

Reports; and (7) Rules 4.7, 4.12, 4.13 and 4.22, by conforming the various signature requirements thereof.¹³

In announcing the Proposal, the Commission stated:

The relief the Commission is proposing today is consistent with the purpose and intent of the CFMA (Commodity Futures Modernization Act of 2000), and with the input the Commission has received in connection with its prior initiatives. . . . Accordingly, it is intended to allow greater flexibility and innovation, and to take into account market developments and the current investment environment, by modernizing the requirements for determining who should be excluded from the CPO definition, and who should remain within the CPO and CTA definitions but be exempt from registration. Thus, this relief is intended to encourage and facilitate participation in the commodity interest markets by additional collective investment vehicles and their advisers, with the added benefit to all market participants of increased liquidity.¹⁴

In connection with issuing the Proposal, the Commission also provided temporary no-action relief to Rule 4.5 eligible persons and CPOs and CTAs who met the trading and other criteria specified therein (Temporary No-Action Relief).¹⁵ The Proposal required that the Temporary No-Action Relief be claimed by filing a notice with the Commission. The effect of this final rulemaking on claimants under the Temporary No-Action Relief is discussed below.¹⁶

C. The Comments on the Proposal

The Commission received thirty-one comment letters on the Proposal, as follows: Six from registered CPOs and CTAs; two from registered introducing brokers; two from registered securities investment advisers; one from a registered futures association; one from a futures industry trade association; two from securities industry trade associations; nine from law firms; one from a bar association; one from a certified public accounting firm; and six from retail investors. The majority of these commenters voiced strong support for the Proposal, by such statements as that it would fulfill the Commission's express purposes in making the Proposal, would better harmonize CFTC and Securities and Exchange Commission (SEC) regulation of investment management professionals, and would go a long way toward addressing the issues raised at the Roundtable.¹⁷

In light of these comments, the Commission generally is adopting the revisions to the Part 4 Rules that it proposed. Where the Commission is making a change from the Proposal, it discusses the change below.¹⁸ In the **Federal Register** release announcing the Proposal (Proposing Release), the Commission gave a detailed explanation of each rule amendment it had proposed to make.¹⁹ Accordingly, the scope of this **Federal Register** release generally is restricted to the comments received on the Proposal and to the changes to, and clarifications of, the Proposal that the Commission is making in response thereto. The Commission encourages interested persons to read the Proposing Release for a fuller discussion of the purpose of each of the amendments contained in the Proposal.

D. Significant Changes From the Proposal

The significant changes from the Proposal that the Commission is making in the rules it is adopting today are as follows: (1) Rule 4.5 no longer contains a "marketing" restriction, but it does require disclosure of the fact, and effect, of a claim for exclusion from the CPO definition; (2) Rule 4.13(a)(3) expands the trading limit criterion thereunder to "5 percent" and "100 percent," from the proposed "2 percent" and "50 percent" limits; (3) Rule 4.13(a)(3) expands the investor eligibility criterion thereunder to "knowledgeable employees" and certain other persons, in addition to "accredited investors," as proposed; and (4) Rule 4.22 now provides for electronic distribution of Annual Reports, in addition to Account Statements, as proposed, where a CPO furnishes a one-way disclosure notice

terms that the Commission should do more rather than less to protect investors, and that hedge funds should be subject to "full and fair" disclosure standards. These letters did not, however, refer to any specific proposed rule or any of the Commission's specific requests for comments. One of the other commenters on the Proposal suggested changes to Rules 4.5 and 4.13 that would have made the relief thereunder available to additional types of pension plan entities. This suggestion is outside the scope of this rulemaking. Accordingly, the Commission intends to consider the merits of the application of Rule 4.5 or 4.13 to any such plan on a case-by-case basis. (However, some of those plans are now covered by the rules the Commission is publishing today. See, e.g., Rule 4.14(a)(8)(i)(C)(2).)

¹⁸ In addition, the Commission is adopting certain clarifying amendments to Rule 4.7, such that Rule 4.7(a)(2)(vi) now refers to section 2(a)(51)(A) of the Investment Company Act of 1940 and Rule 4.7(a)(3)(viii) now includes "a limited liability company or similar business venture." Also, to clarify the availability of Rule 4.13(a)(2), the Commission is employing the term "participant" in lieu of the term "person" in Rule 4.13(a)(2)(iii).

¹⁹ *Supra* n.13.

and the pool participant does not timely object to such distribution.

In addition, the Commission is clarifying: (1) The meaning of the term "aggregate net notional value" in Rule 4.13(a)(3); (2) the effect of this final rulemaking on the Temporary No-Action Relief; (3) the applicability of the Annual Report requirement to CPOs who withdraw from registration in reliance upon Rule 4.13(a)(3) or (a)(4); and (4) in new Appendix A to Part 4, the application of the Rule 4.13(a)(3) trading limit criteria to a broad range of fund-of-fund situations.

II. Responses to the Comments on the Proposal

A. Amendment to Rule 4.5: Deleting Trading and "No Marketing" Criteria for Exclusion From the CPO Definition

The Commission proposed to amend the operating criteria of Rule 4.5 by deleting therefrom provisions concerning commodity interest trading restrictions and related disclosures.²⁰ The Commission explained that the operating criteria of the rule would continue to include the "no marketing" and submission to special calls requirements. The Commission reasoned that "it is appropriate to maintain the marketing restriction because, unlike the case with the proposed CPO registration exemption, members of the retail public may participate in the trading vehicles subject to Rule 4.5."²¹ The Commission nonetheless requested comment on the merits of retaining the "no marketing" criterion—i.e., that a Rule 4.5 qualifying entity "will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures or commodity options markets."

In response to this request, one commenter agreed with the proposed retention of the "no marketing" criterion (and with the Commission's rationale therefore) but several commenters disagreed with it. This latter group supported its position with claims that, in the absence of any trading restriction, the "otherwise regulated" nature of the qualifying entities specified in Rule 4.5 would provide adequate customer protection, and, further, that compliance with the subjective nature of the marketing restriction could give rise to the possibility of unequal enforcement where commodity interest trading was restricted.

²⁰ See 68 FR 12622, 12625–26.

²¹ 68 FR 12622, 12626.

¹³ See 68 FR 12622, 12625–30.

¹⁴ 68 FR 12622, 12625.

¹⁵ See 68 FR 12622, 12630–32.

¹⁶ See I.L.F.1. above.

¹⁷ The six retail investors submitted nearly identical letters, each of which stated in general