

CLIENT UPDATE

CFTC STREAMLINES PROCESS TO DELEGATE COMMODITY POOL OPERATOR AUTHORITY

NEW YORK

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BACKGROUND

On May 12, 2014, the Division of Swap Dealer and Intermediary Oversight (the “DSIO”) of the Commodity Futures Trading Commission (the “CFTC”) issued Staff Letter No. 14-69 (the “Letter”)¹ which provides a streamlined process for requesting relief from the registration requirement of Section 4m(1) of the Commodity Exchange Act (the “Act”)² by those commodity pool operators (“CPOs”) that have (i) delegated investment management authority as a CPO of a commodity pool (“Delegating CPO”) to another CPO that is registered with the CFTC (“Designated CPO”) and (ii) satisfied certain other requirements.

The CFTC states that the number of such requests has dramatically increased since the enactment of the Dodd-Frank Act, which included swaps in the definition of commodity interests and, as a result, has caused more persons to fall under the definition of CPO. Accordingly, the Letter is an effort to reduce the burden on CPO registrants as well as staff in dealing with requests for no-action relief in such situations where the staff has routinely granted relief.

¹ Available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-69.pdf>

² Section 4m(1) makes it unlawful for any person who comes within the CPO definition, “unless registered under [the Act], to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such . . . [CPO].”

For example, while the CPO of a commodity pool is generally (i) the general partner if a limited partnership, (ii) the managing member or manager if a limited liability company, (iii) the trustee if a trust, or (iv) the board of directors if a corporation, the investment managers of pools are frequently named as Designated CPOs to ease administrative burdens where such investment managers sponsor a number of different pools that each use different general partners for tax, regulatory, or business reasons.

In cases where subsidiaries of a fund are commodity pools, the CPO of the fund is the CPO of all such subsidiaries. Where a subsidiary of a fund engages a third-party advisor as the sole investment manager or co-investment manager, then in order to avoid ambiguity, it is highly advisable to designate the investment manager of the fund as the investment manager of the subsidiary through the delegation procedure.

THE STREAMLINED APPROACH CRITERIA

A Delegating CPO that intends to seek no-action relief from the registration requirement in Section 4m(1) of the Act using the streamlined approach must first satisfy the following criteria (“Criteria”):

- The Delegating CPO (i) has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool pursuant to a legally binding document (e.g., a delegation agreement, a constitutive document, an investment management agreement); (ii) does not participate in the solicitation of participants for the commodity pool; (iii) does not manage any property of the commodity pool; and (iv) is not subject to a registration disqualification from the CFTC.³
- The Designated CPO (i) is registered as a CPO; (ii) has a business purpose for being a separate entity from the Delegating CPO that is not solely to avoid registration by the Delegating CPO (e.g., an administrative burden); and (iii) maintains the books and records of the Delegating CPO.⁴
- Where the Delegating CPO and the Designated CPO are each a non-natural person, then one such CPO controls, is controlled by, or is under common control with, the other CPO.
- Where a Delegating CPO is a non-natural person, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes

³ See CEA Sections 8a(2) and 8a(3), which require that the CFTC give entities notice of any restrictions or suspensions.

⁴ In accordance with CFTC Regulation 1.31.

to be jointly and severally liable for any violation of the CEA or the CFTC’s regulations by the other in connection with the operation of the commodity pool.

- Where a Delegating CPO is a natural person and is not an Unaffiliated Board Member,⁵ then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or the Commission’s regulations by the other in connection with the operation of the commodity pool.
- Where a Delegating CPO is an Unaffiliated Board Member, then such Delegating CPO must be subject to liability as a Board member in accordance with the laws under which the commodity pool is established.

THE STREAMLINED APPROACH REQUEST

Where the applicable Criteria are met, the Delegating CPO may submit a request for relief using a form attached to the Letter, which requires the following information:

- The name, main business address, main business telephone number and name of a contact person of each of the Delegating CPO(s) and the Designated CPO (and, if the request is made by someone other than the Delegating CPO, the name, main business address, and main telephone number of the requestor);
- The NFA ID Number of the Designated CPO;
- The name(s) of the commodity pool(s) with respect to which relief is being sought;⁶
- A representation that the applicable Criteria are met (such representation may be made by an authorized representative of the Delegating CPO(s)); and
- A statement from the Designated CPO acknowledging that it has been designated as the registered CPO of the commodity pool(s) and that it satisfies the applicable Criteria (such acknowledgement may be made by an authorized representative of the Designated CPO).

⁵ “Unaffiliated Board Member” means a natural person who is a voting member of the board of directors or an equivalent governing body of the commodity pool who: (i) is not a member of the management or an employee of the Designated CPO or any affiliate thereof; (ii) is not a substantial beneficial owner of the Designated CPO or any affiliate thereof or of any company holding more than 5% of such Designated CPO’s beneficial ownership interests or any affiliate thereof; and (iii) has no other interest or relationship (based on relevant facts and circumstances) that could interfere with his/her ability to act independently of management of the Designated CPO or any affiliate thereof or of any company holding more than 5% of such Designated CPO’s beneficial ownership interests or any affiliate thereof.

⁶ A single request for relief may be requested by a Delegating CPO with respect to multiple commodity pools.

Although this relief is not self-executing, the DSIO has indicated that it intends to issue no-action relief to Delegating CPOs if they have requested the relief in the manner set forth in the Letter and meet the relevant Criteria.

In addition, the DSIO recognizes that there may be CPO delegation situations involving facts or circumstances that do not meet the requirements for requesting relief through the streamlined approach set forth in the Letter, but which might nonetheless also warrant relief. Accordingly, DSIO intends to continue to evaluate other requests for CPO registration no-action relief in the delegation context where the circumstances do not permit the requestor to utilize this streamlined approach. In addition, the Division may expand the streamlined approach to additional scenarios in the future as appropriate.

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Please do not hesitate to contact us with any questions.

May 21, 2014