

its exemptive criteria.³⁸ The Commission also believes that, unlike the NFA Proposal, Rule 4.13(a)(3) should not differentiate between trading for *bona fide* hedging and non-hedging purposes, because, as stated above, the rule is intended to apply to *de minimis* situations, where commodity interest trading—regardless of its purpose—is strictly limited. The Commission notes that two commenters on the ANPR suggested that the Commission should not distinguish between hedge and non-

hedging positions, claiming that such distinctions between these two types of trading are difficult to administer. However, one commenter specifically suggested that the Commission should distinguish between hedge and non-hedge activity in setting a *de minimis* standard. Accordingly, the Commission specifically requests comments on whether under the rule there should be: (1) A higher percentage of assets that may be committed to establish commodity interest positions; and (2)

any greater ability to trade commodity interests for *bona fide* hedging purposes than for non-hedging purposes, including whether there should be any restriction whatsoever on trading for hedging purposes. To assist persons in providing such comments, set forth below is a chart with examples of the application of the various tests under the NFA's and the Commission's proposals, with "LV" standing for the pool's liquidation value and "NT" standing for the notional test.

Contracts	LV (\$)	50% LV (\$)	5% LV (\$)	2% LV (\$)	Initial Margin 9/26/02 (\$)	Settlement level 9/25/02	Contract Value (\$)	Contracts 5% Test	Contracts 2% Test	Contracts NT	Contracts 50% LV NT
S&P	10m	5m	500,000	200,000	17,813	819.29	204,822.50	28	11	48	24
T-Note	10m	5m	500,000	200,000	1,755	114,160.00	114,160.00	284	113	87	43

In response to comments, the Commission is clarifying in Proposed Rule 4.13(a)(3)(i) that the pool may at any time meet *either* of these tests; compliance with the criteria of a test is determined at the time the most recent position is established; the criterion of paragraph (a)(3)(i)(B) applies on a net basis; and the calculation of "notional value" under paragraph (a)(3)(i)(B) now includes the number of futures and options contracts and any multiplier specified in those contracts.³⁹ While the Commission believes either criterion is an appropriate *limited trading* standard, it nonetheless specifically requests comment on the proposed "Two Percent Test."

As with the NFA Proposal, this new rule would require that each participant in the pool is an "accredited investor" and would require a person claiming relief thereunder to "not market participations in the pool as or in a vehicle for trading in the commodity futures or commodity options markets." In response to comments on the ANPR, the Commission is further clarifying in Proposed Rule 4.13(a)(3) that a CPO claiming relief thereunder could also operate certain other pools—*i.e.*, the pools meeting the criteria of Rule

4.13(a)(4), discussed below—without voiding the availability of the relief under either rule.⁴⁰

3. Proposed Rule 4.13(a)(4): Adding an Exemption Where Pool Participants Meet Specified Sophistication Criteria

Proposed Rule 4.13(a)(4) is based on the MFA Proposal. It provides that a person is exempt from CPO registration if interests in the pool for which it seeks to claim relief (1) are exempt from registration under the Securities Act of 1933, and (2) are offered and sold without marketing in the United States (U.S.). In addition, the CPO must reasonably believe that: (1) Natural person participants are "qualified eligible persons [QEPs]," as that term is defined in Rule 4.7(a)(2);⁴¹ and (2) non-natural person participants are QEPs under Rule 4.7 or "accredited investors." While the MFA Proposal would include *any* natural person who is a QEP under Rule 4.7, the Commission does not believe that proposed Rule 4.13(a)(4) needs to be so broad in light of both the absence of any trading limitations therein and the other, alternative criteria being proposed in Rule 4.13(a)(3). Thus, the Commission believes that the Rule

4.7(a)(2) standards for natural persons—*e.g.*, persons who are "qualified purchasers" under Section 2(a)(51)(A) of the ICA⁴²—may be more appropriate for the rule. The Commission nonetheless specifically requests comment on what investor qualifications would be appropriate under Rule 4.13(a)(4) and whether all natural person QEPs should be included for purposes of proposed Rule 4.13(a)(4).

Here, too, and in response to the comments received on the ANPR, Rule 4.13(a)(4) would make clear that a CPO claiming relief thereunder could also operate pools meeting the criteria of Rule 4.13(a)(3) without voiding the availability of the relief under either rule.

4. Additional Provisions Under Rule 4.13

Under the proposed amendments, Rule 4.13 would also contain introductory text and certain additional provisions, which would be based on the provisions of the existing rule, the NFA Proposal, the MFA Proposal and the comments on the ANPR. Generally speaking, these provisions concern: certain disclosures that a CPO who has claimed relief under the rule must make

³⁸ The Commission has patterned this alternative test on the temporary registration no-action relief it issued for CPOs and CTAs in the ANPR, which in turn the Commission had based on the Prior Rule 4.5 Proposal.

³⁹ The Commission also is making these clarifications in the temporary no-action relief it is maintaining below.

⁴⁰ This provision, and the reciprocal provision of Rule 4.13(a)(4), do not include persons and pools meeting the criteria of Rule 4.13(a)(1) or 4.13(a)(2). This is because Rule 4.13(a)(1) is available where, among other things, only one pool is being operated and Rule 4.13(a)(2) would take the operations of such pools into account in computing whether the contribution and participant limitations of the rule had been met.

⁴¹ Specifically, natural persons who come within the MFA Proposal but not proposed Rule 4.14(a)(4) include persons who are "accredited investors" and who meet the Portfolio Requirement of Rule 4.7(a)(1)(v), in that they own securities having an aggregate market value of at least \$2,000,000, have futures margin and option premiums on deposit of at least \$200,000, or own a portfolio with a proportionate combination of these two types of assets.

⁴² 15 U.S.C. 80a-2(a)(51)(A) (2000), which defines a natural person "qualified purchaser" as:

(i) any natural person (including any person who holds a joint, community property, or other similar shared ownership interest in an issuer that is excepted under section 80a-3(c)(7) of this title with that person's qualified purchaser spouse) who owns

not less than \$5,000,000 in investments, as defined by the [SEC]; or

(iv) any person, acting for its own account or the accounts of other qualified purchasers, who in the aggregate owns and invests on a discretionary basis, not less than \$25,000,000 in investments.

Rule 2a51-1(b) under the ICA defines "investments" generally to include (when held for investment purposes, as defined in the rule): securities; real estate; commodity interests; physical commodities; and cash and cash equivalents. Pursuant to ICA Rule 2a51-1(e), the amount of outstanding indebtedness incurred to acquire investments must be deducted from the amount of owned and invested investments when determining if the person is a "qualified purchaser."