

disclosure, reporting and recordkeeping requirements. One of these commenters recommended that the rule treat *bona fide* hedging and non-hedging positions alike, claiming that this would simplify trading limit calculations under the rule by avoiding the need to determine whether a particular "risk management position" qualifies as a hedging position, but another commenter recommended that no trading limits should be applicable to the CPO of a pool that trades commodity interests solely for hedging purposes. Two commenters urged that the rule should permit a limited number of non-accredited investors, such as "knowledgeable employees."

Commenters also requested clarification on the meaning of the term "aggregate net notional value"; on whether security futures products (SFPs) are included in the Rule 4.13(a)(3) trading limit tests; and on whether, to qualify for relief under Rule 4.13(a)(3), a CPO must operate its pool pursuant to an exemption from registration under the '33 Act, as a "privately-offered" pool.³¹

In response to these comments, and in light of its own further deliberations on proposed Rule 4.13(a)(3), the Commission is making various changes from the Proposal in the final rule. Specifically, Rule 4.13(a)(3) as adopted requires: (1) That interests in the pool for which a CPO is seeking to claim relief thereunder must be exempt from registration under the '33 Act and may not be marketed to the public in the United States (U.S.) (paragraph (a)(3)(i)); (2) that the pool may not commit more than 5 percent of assets to establish commodity interest positions or have a notional value of its commodity interest positions that exceeds 100 percent of the pool's liquidation value (paragraphs (a)(3)(ii)(A) and (a)(3)(ii)(B), respectively);³² and (3) that the pool may include, as proposed, participants who are "accredited investors," and in addition, certain family trusts formed by accredited investors; "knowledgeable employees;" and persons who are QEPs under Rule 4.7(a)(2)(viii)(A) (paragraph (a)(3)(iii)).³³

³¹ This is a requirement under Rule 4.13(a)(4) as proposed and as adopted.

One commenter stated that since the investor criteria of Rules 4.13(a)(3) and (a)(4) include, among other persons, certain "accredited investors," then it logically follows that the pool must be privately offered. That is the context in which the rules of the SEC (e.g., Regulation D under the '33 Act) employ the term "accredited investor."

³² Thus, the rule continues to include both hedging and non-hedging positions in the calculation of either test.

³³ As proposed and as adopted, Rule 4.13(a)(3) also generally prohibits the CPO from marketing participations in the pool "as or in a vehicle for

Further, Rule 4.13(a)(3) as adopted now clarifies that: (1) At all times the pool must meet one or the other of the specified trading limits (paragraph (a)(3)(ii)); (2) security futures products are included in each test (paragraph (a)(3)(ii)); (3) the notional value of an option contract must reflect an adjustment for the delta of the contract (paragraph (a)(3)(ii)(B)(1)); and (4) contracts may be netted by underlying commodity and across designated contract markets, registered derivatives transaction execution facilities and foreign boards of trade (paragraph (a)(3)(ii)(B)(2)).

b. New Appendix A to Part 4: "Fund-of-Funds"

Most of the commenters on proposed Rule 4.13(a)(3), and in fact, on the Proposal as a whole, expressed concern over the application of the Rule 4.13(a)(3) trading limits in the "fund-of-funds" context.³⁴ They requested the Commission to confirm in its final rulemaking statements it had made in the Proposal on this issue.³⁵ They also presented numerous scenarios involving "fund-of-funds" structures for the Commission to consider.

To address these concerns, the Commission is adopting today Appendix A to Part 4. The introductory text explains that:

The following provides guidance on the application of the trading limits of Rule 4.13(a)(3)(ii) to commodity pool operators (CPOs) who operate "fund-of-funds." For the purpose of this Appendix A, it is presumed that the investor fund CPO can comply with all of the other requirements of Rule 4.13(a)(3). It also is presumed that where the investor fund CPO is relying on its own computations, the investor fund is participating in each investee fund that trades commodity interests as a passive investor, with limited liability (e.g., as a limited partner of a limited partnership or a non-managing member of a limited liability company). Fund-of-fund CPOs who seek to claim exemption from registration under Rule 4.13(a)(1), (a)(2) or (a)(4) may do so without regard to the trading engaged in by an investee fund, because none of the registration exemptions set forth in those rules concerns limits on or levels of commodity interest trading. Persons whose fact situations do not fit any of the scenarios below should contact Commission staff to discuss the applicability of the registration exemption in Rule 4.13(a)(3) to their particular situations.

trading in the commodity futures or commodity options markets."

³⁴ In the ANPR, the Commission defined a "fund-of-funds" as an investor fund that indirectly trades commodity interests through participation in one or more investee funds that directly trades commodity interests. See 67 FR 68785, 68788, n.15.

³⁵ See 68 FR 12622, 12631.

In adopting Appendix A, the Commission has been guided by the following principles, *i.e.*, that relief under Rule 4.13(a)(3) should be available where:

(1) The CPO of each investee fund is either: (i) Itself claiming exemption from CPO registration under Rule 4.13(a)(3); or (ii) a registered CPO that is complying with the trading restrictions of Rule 4.13(a)(3). In this regard, the CPO of the investor fund should be able to rely upon the representations of the investee fund CPOs to the foregoing effect.

(2) The CPO of an investor fund has actual knowledge of the trading and commodity interest positions of the investee funds (e.g., where the investee funds are operated by the CPO or one or more affiliates of the CPO). In this case the investor fund CPO may aggregate the commodity interest positions across the investee funds to determine compliance with the trading restrictions of Rule 4.13(a)(3).

(3) An investor fund does not trade commodity interests directly, and the CPO has allocated no more than 50 percent of the investor fund's assets to investee funds that trade commodity interests (regardless of the level of commodity interest trading engaged in by those investee pools). The investor fund CPO may claim exemption under Rule 4.13(a)(3) because the investor fund's exposure to the futures markets may be said to be comparable to that of a stand-alone pool that meets the aggregate net notional value test.

(4) An investor fund engages in direct commodity interest trading in addition to its allocation of assets to investee funds, provided the CPO treats the assets committed to direct trading as a separate pool with its own liquidation value and applies the trading restrictions of Rule 4.13(a)(3) to that "separate pool."

3. New Rule 4.13(a)(4): Adding an Exemption Where Pool Participants Are Highly Sophisticated

The Commission proposed new Rule 4.13(a)(4) to provide an exemption from CPO registration where: (1) Interests in the pool for which the CPO seeks to claim relief (a) are exempt from registration under the Securities Act of 1933, and (b) are offered and sold without marketing in the United States (U.S.); and (2) the CPO reasonably believes that (a) natural person participants are QEPs under Rule 4.7(a)(2), and (b) non-natural person participants are QEPs under Rule 4.7 or