures Trading Commission (“CFTC” or “Commission”) regulations that would: (1) codify certain relief the staff of the CFTC (“CFTC Staff”) has previously made available; and (2) modify certain registration and compliance requirements applicable to commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”), in each case, as part of an agency-wide review of CFTC regulations and practices to identify those areas that could be simplified to make them less burdensome (“Proposal”).¹

This comment letter addresses:

- (1) the proposed codification and expansion of CFTC Staff Advisory 18-96 (“Advisory 18-96”) in proposed new CFTC Rule 4.13(a)(4);
- (2) the proposed prohibitions against a CPO relying on certain CPO registration exemptions under CFTC Rule 4.13 if it or its principals are subject to the statutory disqualifications (“Statutory Disqualifications”) set forth in Sections 8a(2) and 8a(3) of the Commodity Exchange Act of 1936, as amended (“CEA” or “the Act”), subject to a disclosure exception;

¹ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (Oct. 18, 2018) (“Proposing Release”).

- (3) the proposed change to CFTC Rule 4.13(a)(3) regarding participant qualification;
- (4) the proposed change to CFTC Rule 4.5(a)(1) to identify the investment adviser as the excluded CPO with regard to the operation of a registered investment company; and
- (5) the potential timing of the compliance dates for any rule changes.

We believe that Dechert is well situated to offer comments on the Proposing Release. Dechert is a global law firm with nearly 200 financial services attorneys practicing in 16 offices across the United States, Europe, Asia and the Middle East. Our funds team spans all five principal European fund centers—London, Luxembourg, Dublin, Frankfurt/Munich and Paris. Dechert has represented a majority of the U.S. asset management industry in connection with the CFTC’s regulation of the U.S. Securities and Exchange Commission (“SEC”)-registered investment companies’ investment advisers as CFTC-registered and exempt CPOs and CTAs. Dechert has an extensive U.S. and non-U.S. commodity market buy-side practice through which we advise private funds, Undertakings for Collective Investments in Transferable Securities (“UCITS”), European Alternative Investment Funds, U.S. pension plans, and insurance companies in many jurisdictions, with respect to matters involving CFTC registration, exemptions and ongoing compliance matters. These matters include rules of self-regulatory organizations, such as exchanges and the U.S. National Futures Association (“NFA”). We regularly advise buy-side swap market participants on the cross-border application of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”) and regulations thereunder, as well as European Market Infrastructure Regulation. We also assist clients with navigating the layers of U.S. and non-U.S. laws and regulations applicable to their businesses.

Codification of Advisory 18-96 into New CFTC Rule 4.13(a)(4) – Potential Unintended Consequences and Costs

The CFTC is proposing to adopt an exemption from CPO registration in new Rule 4.13(a)(4), which would permit a CPO that solicits and/or accepts funds solely from persons located outside the United States for participation in an offshore commodity pool operated by the CPO, to claim a registration exemption with respect to that pool.²

Dechert applauds the CFTC’s effort to (1) reduce the regulatory compliance burden on CPOs that operate a “U.S.-facing” business (taking participants located within the United States into commodity pools) and a “non-U.S.-facing” business (taking participants located outside the United

² Proposing Release, 83 Fed. Reg. at 52904-52905.

States into other commodity pools) through a single asset manager entity and (2) conserve CFTC resources for the protection of domestic pool participants while leaving protection of non-domestic pool participants to local regulators. Dechert appreciates the fact that, by making the operational relief available under Advisory 18-96 a registration exemption under CFTC Part 4, registered CPOs qualifying for the exemption will not need to include pool-level information regarding applicable pools in their CFTC Form CPO-PQR and NFA Form PQR systemic risk reports.³ This change will provide welcome compliance cost and time savings for registered CPOs and their staffs.

With regard to the codification of Advisory 18-96 into the new CFTC Rule 4.13(a)(4) CPO registration exemption, we respectfully request that the CFTC: (1) remove the proposed condition that the commodity pool not hold meetings or conduct administrative activities within the United States;⁴ and (2) not include a requirement for disclosure to current or prospective participants.⁵

Proposed Pool Meetings and Pool Administration Location Requirement. The requirement that a commodity pool not hold meetings in the United States in order for a CPO to qualify for the CPO registration exemption in proposed new CFTC Rule 4.13(a)(4) is vague and does not recognize the increasingly global market in which CPOs operate. In addition, the requirement that a commodity pool not conduct administrative activities in the United States does not account for the use of third-party fund administrators and may make it impossible for certain CPOs to qualify for the exemption due to no fault of their own.⁶ Eliminating these requirements would be consistent with the CPO

³ Advisory 18-96 provides qualifying registered CPOs with relief from CFTC Rule 4.21 (required delivery of a pool Disclosure Document), CFTC Rule 4.22 (reporting to participants) and CFTC Rule 4.23(a)(10) and (a)(11) (certain recordkeeping requirements) with regard to their offshore commodity pools. The requirement to prepare and file CFTC Form CPO-PQR is housed in CFTC Rule 4.27, and was adopted in 2012, long after Advisory 18-96 was published. As a result, for the past six years, registered CPOs operating under Advisory 18-96 have needed to include pool-level information on their CFTC Form CPO-PQR reports and, as a follow-on, on their NFA Form PQR reports.

⁴ Proposed CFTC Rule 4.13(a)(4)(ii).

⁵ In the Proposing Release, the CFTC requests comment on a disclosure requirement. Proposing Release, 83 Fed. Reg. at 52916.

⁶ Advisory 18-96 sets forth several of its conditions in terms of the commodity pool's activity (operation, holding meetings and conducting administrative activities); however, generally commodity pools are merely collective investment vehicles without their own staff, so the commodity pool really does not operate itself, hold meetings or conduct administrative activities. The board of directors, general partner or managing member ("Default CPO"), depending on the form of organization of the commodity pool, is authorized to act on behalf of the commodity pool. Often the Default CPO causes the commodity pool to enter into a contract with an investment manager whereby the investment manager operates the commodity pool, and the Default CPO

registration exemption in CFTC Rule 3.10(c)(3)(i) and would be in keeping with the CFTC's interest in "prioritiz[ing] the use of Commission resources on the customer protection of actual and potential commodity pool participants located in the U.S., and provid[ing] relief to persons with respect to their commodity pool operations that have a limited nexus with markets or participants within the Commission's jurisdiction."⁷

First, the proposed prohibition on commodity pool meetings in the United States is vague in that it is not clear whether the prohibition applies to the staff of the CPO, directors, general partner or managing member of the pool, or other service providers. For example, a director of a CPO that is domiciled outside the United States and generally conducts its operations outside the United States, could need to participate in a pool board meeting telephonically while travelling in the United States. In addition, a CPO could hold a company "off-site" in the United States and staff of the CPO happen to meet and discuss pool-related business.

Second, the proposed requirement fails to account for the fact that many commodity pools have third-party administrators that themselves might have operations in many jurisdictions over which the CPO may not have control.⁸ For example, a CPO may meet all the other requirements of the CPO exemption except that the third-party administrator the CPO has hired for the commodity pool in question conducts the administration of the commodity pool out of the administrator's U.S.-domiciled subsidiary for the administrator's own business reasons. As a result of this condition, that CPO may have to operate the commodity pool in its capacity as a registered CPO in full compliance with the CFTC Part 4 regulations, solely because of the location of the activities of the fund administrator the CPO has caused the pool to engage.

Eliminating this condition would bring proposed new CFTC Rule 4.13(a)(4) into closer alignment with the CPO registration exemption in CFTC Rule 3.10(c)(3)(i). In the Proposing Release, the CFTC states that it would like to provide CPO registration relief *beyond* CFTC Rule 3.10(c)(3)(i).⁹ Eliminating these problematic conditions for qualification for proposed new CFTC Rule 4.13(a)(4), which are in addition to the conditions CFTC Rule 3.10(c)(3)(i), would help the CFTC achieve this

delegates its CPO authority and responsibilities to the investment manager ("Designated CPO"). Effectively, the activity ascribed to the commodity pool becomes the actual activity of the Designated CPO.

⁷ Proposing Release, 83 Fed. Reg. at 52906.

⁸ The CFTC has recognized the industry's use of third-party administrators in CFTC Rule 4.23, which allows a commodity pool's administrator to keep books and records instead of the CPO maintaining the books and records at its own main business address, if certain conditions are met.

⁹ Proposing Release, 83 Fed. Reg. at 52904.

goal. Although not explicitly required by Advisory 18-96 or proposed new CFTC Rule 4.13(a)(4), we anticipate that many CPOs that avail themselves of the registration exemption will be CPOs domiciled outside of the United States, given the requirement that any pool for which a CPO claims the exemption must be operated outside of the United States and only accept (directly or indirectly) capital from sources outside the United States. We would submit that a CPO that operates its relevant pools outside the United States but happens to hold a meeting—however ultimately defined—in the United States, or which has a pool administrator in the United States, is not increasing its limited nexus with the U.S. commodity markets to an extent that should necessitate registering as a CPO, operating these relevant pools in its registered CPO capacity and rendering registration relief unavailable. Given the complexity of today’s modern asset management industry, where meetings are held or pool administrators are located are not core functions of the CPO business. As such, we would request that the requirement that the commodity pool not hold meetings or conduct administrative activities in the United States be removed from the list of conditions necessary to qualify for the registration exemption.

We would also request that the CFTC make it clear that CPOs that meet the requirements of Advisory 18-96 continue to be able to file for and rely on the relief contained therein regardless of the availability of the CPO registration exemption in new proposed CFTC Rule 4.13(a)(4), or at the very least that CPOs that have previously claimed the relief under Advisory 18-96 be allowed to continue to rely on the relief they have claimed and not be required to conduct new qualification analysis and make an exemption notice filing with the NFA that must be reaffirmed annually. The loss of Advisory 18-96 relief would be an added cost and on-going cost to those CPOs currently relying on its relief for their operations.

Proposed Disclosure Requirement. The CFTC also requests comments on whether CPOs claiming the exemption under proposed new CFTC Rule 4.13(a)(4) should be required to disclose the exemption to participants; whether such disclosure would be meaningful to offshore investors; and, if disclosure is required, regarding the timing requirement for such disclosure.¹⁰ We are requesting that proposed new CFTC Rule 4.13(a)(4) not include a disclosure requirement. A disclosure requirement would be a departure from past practice in this area for the CFTC, and could create unintended cost consequences for CPOs that likely would outweigh any investor protection considerations. With regard to past practice, we note that Advisory 18-96, on which the CFTC is basing proposed new CFTC Rule 4.13(a)(4), does not include a disclosure requirement. Given that Advisory 18-96 is the result of a CFTC Staff action rather than a rulemaking, we do not have the benefit of a rule preamble that might possibly indicate whether a disclosure requirement was considered at the time, and, if so, why Advisory 18-96 does not contain one. Mandating disclosure of a CPO’s reliance on proposed new CFTC Rule 4.13(a)(4) would involve an additional cost of

¹⁰ Proposing Release, 83 Fed. Reg. at 52916.

compliance for those CPOs currently relying on Advisory 18-96 who move to reliance on the new exemption whether by choice or because Advisory 18-96 is no longer available, as is a possibility discussed herein. We also note that CFTC Rule 3.10(c)(3)(i) does not have a disclosure requirement.

We are requesting that the CFTC consider the unintended cost of compliance with the proposed disclosure requirement for some CPOs that will operate under proposed new CFTC Rule 4.13(a)(4). Although CPOs operating such commodity pools will be exempt from registration as CPOs, and therefore not subject to the requirements of CFTC Rule 4.21 (required delivery of a pool Disclosure Document), they may nevertheless be subject to local regulatory requirements with respect to updating, filing, approval and distribution of offering documents.

For example, any offering document amendment for an Irish UCITS must be filed with and reviewed by the Central Bank of Ireland. A similar requirement applies to UCITS domiciled in Luxembourg.¹¹ The Luxembourg regulator will not permit a simple “stickering” or amendment of the fund disclosure document with a single new disclosure item; the entire document must be updated if any change is made. This can include an update of tax and country-specific disclosures. Although the Central Bank of Ireland does allow “stickering” of an offering document on a one-off basis, there are limitations on the use of stickers imposed by both the Central Bank of Ireland and other European regulators.

Offering document amendments for UCITS must be filed with each individual country regulator in each European country in which the UCITS are offered, translated into the local language or languages, printed and distributed. In addition, for UCITS offered in additional markets outside of Europe—for example, in Asia—the offering document amendments must be filed with and approved by local regulators, translated into the appropriate language or languages, and updated copies must be provided to fund distributors. Dechert engages in such projects and would be happy to share with the CFTC our estimate of the costs (*e.g.*, legal counsel, translation, printing and other administrative costs) of an offering document amendment project responsive to a disclosure requirement in proposed new CFTC Rule 4.13(a)(4). We would also note that the costs of updating and filing offering documents are generally borne by the applicable fund and, by extension, the

¹¹ UCITS are generally retail funds and can be considered the European equivalent to investment companies registered as such under the Investment Company Act of 1940, as amended (“1940 Act”). As of the end of the third quarter of 2018, Irish (4,420) and Luxembourg-domiciled (10,233) UCITS together accounted for 44.4% of the number of all European UCITS (32,987). Irish and Luxembourg UCITS together encompass a plurality of all European UCITS. *See* European Fund and Asset Management Association Quarterly Statistical Release No. 75, Table 13 (Dec. 2018), available at https://www.efama.org/Publications/Statistics/Quarterly/Quarterly%20Statistical%20Reports/181204_Quarterly%20Statistical%20Release%20Q3%202018.pdf.

participants in the fund. Given that the only nexus to the United States for a CFTC Rule 4.13(a)(4) commodity pool might be that its CPO operates other commodity pools under other CFTC Part 4 exemptions, CFTC-related disclosure may be of very limited use to such a commodity pool participant. We would submit that the cost of compliance with a disclosure requirement would outweigh the participant protection or information consideration.

Prohibitions Against Statutory Disqualifications

The CFTC is proposing new CFTC Rule 4.13(a)(6), which would require any person claiming a CPO registration exemption under CFTC Rules 4.13(a)(1) through (a)(5), or affirming any prior claim of such exemption, to represent that neither the CPO nor any of its principals is subject to any Statutory Disqualifications. The Proposal would provide that such claims of CPO exemption cannot be filed or reaffirmed unless the Statutory Disqualification was: (a) previously disclosed in a registration application that was granted; or (b) disclosed to the CFTC more than 30 days prior to the claim of exemption (together, the “Disclosure Exception”).

Request to Remove Proposed New CFTC Rule 4.13(a)(6). We generally oppose applying the prohibitions against Statutory Disqualifications under proposed new CFTC Rule 4.13(a)(6) to the exemptions under CFTC Rule 4.13(a). We strongly believe that imposing this provision is not necessary or appropriate. Accordingly, we request that the CFTC reconsider and remove proposed new CFTC Rule 4.13(a)(6) from the Proposal.

As an initial matter, the prohibitions against Statutory Disqualifications currently relate solely to claims for relief under Advisory 18-96, which provides relief from certain Part 4 disclosure, reporting and recordkeeping burdens for *registered* CPOs that operate offshore commodity pools. The Proposal would apply the prohibitions from Advisory 18-96 to CPOs relying on each of the exemptions under CFTC Rules 4.13(a)(1) through (a)(5). The framework governing registrants currently relying on Advisory 18-96 is vastly different from that applicable to exempt CPOs. We believe these differences demonstrate that the CFTC has generally determined it does not need to apply as close regulatory oversight for CPOs relying on CFTC Rule 4.13(a) as it does for registered CPOs.

In addition, CFTC Rule 4.13(a) exempt CPOs would need to develop and implement a process to classify all applicable individuals and entities as a principal or not, and then identify whether any identified principals are subject to a Statutory Disqualification. Exempt CPOs are not currently required to engage in this classification and screening process. Certain aspects of the definition of “principal” under the CEA and CFTC Rules¹² do not create a bright-line test, but rather require a

¹² CEA Section 8a(2); CFTC Rule 3.1.

facts-and-circumstances analysis. For example, there is some discretion with regard to identifying the head of a business unit, division or function subject to CFTC regulation. In our experience, the principal classification and screening process creates the majority of the work necessary to register CPOs and CTAs, and is costly. The screening of principals may be especially costly for exempt CPOs located outside of the United States.¹³

The Proposing Release states that the CFTC “lacks data sufficient to determine how many CPOs might be required to cease operating commodity pools pursuant to the exemptions [under CFTC Rule 4.13(a)(1)-(3) and (5)] due to the presence of statutorily disqualified principals.”¹⁴ We agree that the number of exempt CPOs that could be forced to remove a principal (if possible), wind-up exempt CPO operations and/or divest commodity pool participants if proposed new CFTC Rule 4.13(a)(6) were adopted as proposed is potentially unknowable at this time. However, we believe that most if not all CFTC Rule 4.13(a) exempt CPOs could be impacted by needing to develop a classification and screening process.¹⁵

Also, the Statutory Disqualifications are very broad. As currently written, any prior violation of the CEA (*e.g.*, a violation involving marketing) would implicate proposed new CFTC Rule 4.13(a)(6). For example, Section 8a(3)(A) creates a Statutory Disqualification for any person that “has been found by the Commission or by any court of competent jurisdiction to have violated, or has consented to findings of a violation of, *any provision of this Act, or any rule, regulation, or order thereunder* (other than a violation set forth in paragraph (2) of this section), or to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any such provision.”¹⁶

Additionally, we note that the CFTC has other means for protecting market participants besides proposed new CFTC Rule 4.13(a)(6). Exempt CPOs are subject to the anti-fraud provisions of the CEA.¹⁷ In addition, exempt CPOs operating under CFTC Rule 4.13(a)(1)-(3) and (5) are currently required to: make and keep all books and records prepared in connection with their activities as CPOs; make those records available for inspection upon request of any representative of the CFTC,

¹³ See *e.g.*, CEA Section 8a(2)(E) and 8a(3)(B).

¹⁴ Proposing Release, 83 Fed. Reg. at 52923.

¹⁵ We note that the CFTC could consider in its cost-benefit analysis: (A) the number of exempt CPOs currently relying on CFTC Rule 4.13(a)(1)-(3) and (5), multiplied by (B) the estimated cost of identifying principals and conducting the Statutory Disqualification research and analysis with respect to such persons.

¹⁶ Emphasis added.

¹⁷ See, *e.g.*, CEA Section 4o.

U.S. Department of Justice or other appropriate regulatory agency; and submit to certain CFTC special calls for information.¹⁸

Finally, we believe that the Proposing Release does not make clear whether proposed new CFTC Rule 4.13(a)(6) was meant to serve as a disclosure provision, or meant to prevent those CPOs that have a Statutory Disqualification from relying on Rule 4.13(a)(1)-(5) registration exemptions altogether. While it appears that a Statutory Disqualification could be addressed simply with disclosure to the CFTC under a Disclosure Exception, the Proposal does not set forth procedures for how the Disclosure Exception would operate for exempt CPOs. By contrast, the CFTC and NFA rules set forth clear procedures for registration of CPOs that are subject to Statutory Disqualifications.¹⁹

¹⁸ CFTC Rule 4.13(c)(i)-(iii).

¹⁹ See CFTC Rule 3.60; NFA Registration Rules 201-215 and 501-510. Of course, it appears that a CPO that is registered with respect to certain pools and exempt with respect to others and its personnel would be able to satisfy a Disclosure Exception. Likewise, a person previously associated with a registrant following the occurrence of a Statutory Disqualification appears to be able to satisfy a Disclosure Exception.

A similar proposal that affected associated persons (“APs”) of swap dealers (“SDs”) and major swap participants (“MSPs”) changed over time. As background, the Dodd-Frank Act, among other things, amended Section 4s(b)(6) of the CEA to prohibit an AP of an SD or MSP with a Statutory Disqualification from effecting swaps for the SD or MSP, unless the CFTC provided otherwise. On January 19, 2012, the CFTC published final regulations that, among other things: (1) expanded the definition of “associated person” to include APs of SDs and MSPs in CFTC Rule 1.3(aa)(6); and (2) incorporated the prohibitions set forth in CEA Section 4s(b)(6) in CFTC Rule 23.22. In publishing the final rule, the CFTC accepted two comments of note here: (1) provide for the NFA to conduct the vetting process; and (2) add an exception to CFTC Rule 23.22(b) for “any person subject to a statutory disqualification who is already listed as a principal, registered as an associated person of another registrant . . . , or registered as a floor broker (FB) or floor trader (FT).” Registration of Swap Dealers and Major Swap Participants, 77 Fed. Reg. 2613 (Jan. 19, 2012) at 2615. On October 11, 2012, in CFTC Letter No. 12-15, the CFTC Staff provided relief related to CEA Section 4s(b)(6), as long as certain conditions are met (*e.g.*, the NFA provides notice that, had the person applied for registration as an AP, the NFA would have granted the registration). The letter cited multiple reasons for providing relief, including that the CFTC Rule 23.22(b) exception for APs of other entities that were already registered despite a Statutory Disqualification would avoid treating two persons differently because of the products, markets or category of entity they worked for.

Alternative Request to Modify Proposed New CFTC Rule 4.13(a)(6). If the CFTC proceeds with applying the prohibitions on Statutory Disqualifications under proposed new CFTC Rule 4.13(a)(6) to the exemptions under CFTC Rule 4.13(a), we request that the CFTC:

- (1) confirm that proposed new CFTC Rule 4.13(a)(6) is a disclosure provision, and not a potential bar to operating a pool under CFTC Rule 4.13(a)(1)-(5);
- (2) adopt procedures for how the Disclosure Exception would operate;
- (3) provide for a classification and screening procedure;
- (4) limit the scope of application of proposed new CFTC Rule 4.13(a)(6) solely to certain Statutory Disqualifications; and
- (5) limit the application of proposed new CFTC Rule 4.13(a)(6) to the exempt CPO itself, not the principals of the CPO.

As noted above, while it appears that a Statutory Disqualification could be addressed simply with disclosure to the CFTC under a Disclosure Exception, it is not clear based on the Proposing Release or the text of proposed new CFTC Rule 4.13(a)(6) how the Disclosure Exception would operate or what the implications of disclosure of a Statutory Disqualification would be. In this regard, the CFTC should confirm that proposed new CFTC Rule 4.13(a)(6) is solely a disclosure provision and adopt clear procedures for how the Disclosure Exception would operate. We believe that the NFA would be the most logical choice to administer the disclosure procedures under proposed new CFTC Rule 4.13(a)(6).²⁰

As noted above, each applicable exempt CPO would need to undertake the classification and screening process (*i.e.*, identify principals and whether such principals are subject to any Statutory

²⁰ Designating the NFA to administer new Rule 4.13(a)(6) would be consistent with final CFTC Rule 23.22(b) as discussed above. The clarifications and process improvements that were necessary to implement CFTC Rule 23.22(b) could be useful point of reference for the CFTC in considering the actual implementation (and costs) associated with proposed new CFTC Rule 4.13(a)(6). We note that the NFA template used for SD and MSP APs reporting of Statutory Disqualifications is a check-the-box and fill-in-the-blank form, and does not allow for submission of supporting documentation. We also note that Part 1A of SEC Form ADV (uniform form for investment adviser registration with the SEC, among other uses) also utilizes a disclosure approach and has a check-the-box and fill-in-the-blank Disclosure Reporting Page (“DRP”) that asks for disciplinary history about the registrant and its advisory affiliates for criminal, regulatory and civil judicial actions. Form ADV, Part 1A at Item 11 Disclosure Information.

Disqualification). If proceeding with adopting proposed new CFTC Rule 4.13(a)(6), the CFTC should consider: (1) providing guidance as to how an exempt CPO could conduct such processes; and (2) establishing a process for disagreement by the CFTC or NFA with an exempt CPO's determination. These are critical issues that are not discussed at all in the Proposing Release.

In addition, sufficient time must be included in developing the compliance date for any proposed new rule, to allow for the implementation of the Disclosure Exception and related procedures by the NFA and for impacted CPOs to have sufficient time to undertake the classification and screening process.

We believe that limiting the Statutory Disqualifications covered under proposed new CFTC Rule 4.13(a)(6) would lessen the compliance costs for exempt CPOs and lessen the implementation burden for the NFA while still protecting pool participants. For example, the reportable Statutory Disqualifications could be limited to instances of fraud (and similar actions) involving commodities, securities and other financial instruments.²¹ As noted above, as currently written, any violation of the CEA (*e.g.*, violations involving marketing) could require disclosure of a Statutory Disqualification. Also, we request that the CFTC consider limiting the application of proposed new Rule 4.13(a)(6) to the CPO itself, not the principals, which would reduce the procedures to be developed and related costs.

If the CFTC intends to use proposed new CFTC Rule 4.13(a)(6) to implement a bar on certain CPOs relying on Rule 4.13(a) exemptions, rather than as a disclosure provision, the Proposal should be explicit in doing so. In such case, the CFTC should consider grandfathering those registrants who were established and began operations before the date new Rule 4.13(a)(6) was adopted. This would alleviate certain potential compliance costs related to the classification and screening processes. In addition, it would be necessary to create a process and timeline for winding down operations of affected exempt CPOs in a manner that does not disrupt the market and disadvantage

²¹ For example, Section 8a(2)(D) relates to those with a felony conviction in the last ten years that “(i) involves any transactions or advice concerning any contract of sale of a commodity for future delivery, or any activity subject to Commission regulation under section 4c or 19 of this Act, or concerning a security, (ii) arises out of the conduct of the business of a futures commission merchant, introducing broker, floor broker, floor trader, commodity trading advisor, commodity pool operator, associated person of any registrant under this Act, securities broker, securities dealer, municipal securities broker, municipal securities dealer, transfer agent, clearing agency, securities information processor, investment adviser, investment company, or an affiliated person or employee of any of the foregoing, (iii) involves embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling, or (iv) involves the violation of” various sections of the Internal Revenue Code of 1986 (“Code”).

impacted CPOs' pool participants. We also believe that it would be appropriate to implement a procedure whereby a CPO could apply for an exemption from such a bar.

Request to Re-Propose New CFTC Rule 4.13(a)(6). We believe that, given the points noted above, there is a lack of sufficient notice to current exempt CPOs (and their principals) and suggest re-proposing Rule 4.13(a)(6), particularly if proposed new CFTC Rule 4.13(a)(6) would act as a bar to prevent certain CPOs from relying on CFTC Rule 4.13(a) exemptions.

Proposed Change to CFTC Rule 4.13(a)(3) Regarding Participant Qualification

The CFTC is proposing to amend the *de minimis* commodity pool exemption in CFTC Rule 4.13(a)(3) to explicitly permit “non-U.S. person participants,” regardless of their financial sophistication. Dechert applauds the CFTC’s effort to clarify this issue. However, we are requesting that the CFTC clarify its meaning and use the term “non-United States person as defined in CFTC Rule 4.7(a)(iv)” in CFTC Rule 4.13(a)(3)(iii)(E), rather than the term “non-U.S. person participants.”

Prior to the rescission in 2013 of the previous CPO registration exemption in CFTC Rule 4.13(a)(4), CFTC Rule 4.13(a)(3)(iii)(E) permitted an investor to invest in a commodity pool whose CPO was relying on the *de minimis* commodity pool exemption, if the investor was a “person eligible to participate in a pool for which the pool operator can claim exemption from registration under paragraph (a)(4) of this section.” At that time, persons eligible to invest in CFTC Rule 4.13(a)(4) commodity pools were natural persons meeting the definition of “qualified eligible person” under CFTC Rule 4.7(a)(2), and non-natural persons meeting the definition of “qualified eligible person” under CFTC Rule 4.7(a), among others. “Non-United States persons” qualified as “qualified eligible persons” under CFTC Rule 4.7(a)(2)(xi). So, until the rescission of CFTC Rule 4.13(a)(4) in 2013, “Non-United States persons” regardless of financial sophistication could invest in CFTC Rule 4.13(a)(3) commodity pools. When the CFTC rescinded the CPO registration exemption in CFTC Rule 4.13(a)(4), subpart CFTC Rule 4.13(a)(3)(iii)(E) was not deleted, but became a cross-reference to a rule that no longer existed. However, in August 2012 the CFTC Staff provided guidance to the industry that the investor qualification standard for CFTC Rule 4.13(a)(3) commodity pools continues to include all “qualified eligible persons.” The CFTC Staff indicated that it intended to make this typographical correction so as not to change the substance of the rule.²²

In light of: (1) the history of CFTC Rule 4.13(a)(3); (2) the typographical nature of the effective deletion of the cross-reference; and (3) the references to the term “non-United States person” in

²² Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations (Aug. 2012).

CFTC No-Action Letter No. 04-13 (which the CFTC cites in the Proposing Release as guidance that the industry is relying on for interpretation of this rule), we have concluded that the CFTC means for proposed CFTC Rule 4.13(a)(iii)(3)(E) to read “Non-United States person” or “Non-United States person as defined in CFTC Rule 4.7(a)(1)(iv)” rather than “Non-U.S. person.” Clarification here would be especially welcome. The term “non-U.S. person” is not defined anywhere in CFTC Part 4. We have identified at least four different CFTC definitions that go to the U.S. status of an investor for purposes of different CFTC regulatory frameworks,²³ so we are

²³ CFTC Rule 3.10(c)(3)(i) provides that a qualifying participant must be “located outside the United States, its territories and possessions.”

Under CFTC Rule 4.7(a)(1)(iv), to be a “Non-United States person” an investor must be “a natural person who is not a resident of the United States; a partnership, corporation or other entity, other than an entity organized principally for passive investment, organized under the laws of a foreign jurisdiction and which has its principal place of business in a foreign jurisdiction; an estate or trust, the income of which is not subject to United States income tax regardless of source; an entity organized principally for passive investment such as a pool, investment company or other similar entity; Provided, That units of participation in the entity held by persons who do not qualify as Non-United States persons or otherwise as qualified eligible persons represent in the aggregate less than 10% of the beneficial interest in the entity, and that such entity was not formed principally for the purpose of facilitating investment by persons who do not qualify as Non-United States persons in a pool with respect to which the operator is exempt from certain requirements of CFTC Part 4 rules by virtue of its participants being Non-United States persons; or a pension plan for the employees, officers or principals of an entity organized and with its principal place of business outside the United States.”

Under the CFTC interpretive guidance on the cross-border application of the Dodd-Frank Act swaps rules, a person must not be: (i) any natural person who is a resident of the United States; (ii) any estate of a decedent who was a resident of the United States at the time of death; (iii) any corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of enterprise similar to any of the foregoing (other than an entity described in prongs (iv) or (v), below) (a “legal entity”), in each case that is organized or incorporated under the laws of a state or other jurisdiction in the United States or having its principal place of business in the United States; (iv) any pension plan for the employees, officers or principals of a legal entity described in prong (iii), unless the pension plan is primarily for foreign employees of such entity; (v) any trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust; (vi) any commodity pool, pooled account, investment fund, or other collective investment vehicle that is not described in prong (iii) and that is majority-owned by one or more persons described in prong (i), (ii), (iii), (iv), or (v), except any commodity pool, pooled account, investment fund, or other collective investment vehicle that is publicly offered only to non-U.S. persons and not offered to U.S. persons; (vii) any legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is directly or indirectly majority-owned by one or more persons described in prong (i), (ii), (iii), (iv),

concerned that a CPO cannot assume that “non-U.S. person” is simply a shortened reference to “non-United States person” as defined in CFTC Rule 4.7(a)(1)(iv).

Proposed Change to CFTC Rule 4.5(a)(1) Regarding the Identification of the Excluded CPO – Notice Filing Obligation and Disclosure Change Considerations

The way that CFTC Rule 4.5(a)(1) and (b)(1) are currently written, the entity that is excluded from the definition of CPO with regard to the operation of a qualifying investment company registered as such under the 1940 Act is the registered investment company. The text of the exclusion is somewhat circular. The CFTC is proposing to amend CFTC Rule 4.5(a)(1) to indicate that the entity that is excluded from the definition of CPO with regard to the operation of a qualifying registered investment company is the fund’s investment adviser registered as such under the Investment

or (v) and in which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity; and (viii) any individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in prong (i), (ii), (iii), (iv), (v), (vi), or (vii). Interpretive Guidance and Policy Statement Regarding Compliance with Certain Swap Regulations, 45292 Fed. Reg. 45292, 45316.

Under the CFTC rule regarding margin requirements for uncleared swaps, a person must not be: (i) A natural person who is a resident of the United States; (ii) an estate of a decedent who was a resident of the United States at the time of death; (iii) a corporation, partnership, limited liability company, business or other trust, association, joint-stock company, fund or any form of entity similar to any of the foregoing (other than an entity described in paragraph (iv) or (v) of this section) (a “legal entity”), in each case that is organized or incorporated under the laws of the United States or that has its principal place of business in the United States, including any branch of such legal entity; (iv) a pension plan for the employees, officers or principals of a legal entity described in paragraph (iii), unless the pension plan is primarily for foreign employees of such entity; (v) a trust governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust; (vi) a legal entity (other than a limited liability company, limited liability partnership or similar entity where all of the owners of the entity have limited liability) that is owned by one or more persons described in paragraphs (i) through (v) and for which such person(s) bears unlimited responsibility for the obligations and liabilities of the legal entity, including any branch of the legal entity; or (vii) an individual account or joint account (discretionary or not) where the beneficial owner (or one of the beneficial owners in the case of a joint account) is a person described in paragraphs (i) through (vi).

In addition, SEC Regulation S—to which many CFTC Rule 4.13(a)(3) commodity pools are also subject—has a slightly different definition of U.S. person, as does the Code.

Advisers Act of 1940, as amended.²⁴ Although Dechert agrees with the change in concept, we think the CFTC needs to consider the cost implications of the process to implement this change.

Dechert agrees that the proposed amendment leads to a logical conclusion, given that the CFTC has stated that the entity needing to register as a CPO with regard to the operation of a registered investment company, because that fund cannot meet the *de minimis* conditions of CFTC Rule 4.5(c)(2)(iii), should be the investment adviser rather than the registered investment company.²⁵ However, there are significant practical implications involved in making this change and the cost of compliance with the change, especially given that this change is being made as part of the CFTC's KISS Project, which has a stated purpose to identify those areas of CFTC regulation that can be simplified to make them less burdensome and less costly.²⁶

The challenge that will be presented to the industry involves both exclusion notice filings made with the NFA and fund disclosure changes. The proposed amendment to CFTC Rule 4.5(a)(1) would require a mass migration of CFTC Rule 4.5 exclusion notice filings within the NFA exemptions system, from the location where many of the filings are currently filed to their respective investment advisers' exemption files. Because of the way that CFTC Rule 4.5(a)(1) and (b)(1) are written, historically, registered investment companies 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.

Following the CFTC's amendment to CFTC Rule 4.5(c) in 2012, CPOs that needed to register as a result of operating registered investment companies that no longer allowed them to qualify for the exclusion, moved affected commodity pools to the investment advisers' NFA exemption file and filed operational exemptions under CFTC Rule 4.12(c)(3).²⁷ However, it is our observation that a vast majority of registered investment companies that could continue to qualify for the exclusion left their notice filings where they were in the NFA system, as CFTC Rule 4.5(a)(1) itself had not been amended.

²⁴ Proposing Release, 83 Fed. Reg. at 52911 n. 109.

²⁵ Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252, 11259 (Feb. 24, 2012).

²⁶ See Project KISS, 82 Fed. Reg. 23765 (May 24, 2017).

²⁷ We are also aware that some CPOs moved the registered investment companies' CFTC Rule 4.5 exclusion notices to the investment adviser's NFA exemption file.

Although the CFTC's Paperwork Reduction Act and CEA Section 15(a) Cost-Benefit Considerations analysis in the Proposing Release do not address how many registered investment companies will be affected by the proposed amendment to CFTC Rule 4.5(a)(1), we understand that the sheer number of registered investment company series operated under CFTC Rule 4.5 dwarfs the number of registered investment companies operated under CFTC Rule 4.12(c)(3).²⁸ Although Dechert does not have data on how many registered investment company series this affects, the NFA would have that data in its BASIC system. The proposed rule change would require moving all of those filings within the NFA exemptions system. If the only method that is available to make these changes is the current method, each CPO exclusion notice for each series will need to be moved manually by the CPO with the help of the NFA exemptions staff. This is because the current method of moving an exemption or exclusion notice in the NFA system for an exempt or excluded CPO 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.

The proposed amendment to CFTC Rule 4.5(a)(1) will also have fund disclosure change implications for affected registered investment companies. Under CFTC Rule 4.5(c)(ii), an excluded CPO must disclose in writing to each participant (whether existing or prospective) that the commodity pool is operated by a person who has claimed an exclusion from the definition of the term "commodity pool operator," and therefore is not subject to registration or regulation as a CPO. Registered investment companies prepare and file with the SEC a registration statement on SEC Form N-1A or SEC Form N-2. Registered investment companies generally disclose the reliance on CFTC Rule 4.5 in Part B of the registration statement (the Statement of Additional Information). Registered investment companies that have carefully worded their CPO exclusion disclosure to identify the trust or company as the excluded CPO rather than the investment adviser will need to consider whether a disclosure change to identify the investment adviser as the excluded CPO is a material change and therefore necessitates making an off-cycle amendment to their registration statements. This process is not without cost. Disclosure updating and filing costs are generally borne by the applicable fund, and by extension the participants in the fund who by and large are retail investors saving for retirement, education expenses or other long-term goals.

Our suggestion for how to address this issue would be to forego identifying the investment adviser as the excluded CPO in CFTC Rule 4.5(a)(1). If the change must be made, we would request that

²⁸ As a result of the expansion of the definition of commodity interest by the Dodd-Frank Act and changes over time to how registered investment company assets are managed, nearly every registered investment company series except money market funds is considered to trade commodity interests and therefore has to have on file with the NFA either a CFTC Rule 4.5 exclusion notice or be operated under CFTC Rule 4.12(c)(3).

the CFTC work with the NFA to help affected entities to move their exclusion notices in the NFA exemptions system in an efficient manner.

Potential Timing of Compliance Dates

Given the amount of work that some of these rule proposals would entail, including working with other U.S. and non-U.S. regulators and making manual changes in the NFA exemptions system, we would request that the CFTC not set any of the compliance dates for any of the proposed rule changes for December 31 of any given year. Not every change may be addressed ahead of time, and where the exact timing for changes would occur during a major holiday season for several religious faiths and national holidays, the burden of compliance can multiply. This request comes out of the experience of assisting CPOs and CTAs with the implementation of the CFTC's Part 4 rule changes that went into effect on December 31, 2012.

Thank you for considering our comments. If you have questions or if we can provide additional information that may assist the CFTC or the CFTC Staff, please contact Audrey Wagner (audrey.wagner@dechert.com or +1 202.261.3365), Philip Hinkle (philip.hinkle@dechert.com or +1 202.261.3460), Karen Anderberg on matters related to regulation and operation of European UCITS (karen.anderberg@dechert.com or +44 20.7184.7313), or Ashley Rodriguez (ashley.rodriguez@dechert.com or +1 202.261.3446).

Respectfully submitted,

/s/ Dechert LLP