

# CLIENT UPDATE

## CFTC'S DSIO ADDRESSES THE TREATMENT OF WHOLLY-OWNED SUBSIDIARIES OF COMMODITY POOLS IN NO-ACTION RELIEF TO PERMIT CONSOLIDATED REPORTING

### NEW YORK

Byungkwon Lim  
blim@debevoise.com

Gary E. Murphy  
gemurphy@debevoise.com

Michael J. Decker  
mjdecker@debevoise.com

The Division of Swap Dealer and Intermediary Oversight (the "Division") of the U.S. Commodity Futures Trading Commission (the "Commission" or "CFTC") released a letter on September 8, 2014 (the "Letter")<sup>1</sup> that provides certain no-action relief from reporting obligations to a registered commodity pool operator (a "CPO") of a parent commodity pool (a "Parent Pool") that is not registered as an investment company under the Investment Company Act of 1940 and that uses a wholly-owned subsidiary to trade in commodity interests (a "Trading Subsidiary").

A CPO relying on such relief may file with the National Futures Association ("NFA"): (i) an annual report for the Parent Pool that contains consolidated financial statements for the Parent Pool and its Trading Subsidiary (in lieu of a separate annual report for each of the Parent Pool and the Trading Subsidiary pursuant to Commission regulation<sup>2</sup> sections 4.7(b)(3) or 4.22(c), as applicable); and (ii) a Form CPO-PQR for the Parent Pool that contains consolidated Form CPO-PQR data for the Parent Pool and its Trading Subsidiary (in lieu of a separate Form CPO-PQR for each of the Parent Pool and the Trading Subsidiary pursuant to section 4.27(c)).

---

<sup>1</sup> Available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-112.pdf>

<sup>2</sup> Unless otherwise indicated, all section references are to the Commission regulations under the Commodity Exchange Act.

In addition to the relief provided, the Letter is significant because it confirms the Division staff's view that a wholly-owned subsidiary trading swaps or futures is itself a commodity pool, so that its status as a partially exempt pool under section 4.7 or an exempt pool under section 4.13(a)(3) must be determined separately from and independently of its parent pool.

### **INDEPENDENT POOL STATUS OF WHOLLY-OWNED SUBSIDIARY OF COMMODITY POOL**

The Letter states that a Trading Subsidiary used for the purpose of trading commodity interests is considered to be a separate "commodity pool" or a "pool" apart from the Parent Pool, and that unless a Trading Subsidiary can itself satisfy the criteria for an exemption or exclusion for its CPO from registration, the CPO of a Parent Pool that has a Trading Subsidiary is required to register with the CFTC as the CPO of such Trading Subsidiary and is subject to CFTC compliance with respect to such Trading Subsidiary.

The Letter also states that whether a Trading Subsidiary's CPO is subject to registration is independent of whether the Parent Pool's CPO is subject to registration, so that even if the CPO of the Parent Pool is exempt from registration with respect to its operation of the Parent Pool, it is possible such CPO must register with respect to its operation of the Trading Subsidiary. We note that in determining on the registration requirement for the Parent Pool's CPO, all commodity interests held by the Trading Subsidiary will be attributed to the Parent Pool.

The Division staff provided its view on this issue with respect to a wholly-owned subsidiary of a commodity pool operated by a registered CPO in a 2012 Q&A.<sup>3</sup> This is the first time the staff provides its view in writing with respect to a wholly owned subsidiary of a commodity pool, whether or not the pool is operated by a registered CPO.

Registered CPOs are subject to section 4.22(c), which requires CPOs to submit electronically an annual financial report to the National Futures Association, although registered CPOs operating pursuant to an exemption under section 4.7 are permitted to instead file a streamlined annual report pursuant to section 4.7(b)(3). Absent relief, the CPO of a Trading Subsidiary must file the relevant annual report with the NFA independent of any obligations such CPO may have with respect to the Parent Pool.

---

<sup>3</sup> CFTC's Division of Swap Dealer and Intermediary Oversight Responds to Questions Regarding Recent Amendments to Compliance Obligations for Commodity Pool Operators and Commodity Trading Advisors, available at: [http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq\\_cpocta.pdf](http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf)

In addition to the annual report requirements, a CPO must also comply with section 4.27(c), which requires, among other things, a CPO to file Form CPO-PQR with the NFA. Absent relief, a CPO of a Trading Subsidiary is required to file a Form CPO-PQR with respect to the Trading Subsidiary independent of any obligations a CPO may have with respect to the Parent Pool.

### **NO-ACTION RELIEF**

Based on findings that consolidating Parent Pool and Trading Subsidiary financial reports and Form CPO-PRQ data will not impede the provision of information on trading performance and financial condition or related risk assessments, the Division grants relief such that (i) an annual report for a Parent Pool may contain consolidated financial statements for the Parent Pool and its Trading Subsidiary in lieu of a separate annual report for each of the Parent Pool and the Trading Subsidiary pursuant to sections 4.7(b) or 4.22(c), as applicable; and (ii) Form CPO-PQR data may be consolidated for the Parent Pool and its Trading Subsidiary in lieu of a separate Form CPO-PQR for each of the Parent Pool and the Trading Subsidiary pursuant to section 4.27(c).

In addition, the Division notes that it has previously issued similar relief to CPOs of registered investment companies that utilize controlled foreign corporations for trading in commodity interests,<sup>4</sup> and that the no-action relief provided in the Letter essentially expands the class of commodity pools for which a CPO may consolidate annual reports and CPO-PQR reports.

### **REQUIREMENTS FOR RELIEF**

Relief with regard to sections 4.7(b) or 4.22(c), as applicable, is available provided that:

- the CPO of the Parent Pool is also the CPO of the Trading Subsidiary;
- the exposure to the Trading Subsidiary by the participants in the Parent Pool is shared pro rata; and
- the CPO prepares and files with the NFA an annual report for the Parent Pool that contains consolidated audited financial statements for the Parent Pool that includes the holdings, gains and losses, and other financial statement amounts attributable to the Trading Subsidiary.<sup>5</sup>

---

<sup>4</sup> See CFTC Staff Letter No. 13-51, available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/13-51.pdf>

<sup>5</sup> However, if the Parent Pool and its Trading Subsidiary are subject to different annual report requirements (e.g., the annual report for the Parent Pool is subject to section 4.7(b)(3), while the annual report for the Trading Subsidiary is

Relief with regard to section 4.27(c) (i.e., Form CPO-PQR) is available provided that:

- the CPO of the Parent Pool is also the CPO of the Trading Subsidiary;
- the exposure to the Trading Subsidiary by the participants in the Parent Pool is shared pro rata; and
- the CPO provides a consolidated report for the Parent Pool that includes the data for the Trading Subsidiary to the NFA pursuant to section 4.27(c).

### **CLAIMING RELIEF**

The no-action relief provided is not self-executing; eligible CPOs must file a claim to perfect the relief, which will be effective upon filing if materially complete. Such notice of claim must:

- state the name, main business address, and main business telephone number of the CPO claiming the relief;
- state the capacity (i.e., CPO) and the name of each Trading Subsidiary for which the claim is being filed and the name of the Parent Pool matched with each Trading Subsidiary;
- be signed by the CPO (which may be effected by attaching a signed pdf statement from the CPO); and
- be filed with the Division via email to [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov), with the subject line "Trading Subsidiary Letter 14-112".

\* \* \*

Please do not hesitate to contact us with any questions.

September 11, 2014

---

subject to section 4.22(c)), then the consolidated annual report for the Parent Pool must be prepared in accordance with the more stringent annual report requirement (e.g., in the example above, section 4.22(c)).