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December 11, 2023

Via Electronic Submission

Christopher Kirkpatrick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street NW
Washington, DC 20581

Re: Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools: Updating the 'Qualified Eligible Person' Definition; Adding Minimum Disclosure Requirements for Pools and Trading Programs; Permitting Monthly Account Statements for Funds of Funds; Technical Amendments (RIN: 3038–AF24)

Dear Mr. Kirkpatrick:

Managed Funds Association ("**MFA**")[1] submits these comments to the Commodity Futures Trading Commission ("**CFTC**" or, the "**Commission**") in response to the Commission's notice of proposed rulemaking to CFTC Regulation 4.7 (the "**NPRM**").[2]

MFA has long supported and shares in the Commission's commitment to investor protection. We appreciate the Commission's vigilance in reviewing its regulatory framework to ensure that it meets the current needs of commodity market participants, while considering the impact of any rulemaking on both investors, and commodity pool operators ("**CPOs**") and commodity trading advisors ("**CTAs**"). Increasing the investor qualification threshold for "qualified eligible persons" ("**QEPs**") subject to the portfolio requirement of CFTC Regulation 4.7 (the "**Portfolio Requirement**") and codifying the Commission's long standing exemptive relief related to Funds of Funds ("**FoFs**") reporting, are examples of regulatory issues presented in the NPRM that may currently be ripe for review. The NPRM also includes a number of

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[1] MFA, based in Washington, D.C., New York, Brussels, and London, represents the global alternative asset management industry. MFA's mission is to advance the ability of alternative asset managers to raise capital, invest, and generate returns for their beneficiaries. MFA advocates on behalf of its membership and convenes stakeholders to address global regulatory, operational, and business issues. MFA has more than 170 member firms, including traditional hedge funds, credit funds, and crossover funds, that collectively manage nearly $2.2 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time.

[2] 88 Fed. Reg. 70852 (Oct. 12, 2023), avail. at https://www.cftc.gov/sites/default/files/2023/10/2023-22324a.pdf.

proposed disclosure requirements that are premature to consider and that, if ultimately adopted, would not provide any protections above and beyond those the current regulations applicable to 4.7 CPOs and CTAs. Further, imposing the disclosure regime contemplated in the NPRM may lead to the presentation of potentially misleading investor disclosures. We are also concerned that when weighed against any hypothetical protections a minimum disclosure regime would provide to QEPs, the costs to 4.7 CPOs and CTAs would be unduly burdensome, particularly given the lack of benefits over the current requirements. The NPRM would fundamentally change the scope of CFTC Regulation 4.7 and impose an unnecessarily prescriptive and broad, prescriptive disclosure regime on CPOs and CTAs that engage a sophisticated investor base, without any corresponding benefit to investors.

Accordingly, we recommend that the Commission reconsider the NPRM as discussed below.

I. EXECUTIVE SUMMARY

A. An increase, if any, in the Portfolio Requirement thresholds should carve out certain employees of CPOs and CTAs and does not need to be accompanied by mandatory minimum disclosures to protect the interests of investors.

B. There is no specific evidence indicating that the minimum disclosure obligations in the NPRM would enhance investor protections or otherwise remedy any existing investor protection concerns.

C. The NPRM would result in excessive, unnecessary, and potentially misleading disclosures to investors because it would impose existing performance and disclosure rules designed to apply to retail and non-sophisticated investor offerings, on complex, multi-layered private fund offerings to sophisticated investors.

D. The NPRM would not cure any perceived asymmetry of data concerns, and in some cases would decrease the usefulness of disclosures that many private fund advisers, CPOs and CTAs already provide to investors in the normal course of business.

E. The CFTC's existing regulatory framework is sufficient to provide effective oversight of 4.7 CPOs and CTAs and to ensure that disclosures provided to investors are relevant, useful, accurate and not misleading.

F. The Commission should revise the NPRM to eliminate the requirement for CPOs and CTAs of 4.7 pools and accounts to provide the specifically prescribed disclosures and performance information in CFTC Regulations 4.24, 4.25, 4.34, 4.35 (the "**Disclosure and Performance Rules**"), and instead should continue to permit CPOs and CTAs of 4.7 pools and accounts to provide relevant and

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accurate disclosures and performance. CPOs and CTAs of 4.7 pools and accounts are best suited to develop relevant disclosures that would best benefit such sophisticated investors.

G. The NPRM would increase costs on CPOs and CTAs, which the CFTC has not adequately considered, without improving the data, disclosure, and performance information available to investors.

H. The NPRM in some respects is internally inconsistent, and we request that the Commission provide clarification with respect to certain aspects of the NPRM, as detailed below.

II. KEY ISSUES WITH THE PROPOSED AMENEDMENTS TO CFTC REGULATION 4.7

A. <u>The Increase in the Qualification Threshold for QEPs that Must Satisfy the Portfolio Requirement Should Include a Carve-Out for Certain CPO/CTA Employees and, Importantly, does not Need to be Coupled with Mandatory Disclosures to be Effective; Imposing Universal Disclosure Requirements on QEPs is Premature</u>

An increase in the investor qualification thresholds for QEPs could modernize CFTC Regulation 4.7 to meet contemporary expectations regarding sophisticated investors. MFA suggests, however, that the CFTC also include a modest carve-out from the dollar thresholds to facilitate investment by employees of the CPO/CTA. The changes proposed in the NPRM would bring the Portfolio Requirement monetary threshold into closer alignment with the qualified purchaser ("**QP**") standard, consistent with the investor base for many 4.7 pools. The NPRM would primarily impact commodity pools that are private funds that employ varying, complex strategies, with trading profiles and portfolios beyond just commodity interest trading. Under the Commission's part 4 regulations, retail or other non-QEP investors are provided with a more fulsome set of disclosures consistent with their relative sophistication level. QEPs, by contrast, leverage their sophistication and experience, and often rely on tailored disclosures provided by the CPOs and CTAs of 4.7 pools and accounts to make informed investment decisions. CPOs and CTAs of 4.7 pools and accounts prepare disclosures for QEPs based on interactions with these sophisticated investors, to directly address the disclosure preferences of QEP investors. Increasing the investor qualification threshold in the Portfolio Requirement further ensures that only sophisticated investors qualify as QEPs.

In the event the Commission ultimately determines to raise the QEP qualification threshold as proposed, it would be necessary to clarify the status of QEPs that qualified as such at the time of investment but may no longer satisfy the revised Portfolio Requirement under the NPRM. The increase in the QEP qualification threshold will likely result (as the Commission

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acknowledges) in a number of "currently-qualifying QEPs no longer meeting the thresholds."[3] MFA encourages the CFTC to grandfather investors who are QEPs under the current standard but would not be under any revised standard. The NPRM makes clear that, as is currently the case, any determination of QEP status will continue to be made at the time of sale of pool participant units, or when an exempt account is opened with a CTA.[4] Therefore, any increase in the QEP investor qualification threshold would not require an individual that qualified as a QEP at the time of investment to redeem its investment in the event that they no longer meet the increased QEP thresholds. The NPRM makes a brief reference to the fact that increasing the Portfolio Requirement thresholds would prevent 4.7 CPOs from accepting additional subscriptions from former QEPs that no longer satisfy the Portfolio Requirement under the increased thresholds, but it does not address or consider the consequences of such a scenario.[5]

This qualification gap presents several potentially significant investor experience concerns and raises compliance and operational questions that the Commission should more fully consider and address.[6] This scenario could prove incredibly disruptive to pool participants, and to CPOs operating pools with both QEPs and former QEPs. Beyond the issue of whether former QEPs may make additional subscriptions, the Commission should address whether former QEPs would need to receive full part 4 disclosures, whereas the remainder of QEP pool participants would presumably only receive any required disclosures as prescribed in the NPRM. Additionally, former QEPs would be disadvantaged as compared to other exempt pool participants, unable to exercise the full rights of an investor as they understood them to be at the time of investment.

Employee pool participants also may be disadvantaged by an increase in the Portfolio Requirement thresholds. Many CPOs seek to foster employee ownership and allow employees to participate in pools or offer pool interests as part of an employee's compensation and incentive package. For employees that previously qualified as a QEP but may no longer meet the increased thresholds as proposed in the NPRM, these employees presumably would no longer be entitled to receive additional interests as part of their continued employment compensation structure. These employee QEPs who may not meet the "knowledgeable employee" standard under the Investment Company Act of 1940,[7] no longer satisfy the Portfolio Requirement, and do not

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[3] 88 FR at 70854-70855.

[4] 88 FR at 70855; *see also* CFTC Regulation 4.7(a)(3).

[5] 88 FR at 70869.

[6] Commissioner Mersinger, describing how the NPRM fails to fulfill fundamental functions of sound rulemaking, highlights, among other concerns, that the Commission "does not explain that, as a result, 'former QEPs' would not be able to make additional investments in exempt commodity pools they are currently participating in …." 88 FR at 70833.

[7] Investment Company Act Rule 3c-5 (17 CFR § 270.3c-5).

otherwise satisfy the qualification requirements of CFTC Regulation 4.7(a)(2)(vii) or 4.7(a)(2)(viii)(A)(3), (4), would be forced to forfeit a key part of their compensation. Further, CPO employers would likely be forced to find alternative ways to compensate such employees, at a cost.

In the NPRM, the Commission expressly noted that retaining the requirements of current CFTC Regulation 4.7(a)(3) would "minimize[] the potential for disruption to the 4.7 pool or trading program, as well as possible negative consequences for QEPs."[8] In addition to maintaining the current requirements of CFTC Regulation 4.7(a)(3), to further ensure that any new rulemaking minimizes disruption to existing QEPs, MFA recommends that the Commission allow individuals that previously qualified as QEPs under the existing Portfolio Requirement, to continue to be allowed to fully participate in any 4.7 offering that such QEP may already have been invested in prior to the effective date of any increase in the Portfolio Requirement. The Commission can effect this change by either providing express guidance, or by amending CFTC Regulation 4.7 to include this new category of former QEPs in the list of QEPs that do not need to satisfy the Portfolio Requirement in CFTC Regulation 4.7(a)(2). We encourage the Commission to clarify and explain its expectations with respect to 4.7 offerings with pool participants that are both QEPs, and former QEPs that no longer satisfy the Portfolio Requirement. Without additional guidance and clarity, it is extremely difficult to accurately quantify the cost burden that would result from adoption of the NPRM.

There is no demonstrated need, as discussed below, to couple an increase in the Portfolio Requirement threshold with mandatory disclosures to be effective.[9] Doubling the QEP dollar thresholds is sufficient to address the Commission's current investor protection and modernization goals, without conditioning the increase on the adoption of a prescriptive, retail orientated disclosure regime contained in the Disclosure and Performance Rules. There is no indication that *both* an increase in the Portfolio Requirement and the proposed minimum disclosures are necessary to address a specific, identifiable problem. In fact, in separate statements addressing the NPRM, each of Commissioners Mersinger and Pham indicated that any concerns of the Commission may be alleviated by increasing the QEP threshold, and that the

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8 88 FR at 70855.

9 It is worth noting that the U.S. Securities and Exchange Commission ("**SEC**") has on occasion revisited and adjusted certain of its investor qualification standards without also requiring accompanying disclosures. For example, in 2011 the SEC revised the "accredited investor" standard to exclude one's primary residence from the net worth calculation, and more recently, in 2021, the SEC raised the dollar thresholds for a "qualified client." Neither of these changes was accompanied by required disclosures.

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Commission should first evaluate whether adjusting the Portfolio Requirement is effective, before imposing a universal disclosure obligation on 4.7 CPOs and CTAs.[10] We agree.

In addition to not moving forward with the proposed Disclosure and Performance Rules, we as discussed above recommend that if the Commission proceeds with increasing the QEP standards, it includes the carve-out MFA recommends above regarding employee-investors in CPOs managed by their employer. It furthermore is important that the adoption and implementation of any revision to the QEP standard minimize disruption on existing fund investments and "grandfather" any investors that were QEPs under the legacy standard to prevent a mass, forced redemption by investors that would not be QEPs under the heightened standards.

B. <u>Increasing Disclosures Would Not Address or Remedy Any Actual Investor Protection Issue or Current Shortfall</u>

When the Commission originally established the 4.7 exemptive relief framework in 1992, it concluded that "QEPs are able to identify and obtain the information they deem necessary to evaluate the investment offered and thus that prescriptive rules imposing specific disclosure requirements are not essential."[11] This same rationale continues to apply with equal force today. The NPRM, however, indicates that the CFTC's thinking has evolved since 1992, and somehow is now "concerned that the absence of minimal disclosure obligations and an ongoing requirement to keep them accurate fails to ensure that all QEPs have the leverage and resources to demand the information necessary for QEPs to make informed investment decisions, or to engage in ongoing close monitoring to confirm that the information provided remains accurate and complete to facilitate their continued understanding of their investments."[12] There is no evidence cited in the NRPM or elsewhere, however, that QEPs currently lack sufficient information to make informed decisions. Realigning the QEP standard with contemporary expectations regarding sophisticated investors by raising the Portfolio Requirement thresholds further mitigates concerns regarding availability of information. Regardless, mandating overly prescriptive and rigid disclosures for 4.7 CPOs and CTAs would not necessarily remedy this purported concern. Instead, MFA urges the Commission to recognize that sophisticated, institutional investors request information they need, which managers provide, and which serves to advance the industry's disclosure practices generally. CPOs and CTAs should be able to continue to provide relevant disclosures that they as fiduciaries to the funds they manage have

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[10] *See* Dissenting Statement of Commissioner Summer K. Mersinger on Proposal to Narrow Historical Exemptions for Qualified Eligible Persons in Rule 4.7 (Oct. 2, 2023); and Concurring Statement of Commissioner Caroline D. Pham on Notice of Proposed Rulemaking Regarding Commodity Pool Operators, Commodity Trading Advisors, and Commodity Pools Operated under CFTC Rule 4.7 (Oct. 2, 2023).

[11] 1992 Final Rule, 57 FR at 34857.

[12] 88 FR at 70856.

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determined to be necessary to comply with Rule 4.7. The existing regulatory framework currently in place has proven to be effective and the NPRM contains no evidence to the contrary.

The existing regulatory framework for 4.7 pools and accounts also has been demonstrated to be sufficient to ensure that accurate and useful information is being provided to investors in a fair and equitable manner – we are unaware of any finding by the CFTC or the National Futures Association ("**NFA**") suggesting that the existing disclosure regime is somehow inadequate. The existing disclosure regime has evolved over the years to address the needs of sophisticated fund investors, consider other disclosures provided by CPOs/CTAs as required under the Investment Advisers Act of 1940, and to satisfy the CPOs'/CTAs' own obligations as fiduciaries. Further, any mandatory disclosures that may be imposed on 4.7 CPOs and CTAs should be tailored and specific to offerings to sophisticated investors, and distinct from the broader, more generally applicable disclosures required by the current Disclosure and Performance Rules. Any new disclosure regime must consider the specific context in which it will apply.

MFA shares the Commission's concern for, and commitment to, investor protection, and agrees that any disclosures provided to investors should be accurate and not misleading. The Commission acknowledges that 4.7 CPOs and CTAs typically provide certain disclosures and information to investors relevant to a specific offering or investment. While these disclosures are not currently mandated, any disclosures provided are nevertheless required to be accurate, and "not misleading."[13] Disclosures that are provided in the 4.7 context have become market practice and are made to satisfy the preferences and demands of sophisticated investors. Further, 4.7 CPOs and CTAs are in the best position to assess what disclosures are most relevant and useful to QEP investors, directly addressing investor concerns and interests, in the context of the specific product or strategy.

MFA notes that two of the principal rationales for the CFTC proposing to require this detailed, duplicative disclosure – the rise of digital assets and the increased use of swaps – have been adequately considered by other regulators and addressed in other rulemakings and interpretive guidance as determined necessary. As it relates to digital assets, NFA Interpretive Notice 9053 and NFA Compliance Rule 2-51 establish disclosure requirements for CPOs and CTAs (in addition to futures commission merchants and introducing brokers) that offer pools or trading programs that trade virtual currencies.[14] Since all registered CPOs and CTAs are required to be NFA members, CFTC should allow for NFA members to comply with the existing NFA disclosure requirements without requiring additional disclosures. As it relates to the increased use of swaps, US and global regulators since the enactment of the Dodd-Frank Act

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13 CFTC Regulation 4.7(b)(2)(i); 4.7(c)(1)(i).

14 National Futures Association Interpretive Notice 9073, Disclosure Requirements for NFA Members Engaging in Virtual Currency Activities (eff. Oct. 31, 2018) (avail. at https://www.nfa.futures.org/rulebooksql/rules.aspx?Section=9&RuleID=9073); *See also* See NFA Compliance Rules 2-2, 2-4, 2-9, 2-36 and 2-51.

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have long-considered and implemented additional regulatory requirements for swaps, and wide-ranging conduct, margin, clearing, and reporting requirements. At no time did the CFTC suggest that circumstances warrant a revisiting of the disclosure regime imposed by Rule 4.7, and it similarly is not necessary today. We therefore recommend that the Commission withdraw from consideration the NPRM's proposed revisions to the proposed Disclosure and Performance Rules.

C. Imposing a Prescriptive and Rigid Disclosure Regime on 4.7 CPOs and CTAs is Unnecessary Considering Existing Regulations, and in Certain Instances May Result in Confusing or Otherwise Misleading Disclosures

The NPRM appears to assume a certain symmetry between full Part 4 commodity pools and accounts, and 4.7 pools and accounts, namely: (i) that all 4.7 CPOs and CTAs have some familiarity with the full Part 4 requirements that they can leverage to comply with the disclosure regime proposed in the NPRM, and (ii) that the disclosure requirements and break-even and performance information required under the proposed disclosure rules would necessarily be useful or relevant to QEPs in all 4.7 pools or accounts. Many 4.7 pools, however, are private funds offered only to highly sophisticated investors that are not only QEPs, but often also required to be QPs to comply with the securities laws, and the CPOs of these funds frequently are wholly unfamiliar with the requirements of operating a full Part 4 commodity pool. Not all CPOs and CTAs offer both 4.7 and full part 4 compliant products to investors, an important consideration that the NPRM fails to address. In the context of a product offered to non-QEPs, a prescriptive set of disclosures may be a useful tool to ensure that investors are provided relevant disclosures and accurate performance information. For a sophisticated investor base such as QEPs, any disclosures provided should be adjusted for the sophistication level of the investor and be tailored to meet a QEP's specific expectations. Further, the offering or specific account structure should be considered in ultimately determining what disclosures would be most useful and relevant to an investor.

Certain disclosures may be more useful and relevant to QEPs, and other information less so, and the CPO/CTA is best positioned to determine the fund information that QEPs should receive to comply with 4.7. Many CPOs of commodity pools that are private funds adjust their strategies and investments in the ordinary course, consistent with disclosures voluntarily provided in fund offering memoranda and other fund documents. These private funds have multi-strategy mandates that provide managers of such pools discretion to pursue different strategies, vary investment allocations, and invest in a wide array of markets in response to changing market conditions. Sophisticated investors often seek out broad multi-strategy structures because they are constructed to efficiently re-allocate capital across markets in response to changing market conditions. Layering the current Performance and Disclosure Rules on top of these complex structures would not provide clearer or more accurate disclosures to investors. Instead, applying the Disclosure and Performance Rules to such fund structures would potentially require any disclosures to attempt to compensate for the flexibility inherent in these products and potentially result in disclosures that are so generic as to be meaningless to investors. Disclosures

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made under current 4.7 can be tailored to the offering, and address QEP investor preferences and demands, and therefore would be more beneficial to investors and more in line with the Commission's customer protection goals. The NPRM effectively eliminates any real substantive distinctions between the disclosures required to be provided in full Part 4 funds or accounts, and the disclosures proposed in the NPRM. While the Commission has stated that it "does not intend [the] NPRM to dissuade registered CPOs and CTAs from structuring their pools and trading programs to qualify for and utilize the exemptions in Regulation 4.7,"[15] that nevertheless is a likely consequence if the NPRM is adopted as proposed.

A rigid application of the Disclosure and Performance Rules to a complex fund structure may result in confusing and lengthy disclosures that, far from being clear and relevant, may not be instructive at all given the fund and expense structure. Private funds often employ complex and non-traditional fee arrangements and expense structures. These structures are often designed to accommodate a specific, sophisticated investor base. For example, the NPRM would require, among other disclosures, a specific "break-even" analysis with respect to an investment in a 4.7 pool. A direct application of CFTC Regulation 4.24(i)(6) would not necessarily produce clear or relevant disclosures. For a pool structured and operating on a complex expense structure (*e.g.*, an expense pass-through model), it would be difficult to provide an accurate, or more importantly, useful break-even analysis that accounts for pass-through expenses. Pools that operate on an expense pass-through or other complex fund expense structure will typically have highly variable expenses from year to year. Requiring the presentation of a break-even analysis as prescribed in CFTC Regulation 4.24(i)(6), which is inherently a forward-looking analysis, based on historical expense data, would not be representative of future expenses. It would at best be inaccurate from year to year, and at worst, misleading to investors. Providing a misleading break-even analysis also would directly conflict with the current requirements of CFTC Regulation 4.7(b)(2)(i), therefore inconsistent with the stated intent of the Commission.

The specific requirements of CFTC Regulations 4.24(i)(1) and 4.24(i)(2), and 4.24(i)(3), (4) and (5), provide other examples of required disclosures that may be unworkable in the 4.7 context, leading to disclosures that are not relevant to an investor's decision-making process. The requirement to provide a complete description of the fees, commissions and other expenses incurred by the pool in the preceding fiscal year, and those expected to be incurred in the current fiscal year, including fees or other expenses incurred in connection with the pool's participation in investee pools and funds, could lead to an expansive set of disclosures that may not be useful to QEPs invested in pools with complex, multi-layered structures. We also are concerned about the risk posed by CFTC Regulation 4.24(h) in that it may require the disclosure of sensitive information regarding proprietary CPO and CTA trading strategies. The application, moreover, of CFTC Regulation 4.24(i) to full Part 4 commodity pools, which are often simpler structures offered to retail and non-QEPs with strategies focused primarily on commodity interests, produces concise and useful disclosures for investors. By contrast, applying CFTC Regulation

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[15] 88 FR at 70858.

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4.24(i)(3), (4) and (5) to a multi-layered private fund structure, offered to a sophisticated investor base, would result in confusing and lengthy disclosures to investors. These complex fund structures may include multiple sub-funds and trading vehicles with varying fees and expenses, depending on the types of instruments traded.

The Commission has demonstrated that it has sufficient regulatory tools at its disposal to meaningfully oversee 4.7 CPOs and CTAs and assess the sufficiency of disclosure and performance information provided to investors. CPOs and CTAs that claim a 4.7 exemption are registered with the CFTC, and required to be NFA members and subject to NFA examination and oversight. Many 4.7 CPOs and CTAs are dual registrants, subject to SEC investment adviser registration and regulation in addition to CFTC/NFA requirements. Detailed portfolio holdings and related information is also filed with the SEC and CFTC on Form PF and with the NFA and CFTC on Form PQR.

CFTC and NFA rules also impose detailed and meaningful key restrictions on advertisements and information provided to investors, including guidance specific to performance information. NFA Rule 2-29 imposes additional restrictions and guidance with respect to promotional material and communications with the public. NFA Rule 2-29, among other restrictions, requires that investor materials do not contain material misstatements, and includes specific performance guidance consistent with CFTC Regulation 4.25 and 4.35. Any disclosures provided to QEPs are subject to review during an NFA examination, and in addition to the restrictions in CFTC Regulation 4.41 and NFA Rule 2-29, would also remain subject to the prohibition against providing misleading disclosures in CFTC Regulation 4.7(b)(2)(i) and 4.7(c)(1)(i).

For the reasons discussed, the proposed disclosures are inappropriate for 4.7 CPOs and CTAs and unnecessary considering existing CFTC and NFA regulations and oversight authority. Accordingly, MFA recommends that the Commission withdraw consideration of the Disclosure and Performance Rules.

D. The Commission Should Clarify Whether Performance of Other Pools, and Accounts Are Required to Be Disclosed

The NPRM would require CPOs to disclose "performance information listed under CFTC Regulation 4.25 with respect to their 4.7 pool, with the exception of performance information for pools other than the 4.7 pool." To this end, the NPRM specifically carves-out disclosures that would otherwise be required by CFTC Regulation 4.25(a)(3) (pools other than the offered pool) and CFTC Regulation 4.25(c)(2) (other performance of the CPO). The Commission further indicated that this approach is intended to focus on disclosures that are "most important and

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valuable to prospective QEP participants, and [ ] lessen[s] the potential burden on CPOs resulting from incorporating minimum QEP Disclosures in Regulation 4.7."[16]

If the Commission elects to move forward with the any disclosure proposed under the NPRM, it is necessary to narrow the applicability and focus of CFTC Regulation 4.25 to the performance of the 4.7 pool itself, and as such the NPRM would also need to confirm that CFTC Regulation 4.25(c)(3) (major commodity trading advisor performance) and CFTC Regulation 4.25(c)(4) (major investee pool performance) are carved-out from the NPRM. Absent any such carve-outs, the rule would be internally inconsistent, which would lead to conflicting requirements, and potentially require misleading disclosures, and disclosures not relevant to the specific pool or offering.[17] Maintaining the requirements to provide, under certain circumstances, major commodity trading advisor performance and major investee pool performance would conflict with the Commission's statement in the NPRM that "only performance information with respect to their 4.7 pool" would be required under the amended CFTC Regulation 4.7. Additionally, in circumstances where the CPO of a 4.7 pool is also a major commodity trading advisor for the pool (which is not uncommon), the express carve-out for other performance of the CPO otherwise required under CFTC Regulation 4.25(c)(2) would be meaningless, presumably superseded by the requirements of CFTC Regulation 4.25(c)(4).

Thus, we request that the Commission confirm that CFTC Regulation 4.25(c)(3) and 4.25(c)(4) are excluded from the NPRM disclosure requirements. Confirming these carve-outs are particularly important to assess the scope and true costs of implementation as proposed, as well as to assess any potential conflicts with existing regulatory obligations, and whether the NPRM has been appropriately tailored and designed to achieve the Commission's intended investor protection objectives.

E. Several Less Onerous Alternative Disclosure Solutions are Available

We maintain that the current regulatory framework is sufficient from an investor protection perspective, and that the scope and substance of the disclosures provided by 4.7 CPOs and CTAs should continue to be informed by the needs and demands of sophisticated investors, as currently reflected in market practice. Imposing mandatory minimum disclosures would be premature. If the Commission disagrees, it could pursue less rigid disclosure solutions, better suited to meet specific investor protection concerns.

The Commission could require 4.7 CPOs and CTAs to provide disclosures to QEP investors. The scope and substance of the specific disclosures, however, should continue to be

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[16] 88 FR at 70858.

[17] It is also worth highlighting that this incongruity may potentially conflict with certain SEC Marketing Rule guidance regarding the presentation of other account information in offering memoranda. *See Investment Adviser Marketing*, Investment Advisers Act Release No. 5653 (Dec. 22, 2020) at 62, fn 4.

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determined at the discretion of the respective 4.7 CPO or CTA. The CPO/CTA should determine the form of that disclosure, and whether to create a new disclosure document or incorporate the disclosures it determines are important for QEPs into other documents provided to the QEP. These 4.7 CPOs and CTAs are best positioned to determine which specific disclosures would be most useful to QEPs, and consistent with QEP investor expectations. Simply imposing the current Disclosure and Performance Rules on 4.7 CPOs and CTAs would not result in a workable or efficient regulatory framework.

Alternatively, if the Commission determines that it is necessary to impose a minimum disclosure regime on 4.7 CPOs and CTAs, it could do so by leveraging existing regulations and guardrails, and amend CFTC Regulation 4.7 to both require that a disclosure document be provided to QEP investors and to require that certain specific minimum disclosure items be included in the document, such as disclosures regarding fees, expenses, and relevant risks and conflicts. This approach would maintain 4.7 CPO and CTA discretion over the substance of the disclosure information provided. Any disclosures ultimately provided would continue to be bound by the requirements of CFTC Regulation 4.7, CFTC Regulation 4.41, and NFA Rule 2-29. The examination process provides an added layer of protection to each of the alternative approaches described above and continues to allow the Commission to assess whether an investor protection problem exists requiring further action or oversight.

F. <u>Cost Benefit Analysis</u>

As noted in the NPRM, prior to promulgating a regulation, the Commission must consider the costs and benefits of its proposed action.[18] The Commission, respectfully, has failed to engage in an adequate cost benefit analysis sufficient to justify the burdensome and costly disclosure regime outlined in the NPRM. Specifically, the Commission has not offered any insight or commentary as to actual costs related to the proposed rulemaking (other than an acknowledgement that the NPRM will result in an additional cost burden), nor has it sufficiently considered alternatives beyond the rigid disclosure regime presented in the NPRM.[19] The NPRM moreover has not identified a shortcoming with the existing disclosure regime. The Commission makes clear that the "direct effect of these proposed amendments would be an

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[18] 7 U.S.C. § 19(a).

[19] Beyond presenting a binary set of alternatives in discussing the requirements of the Regulatory Flexibility Act, the Commission fails to consider any other alternatives to the proposed disclosure regime. Its discussion is limited to the small entity CTA context, and it presents the alternatives as: "(1) to not amend Regulation 4.7 to add disclosure requirements for 4.7 trading programs; or (2) to amend Regulation 4.7(c)(1) to require compliance with the entirety of the disclosure regulations generally applicable to registered CTAs offering trading programs to non-QEP advisory clients." 88 FR at 70865. As described in greater detail above, there are several alternative approaches available to the Commission, and we strongly encourage it to consider all available alternatives prior to any final rulemaking.

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increase in the operating costs of CPOs and CTAs utilizing Regulation 4.7."[20] While that much is clear, the NPRM does not, however, make any attempt to quantify these costs, an essential condition to any rulemaking, particularly one that mandates new disclosure requirements.

The Commission has severely underestimated the cost burden to 4.7 CPOs and CTAs that will result from the NPRM. Further, these additional costs will most likely impact smaller fund managers, CPOs, and CTAs disproportionately. Insofar as many of the costs and expenses associated with the disclosure regime outlined in the NPRM will likely be characterized as fund expenses, these costs will ultimately be passed on to pool participants. Consequently, in purporting to address investor protection concerns, the Commission would be imposing an additional expense burden on sophisticated pool participants.

There are a number of cost considerations that we feel the Commission has overlooked which will ultimately lead to significantly increased costs for 4.7 CPOs and CTAs, and pool participants. The NPRM disclosure requirements also would impose considerable new compliance requirements for CPOs and CTAs that have not been properly considered.

Many CPOs and CTAs rely on external administrators, compliance consultants, accountants, and other third-party service providers to compile and assist in calculating performance information and account statement disclosures. Relatedly, many CPOs and CTAs rely on outside counsel to prepare and review disclosure documents to ensure consistency and compliance with the requirements of the Disclosure and Performance Rules. Smaller CPOs and CTAs are more likely to rely on outside service providers to assist with regulatory compliance, whereas larger CPOs and CTAs may have sufficient capacity to address these concerns in-house. Regardless, the costs associated with compliance under the NPRM would ultimately be borne by investors as many of these compliance, legal and accounting related costs will be fund expenses. Additionally, to the extent an administrator, compliance consultant or other third-party service provider currently assists a CPO or CTA in preparing disclosures or calculating performance information, considering the fundamental change in the disclosure obligations contemplated in the NPRM, any existing contractual terms with such service providers would need to be renegotiated to address the increased scope of work.

For CTAs and CPOs that seek to rely on existing disclosures in offering memoranda and/or subscription documents, the CPO and CTA will effectively be obligated to track the locations of the requisite disclosures across all of its 4.7 pools. For a large financial services firm this would result in the firm tracking disclosures for literally hundreds of 4.7 pools and updating them annually. The NPRM does not adequately consider these considerable additional costs, nor does it demonstrate the need for this new disclosure regime. For CPOs and CTAs that operate a large number of 4.7 pools and accounts where there may be no existing disclosure document in place, the initial costs and time burden associated with drafting and distributing a compliant

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[20] 88 FR at 70871.

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disclosure document for these pools would be substantial. Further, to require that these documents be updated at least annually will compound the burden.

Considering the above concerns, we urge the Commission to more closely scrutinize the specific costs associated with the disclosure regime outlined in the NPRM. We recommend that the Commission abandon a mandatory disclosure regime for 4.7 CPOs and CTAs.

III. CONCLUSION

MFA appreciates the need for investors in commodity pools and accounts to be able to access relevant information, related to their investments, and supports the Commission's goal to ensure that any such information is equally and equitably provided to investors. MFA believes that mandating minimum disclosures at this point is premature, especially considering the proposed increase in the QEP investor qualification thresholds. Further, imposing the current Disclosure and Performance Rules on 4.7 CPOs and CTAs is unlikely to result in pool participants and managed account holders receiving disclosures that meaningfully improve or inform their respective investment decisions or ability to monitor the risks associated with such investments. Several less onerous and more workable solutions, as detailed above, are available to the Commission and should be carefully considered before it settles on any mandatory disclosure regime for 4.7 CPOs and CTAs. Finally, the Commission should engage in a robust cost benefit analysis prior to finalizing any changes to CFTC Regulation 4.7.

MFA appreciates the opportunity to work with the Commission on the NPRM. We also welcome the opportunity to discuss our views with you in greater detail. Please do not hesitate to contact Jeffrey O. Himstreet, Vice President & Senior Counsel (jhimstreet@managedfunds.org), or the undersigned, at (202) 730-2600, with any questions that you, your respective staffs, or the Commissions' staff might have regarding this letter.

Very truly yours,

/s/ Jennifer W. Han

Jennifer W. Han
Executive Vice President
Chief Counsel & Head of Global Regulatory Affairs

cc: The Hon. Rostin Benham, CFTC Chairman
The Hon. Kristin N. Johnson, CFTC Commissioner
The Hon. Christy Goldsmith Romero, CFTC Commissioner
The Hon. Summer K. Mersinger, CFTC Commissioner
The Hon. Caroline D. Pham, CFTC Commissioner

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