

most recent position was established, does not exceed the liquidation value of the qualifying entity's portfolio, after taking into account unrealized profits and unrealized losses on any such contracts it has entered into. For this purpose, the term "notional value" should be calculated for each such futures position by multiplying the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit and for each such option position by multiplying the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit.

Neither eligible persons who have claimed relief under Rule 4.5 nor eligible persons who claim such relief in the future need to take any additional action to operate their qualifying entities in accordance with the notional test. Rather, making the representations currently required by the rule in a Notice filed with the NFA and the Commission—including the representation concerning the Five Percent Test—is all that is required.

This relief will remain in effect until such time as the Commission takes final action on the amendment to Rule 4.5 it is proposing herein. This relief is, however, subject to the condition that, upon adoption of any amendment to Rule 4.5, the eligible person must comply in full with the terms of any amendment the Commission may adopt. When the Commission adopts a final rule, it will, if necessary, provide affected eligible persons and qualifying entities with sufficient time within which to comply with the rule adopted or to liquidate positions entered into in accordance with the no-action relief.

B. CPO and CTA Temporary Registration No-Action Relief

1. Relief for CPOs

a. In General

The Commission will not commence any enforcement action against a CPO for failure to register as a CPO under Section 4m(1) of the Act, where each pool for which the CPO claims registration no-action relief hereunder meets and remains in compliance with the following criteria:

- a. Participation in the pool is restricted to: "accredited investors" as defined in Rule 501(a) under the Securities Act; "knowledgeable employees" as defined in Rule 3c-5 under the Investment Company Act of 1940;⁷² Non-U.S. persons as defined in CFTC Rule 4.7(a)(1)(iv); and the persons described in CFTC Rule 4.7(a)(2)(viii)(A); and
- (ii) At any time, the pool's commodity interest trading, whether entered into for

bona fide hedging purposes or otherwise,⁷³ meets either of the following tests:

(A) The aggregate initial margin and premiums required to establish commodity interest positions, determined at the time the most recent position was established, does not exceed two percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into; *Provided*, That in the case of an option that is in-the-money at the time of purchase, the in-the-money amount as defined in Rule 190.01(x) may be excluded in computing such two percent; or

(B) The aggregate net notional value of the pool's commodity interest positions, determined at the time the most recent position was established, does not exceed fifty percent of the liquidation value of the pool's portfolio, after taking into account unrealized profits and unrealized losses on any such positions it has entered into. For this purpose, the term 'notional value' should be calculated for each such futures position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the current market price per unit and for each such option position by multiplying the number of contracts by the size of the contract, in contract units (taking into account any multiplier specified in the contract), by the strike price per unit.

b. CPOs Who Operate "Funds-of-Funds"

In a footnote to the ANPR, the Commission addressed the situation where a commodity pool indirectly trades commodity interests as a "fund of funds."⁷⁴ As the Commission stated:

The operator of a 'fund of funds' (an Investor Fund) that indirectly trade[s] commodity interests through participation in one or more funds that directly trades commodity interests (each an Investee Fund) could claim exemption from registration under the No-Action Relief where that Investor Fund trades commodity interests solely through participation in one or more Investee Funds, and the CPO of each such Investee Fund has itself claimed the No-Action Relief. The operator of an Investor Fund that additionally directly trades commodity interests could also claim the no-action relief, so long as the portion of the Investor Fund that directly trades commodity interests does not exceed the limit referred to above.

The Commission provided the following example of this situation:

For example, assume that the Investor Fund has a liquidation value of \$1 million, four-fifths of which is invested in four Investee Funds whose operators have claimed the No-Action Relief. With the remaining one-fifth of liquidation value, or \$200,000, the operator of the Investor Fund may have the Fund directly trade commodity interests, provided that the notional value of the Fund's commodity interest positions does

not exceed fifty percent of the Fund's liquidation value, adjusted for unrealized profits and unrealized losses on positions directly entered into by the Fund.

The Commission went on to state that:

If, however, the notional value of those positions exceeded fifty percent of the liquidation value of \$200,000, the operator would only be able to claim the No-Action Relief if the operator knew that the notional value of all of the Investor Fund's commodity interest positions (*i.e.*, those held outright and those held through investment in the four Investee Funds) was fifty percent of the Investor Fund's liquidation value. To be in possession of such information, the operator would need to have direct knowledge of, and immediate access to, the notional value of the commodity interest positions of each Investee Fund. The operator of the Investor Fund could have this knowledge and access where, for example, it was the same person as, or an affiliate of, the CPOs of the Investee Funds.

In response to these examples, the Commission received two sets of comments. One set claimed that, under these examples, it appeared that fund-of-funds CPOs wishing to claim the no-action relief could invest only in pools operated by CPOs who had themselves already claimed the no-action relief, to the disadvantage of registered CPOs. The other set of comments claimed that the requirements for "direct knowledge of" and "immediate access to" Investee Funds set unnecessarily high standards. The Commission believes these comments have merit. Accordingly, by this **Federal Register** release the Commission confirms that: (1) The CPO of a fund-of-funds may claim the registration no-action relief provided herein if the CPO of each of the Investee Funds into which the fund-of-funds invests either has registered with the Commission as a CPO or has claimed the no-action relief with respect to the Investee Fund; and (2) regardless of whether the CPO of the Investee Fund was an unregistered CPO that had claimed the registration no-action relief or a registered CPO, in each case the Investor Fund's CPO would be entitled to rely upon a representation by the Investee Fund's CPO that the CPO was operating the Investee Fund in compliance with the requirements of the no-action relief. Additionally, by this **Federal Register** release, the Commission generally seeks comment on how to treat "funds-of-funds" in the context of CPO registration and Rule 4.13.

2. Relief for CTAs

The Commission will not commence enforcement action against a CTA for failure to register as a CTA under Section 4m(1) of the Act, where the CTA

⁷² See Rule 1.3(z).

⁷⁴ See 67 FR at 68788, n. 15.

⁷² 17 CFR 270.3c-5 (2002).