

MEMO# 28373

September 11, 2014

CFTC Staff Allows Commodity Pool Operators Greater Flexibility to Use Third Party Recordkeepers

[28373]

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TO: ACCOUNTING/TREASURERS COMMITTEE No. 23-14

COMPLIANCE MEMBERS No. 15-14

DERIVATIVES MARKETS ADVISORY COMMITTEE No. 58-14

REGISTERED FUND CPO ADVISORY COMMITTEE RE: CFTC STAFF ALLOWS COMMODITY POOL OPERATORS GREATER FLEXIBILITY TO USE THIRD PARTY RECORDKEEPERS

This week, the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission issued an exemptive letter that authorizes a commodity pool operator (“CPO”) to use any third party recordkeeper, subject to certain conditions. [\[1\]](#) The Division’s letter, which is briefly discussed below, responds to requests from ICI and other interested parties for clarification regarding the scope of the books and records relief granted by the CFTC last year. [\[2\]](#)

The Division also issued two other letters providing relief to certain CPOs. One letter states that the Division will not recommend enforcement action against a CPO of a pool that is not a registered investment company and that uses a wholly-owned subsidiary to trade in commodity interests if the CPO files (1) an annual report containing consolidated financial statements for the pool and subsidiary and (2) a Form CPO-PQR containing consolidated data for the pool and subsidiary, provided certain conditions are met. [\[3\]](#) The other letter sets forth the Division’s position that a registered CPO that “only operates pools pursuant to a claim of exemption from registration, or for which they maintain an exclusion from the definition of commodity pool operator,” is not required to file Form CPO-PQR. [\[4\]](#)

Use of Third Party Recordkeepers

Prior to last year, CFTC rules directed all CPOs to maintain their required books and records at the CPO’s main business office. In August 2013, as part of its rulemaking to harmonize compliance requirements for fund advisers required to register as CPOs, the CFTC amended Regulation 4.23 to permit all CPOs to maintain their books and records with certain third-party recordkeepers: the pool’s administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool. [\[5\]](#) In its

adopting release, the CFTC explained that the main business office requirement is “rooted in the timely and certain access” of the data contained in the CPO’s books and records. The release further acknowledged that, “to the extent that such data is readily accessible to a CPO” and “timely and complete access to that data is available,” the CFTC views the main business office requirement as having been met.

The Division’s letter allows a CPO to use any third party recordkeeper to maintain its required books and records, provided:

1. That the CPO’s timely access to such records is maintained, such that the CPO will satisfy the obligations of the applicable Commission regulations, particularly with respect to providing such records for inspection; and
2. The CPO timely and completely files the statements required pursuant to Commission Regulations 4.7(b)(5) or 4.23(c), as applicable. [6]

The letter emphasizes that “the CPO remains responsible for ensuring that all books and records required to be kept are maintained in accordance with Commission regulations, and producing them upon request, within the time specified by the regulations. These obligations remain with the CPO regardless of the condition of, or failures by, the third party recordkeeper.” The Division believes that these “retained obligations provide an incentive for CPOs to select well qualified third party recordkeepers.”

In a footnote, the Division also acknowledges concerns regarding the requirement that all records required to be maintained by Regulation 4.23 must be kept in accordance with CFTC Regulation 1.31, portions of which “may no longer be in keeping with modern data management practices.” The footnote states that the Division intends to perform a review of the requirements of Regulation 1.31 and their applicability to the current technological environment.

Rachel H. Graham
Senior Associate Counsel

Frances M. Stadler
Senior Counsel - Securities Regulation

endnotes

[1] CFTC Letter No. 14-114 (Sept. 8, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-114.pdf>. The letter was issued pursuant to authority delegated to the Division under Regulations 140.93 and 4.12(a).

[2] See Letter from Karrie McMillan, General Counsel, ICI to Gary Barnett, Director, Division of Swap Dealer and Intermediary Oversight, CFTC, dated August 28, 2013 (seeking confirmation on permitted third party recordkeepers and other harmonization issues).

[3] CFTC Letter No. 14-112 (Sept. 8, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-112.pdf>. CFTC Letter No. 13-51 (Sept. 5, 2013) affords similar relief to CPOs of registered funds.

[4] CFTC Letter No. 14-115 (Sept. 8, 2014), available at

<http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-115.pdf>.

[5] See Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators, 78 Fed. Reg. 52308 (Aug. 22, 2013) (adopting release).

[6] As the Division letter explains, these statements require that the CPO identify the recordkeeper, the recordkeeper's contact information, which records shall be so kept, and representations regarding the continued and proper keeping of those records.

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