

CLIENT UPDATE

CFTC PROVIDES NO-ACTION RELIEF TO CERTAIN DELEGATING COMMODITY POOL OPERATORS

NEW YORK

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On October 15, 2014, the Division of Swap Dealer and Intermediary Oversight (the “DSIO”) of the Commodity Futures Trading Commission (the “CFTC”) issued Staff Letter No. 14-126 (the “Letter”)¹ which provides self-executing no-action relief from the registration requirement of Section 4m(1) of the Commodity Exchange Act (the “Act”)² to 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 Letter replaces the relief previously provided by CFTC Staff Letter No. 14-69 (“Letter 14-69”).³ Although the Letter’s relief is generally consistent with the relief provided under Letter 14-69 (with the exception of certain clarifications and mechanics), any person who has not requested relief, or has a pending request, under Letter 14-69 should instead now assess whether they are entitled to the self-executing relief provided by the Letter.

¹ Available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-126.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].”

³ Our prior Client Update is available at: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7635c8aa-c7e5-499e-8200-64f49b2ce615>

THE STREAMLINED NO-ACTION RELIEF CRITERIA

The DSIO will not recommend that the CFTC commence an enforcement action under Section 4m(1) of the Act against a Delegating CPO for failure to register as a CPO if the following criteria are satisfied:

- The Delegating CPO:
 - has, pursuant to a legally binding document (including, but not limited to, a separate delegation agreement, a document that establishes the pool, or an investment management agreement between the Delegating CPO and the Designated CPO), delegated to the Designated CPO all of its investment management authority with respect to the commodity pool at issue; provided, however, that satisfaction of this criteria is not precluded where: (i) a Delegating CPO or the Designated CPO appoints one or more third parties to serve as investment manager(s) of the pool, and (ii) each such third-party investment manager is registered as a commodity trading advisor (“CTA”) or is exempt from such registration pursuant to the Act or the CFTC’s regulations;
 - does not participate in the solicitation of participants for the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is registered as an associated person (“AP”) of the Designated CPO or is exempt from registration as such pursuant to the Act or the CFTC’s regulations, and (ii) participates in the solicitation of pool participants solely in its capacity as an AP of the Designated CPO; and
 - does not manage any property of the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is a principal or employee of the Designated CPO or of a CTA of the pool at issue, and (ii) has management responsibilities over pool property; provided further, however, that such Delegating CPO: (1) exercises these management responsibilities solely in the capacity of a principal or employee of the Designated CPO or as a CTA of the pool and not as the Delegating CPO of the pool, and (2) in connection with exercising these management responsibilities, is subject to supervision as a principal or an employee by either the Designated CPO or a CTA of the pool in accordance with CFTC regulations. For purposes of this criterion, management of pool property does not include responsibilities with respect to pool property of an administrative, clerical, or ministerial nature.
 - is not subject to certain statutory registration disqualifications, as set forth in CEA Sections 8(a)(2) and 8(a)(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, and (iii) maintains the books and records of the Delegating CPO with respect to the commodity pool in accordance with CFTC regulations.
- 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 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,⁴ 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 remain fully responsible as a Board member in accordance with the laws under which the commodity pool is established.

The relief is self-executing, such that no notice or claim needs to be filed to take advantage of it.

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Please do not hesitate to contact us with any questions.

October 21, 2014

⁴ “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. With respect to clause (iii), the CFTC indicates that interests or relationships that are indicative of an affiliation with the Designated CPO that could trigger clause (iii) may include, for example: the director is a material service provider or investment counterparty to the Designated CPO or any of its affiliates, or is (or within the past three years was) employed in an executive capacity by (or was a principal or employee of) a material service provider or investment counterparty to the Designated CPO or any of its affiliates.