

In light of these comments, the Commission is amending Rule 4.5 such that it no longer contains any restrictions relating either to commodity interest trading or to marketing of the entity. The rule does, however, continue to require disclosure to investors “now, that the qualifying entity’s operator has claimed exclusion from the CPO definition, and that therefore the person is not subject to CPO registration and regulation under the Act. This requirement is set forth in paragraph (c)(2)(i) of the amended rule. The Commission did not propose to change the “special call” provision of Rule 4.5, and, accordingly, the rule continues to contain this provision, in paragraph (c)(2)(ii).²²

The disclosure requirement the Commission is adopting today may be satisfied in the same manner that the Commission previously established for the (albeit now deleted) disclosure of commodity interest trading limits under Rule 4.5—*i.e.*:

through inclusion of the specified information in any document which is required by the qualifying entity’s other Federal or State regulator to be routinely furnished to participants or, if no such document is required to be routinely furnished, through disclosure in any instrument that is required by the other regulator to establish the entity’s investment policies and objectives and which is required by such other regulator to be made available (but not specifically furnished) to the entity’s participants.²³

At the request of other commenters, the Commission confirms that Rule 4.5 does not affect the ability of a person who has claimed an exclusion from the CPO definition thereunder: (1) To invest in any other trading vehicles—*e.g.*, a commodity pool that engages in unlimited commodity interest trading; and (2) to qualify for an exemption from registration as a CPO under Rule 4.13 in connection with its operation of another trading vehicle that is not covered under Rule 4.5—*e.g.*, a trading vehicle that is

not a registered investment company covered under Rule 4.5(b)(1) or a non-pool covered under Rule 4.5(a)(4). This latter confirmation is contained in new Rule 4.5(g), and new Rule 4.13(f) contains a reciprocal provision for CPOs claiming registration relief thereunder. Also, the Commission is discussing below the effect of this rulemaking generally on persons who previously have claimed relief under Rule 4.5.²⁴

The Commission did not propose, and is not now adopting, any other amendments to Rule 4.5. Thus, the proviso to Rule 4.5(c) continues to state that compliance with the operating criteria of the rule:

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 (an eligible) person or qualifying entity is established.

Moreover, eligible persons and qualifying entities remain subject to all relevant provisions of the Act and the Commission’s rules that apply to all commodity interest market participants, such as the general antifraud rules, the prohibitions on manipulation and the trade reporting requirements.²⁵

B. Amendments to Rule 4.13: Adding CPO Registration Exemptions

1. Use of Terms Defined Under the Federal Securities Laws

Various of the new CPO registration exemptions under Rule 4.13 that the Commission is adopting today base eligibility on pool participants coming within the meaning of a term that is defined under the federal securities laws—*e.g.*, that of “accredited investor,” defined in Rule 501(a) under the Securities Act of 1933 (“33 Act”).²⁶ As requested by commenters, by this **Federal Register** release the Commission confirms that it intends to follow interpretations issued by the SEC and its staff of these definitions and in the event any of these definitions are amended, the Commission will utilize the revised definitions in the applicable Rule 4.13 exemption. However, as the Commission stated in connection with adopting revisions to Rule 4.7 that similarly base relief on certain of these terms:

²⁴ See II.F.1.

²⁵ As stated in I. A. above, these provisions also apply to persons exempt from registration as a CPO or CTA.

²⁶ 17 CFR 230.501(a) (2003). Other such terms found in Rule 4.13 are “knowledgeable employee,” defined in the Investment Company of 1940 (ICA), 17 CFR 270.3c-5 (2003), and “qualified purchaser” (QP), defined in Section 2(a)(51)(A) of the ICA.

The Commission has the right further to interpret or to amend Rule 4.7 to exclude from the (qualified eligible person definition) any person that the SEC or its staff found to be a QP or knowledgeable employee or to include in the (qualified eligible person definition) any person the SEC or its staff excluded from the QP or knowledgeable employee definition, if such action is found to be necessary to effectuate the purposes of the Act and the Commission’s regulations. The Commission expects that it would exercise this right infrequently.²⁷

2. New Rule 4.13(a)(3): Adding an Exemption Where Commodity Interest Trading Is Limited and Pool Participants are Sophisticated

a. In General

The Commission proposed new Rule 4.13(a)(3) to provide an exemption from CPO registration where: (1) The pool a person operates engages in a limited amount of commodity interest trading—*i.e.*, by committing no more than 2 percent of the liquidation value of the pool’s portfolio to establish commodity interest trading positions, whether entered into for *bona fide* hedging purposes or otherwise, or where the aggregate net notional value of the pool’s commodity interest trading does not exceed 50 percent of the pool’s liquidation value; (2) the CPO reasonably believes that each investor in the pool is an “accredited investor”; and (3) the CPO does not market participations in the pool as or in a vehicle for trading in the commodity futures or commodity options markets.²⁸ After explaining how and why this proposal differed from the CPO registration exemption proposal submitted to the Commission by the National Futures Association (NFA) as set forth in the ANPR,²⁹ and after noting the comments received on the ANPR,³⁰ the Commission specifically requested comment 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.

Many commenters provided input on proposed Rule 4.13(a)(3). Several of them stated that the proposed trading limits were too low, such that the exemption would be unavailable to many CPOs who should not be subject to the Commission’s registration,

²⁷ 65 FR 47848, 47852 (Aug. 4, 2000).

²⁸ See 68 FR 12622, 12626–27.

²⁹ See 67 FR 68785, 68786–87.

³⁰ See 68 FR 12622, 12626–27.

²² The special call provision previously was set forth in paragraph (c)(2)(iv) of Rule 4.5.

²³ 50 FR 15868, 15879 (Apr. 23, 1985).

The Commission further stated that it was aware that: certain qualifying entities—*e.g.*, registered investment companies—are required by their other regulators to make disclosures directly to their participants but that other qualifying entities—*e.g.*, a commingled trust fund of a federally regulated bank—may not be subject to any such direct disclosure requirement. The Commission intends that those other entities may satisfy this representation by indirect disclosure. For example, in the case of a bank commingled trust fund that intends to trade commodity interests on behalf of the various trust accounts comprising the commingled fund, the bank only needs to make the disclosure representation to the trustee of each underlying trust account. *Id.*, n.69.