

“accredited investors.”<sup>36</sup> After explaining how and why this proposal differed from the CPO registration exemption proposal submitted to the Commission by the MFA, as set forth in the ANPR,<sup>37</sup> the Commission requested comment on what investor qualifications would be appropriate under proposed Rule 4.13(a)(4) and whether all natural person QEPs should be included for purposes of the rule.

The comments received in response to this request were mixed, with some stating that the proposed investor eligibility qualifications would be appropriate, yet others claiming that the proposal was unnecessarily restrictive and that the rule should include all natural person QEPs—*i.e.*, natural persons who are QEPs under *either* Rule 4.7(a)(2) or (a)(3). Inasmuch as Rule 4.13(a)(4) does not contain any trading limits whatsoever, and the operators in question are not “otherwise regulated”, the Commission is not persuaded by this latter set of comments and, accordingly, it is adopting the rule as proposed.

#### 4. Alternative Proposal for Relief

As an alternative to the foregoing registration exemption proposals for certain CPOs, and to various registration exemption proposals for certain CTAs under Rule 4.14, the Commission sought comment on adoption of a notice registration scheme that would be comparable to the proposed exemption approach with respect to information required to be filed with the Commission and compliance with Part 4 requirements.<sup>38</sup> Specifically, the Commission asked for comment on whether a notice registration scheme could make it more clear to the public and other regulatory authorities that this group of CPOs and CTAs remained subject to the CFTC’s jurisdiction under the Act, the Bank Secrecy Act and other statutes, while providing the same amount of regulatory relief as the proposed exemption.

The Commission received several comments in response to this request, each of which recommended that the Commission not adopt a notice registration scheme. The arguments advanced to the Commission were that such a scheme: (1) Might confuse prospective pool participants into thinking that a notice registrant was subject to more oversight and regulation than it actually would be;<sup>39</sup> (2) was

unnecessary because CPOs exempt from registration remain subject to CFTC jurisdiction, which includes the antifraud provisions of the Act and the Commission’s rules; and (3) would not improve the information available to the Commission but, rather, would raise recordkeeping, supervision and audit requirement issues for all concerned. In light of these comments, the Commission is not adopting a notice registration scheme.

#### C. Amendments to Rule 4.14: Adding and Expanding CTA Registration Exemptions

##### 1. New Rule 4.14(a)(8)(i)(D): Adding an Exemption Where Advice Is to Rules 4.13(a)(3) and (a)(4) Pools

As proposed and as adopted, new Rule 4.14(a)(8)(i)(D) provides CTA registration relief for advisors to commodity pools that meet the requirements of the new CPO registration exemptions based on, among other things, trading limits, as discussed above.<sup>40</sup> Several persons have asked whether the Commission intends that this CTA registration exemption will define the term “primarily” as used in section 4m(3) of the Act,<sup>41</sup> which also provides an exemption from CTA registration, for any CTA that—

is registered with the [SEC] as an investment adviser whose business does not consist *primarily* of acting as a (CTA) \* \* \* and that does not act as a (CTA) to any investment trust, syndicate or similar form of enterprise that is engaged *primarily* in trading in any commodity for future delivery on or subject to the rules of any contract market or registered derivatives transaction execution facility. (Emphasis added.)

The Commission does not intend that the CTA registration exemption in Rule 4.14(a)(8)(i)(D) have any bearing whatsoever on the meaning of the term “primarily” in section 4m(3). Rather, the Commission intends to employ the criteria of Rule 4.14(a)(8)(i)(D) solely for the purposes of the rule itself.<sup>42</sup>

merchant or introducing broker for certain brokers and dealers that are registered with the SEC, are members of a registered national securities association, and solely trade security futures products.

<sup>40</sup> See the discussion of Rule 4.13(a)(3)(ii) in II. B. 2. above.

<sup>41</sup> 7 U.S.C. 6m(3) (2000).

<sup>42</sup> The CFMA added section 4m(3) to the Act and a corresponding Section 203(b)(6) to the Investment Advisers Act of 1940 (IAA), which provides an exemption from registration for:

any investment adviser that is registered with the (CFTC) as a (CTA) whose business does not consist primarily of acting as an investment adviser, . . . and that does not act as an investment adviser to—

(A) (a registered) investment company; or

(B) a company which has elected to be a business development company . . . and has not withdrawn its election.

##### 2. New Rule 4.14(a)(10): Counting Legal Organizations as a Single “Person”

As the Commission explained in the Proposing Release, the single “persons” specified in Rule 4.14(a)(10) for the purposes of section 4m(1) of the Act are patterned after the single “clients” specified in Rule 203(b)(3) under the IAA.<sup>43</sup> By this release, and at the request of a commenter, the Commission confirms that it intends to follow interpretations of Rule 203(b)(3) issued by the SEC and its staff. As stated above in connection with the discussion of Rules 4.13(a)(3) and 4.13(a)(4), however, the Commission has the right to provide its own interpretations concerning the counting of single “persons,” if such action is found to be necessary to effectuate the Act and the Commission’s regulations, and, further, the Commission expects that it would exercise this right infrequently.<sup>44</sup>

#### D. Amendments to Rules 4.21, 4.22 and 4.31

##### 1. Amended Rules 4.21(a) and 4.31(a): Permitting Communications Prior to Disclosure Document Delivery

Commission Rules 4.21 and 4.31 respectively require CPOs and CTAs to provide a Disclosure Document to their prospective pool participants and advisory clients. The Commission proposed to amend these rules to provide that the Disclosure Document must be delivered by no later than the time a CPO delivers a subscription agreement for the pool for which it is soliciting or a CTA delivers an advisory agreement for the trading program for which it is soliciting.<sup>45</sup> To ensure achievement of the purpose of the Disclosure Document—*i.e.*, that prospective investors are fully informed about all material facts before committing their funds—, and consistent with the Roundtable comments, these proposed rule

<sup>43</sup> See 66 FR 12622, 12628–29.

<sup>44</sup> See II.B.1. above. The Commission also has clarified in Rule 4.14(a)(10) as adopted that the source of this exemption is section 4m(1).

*Compare CFTC v. Savage*, 611 Fed. 270 (9th Cir. 1979). There, the Court held that section 4m(1) includes “within the persons to whom an advisor ‘furnishes’ advice customers of an advisee when the advisor knows or should know that advice he gives is directly passed to those customers.” *Id.* at 280. The advisee in *Savage* was a corporation “*i.e.*, a legal organization—that was registered as a futures commission merchant with the Commission. Rule 4.14(a)(10) counts a legal organization as a single “person” where the organization is receiving commodity interest trading advice based on its investment objectives. Inasmuch as the advisee in *Savage* was not receiving advice based on its investment objectives but, rather, as a mere conduit for others to receive advice, it would not be counted as a single “person” under Rule 4.10(d).

<sup>45</sup> See 68 FR 12622, 12629.

<sup>36</sup> See 68 FR 12622, 12627.

<sup>37</sup> See 67 FR 68785, 68787–88.

<sup>38</sup> See 68 FR 12622, 12628.

<sup>39</sup> *Cf.* Rule 3.10(a)(3), which generally provides for notice registration as a futures commission