

**MEMO# 26896**

January 17, 2013

## **Funds Relying on CFTC Rule 4.5 Must Reaffirm the Exclusion By March 1, 2013; NFA Issues Guidance**

[26896]

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 10-13  
COMPLIANCE MEMBERS No. 5-13  
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 10-13  
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 5-13  
ETF ADVISORY COMMITTEE No. 5-13  
INVESTMENT ADVISER MEMBERS No. 8-13  
SEC RULES MEMBERS No. 12-13  
SMALL FUNDS MEMBERS No. 7-13  
UNIT INVESTMENT TRUST MEMBERS No. 4-13 RE: FUNDS RELYING ON CFTC RULE 4.5 MUST REAFFIRM THE EXCLUSION BY MARCH 1, 2013; NFA ISSUES GUIDANCE

Under the amendments to Rule 4.5 that were adopted by the Commodity Futures Trading Commission (“CFTC”) last February, each person who has filed a notice of exclusion under the rule must reaffirm the notice within 60 days of the calendar year end, or withdraw the exclusion (either because the registered investment company (“fund”) for which the notice was filed is no longer engaged in the trading of commodity interests or because registration of the fund’s investment adviser as a commodity pool operator (“CPO”) is required). [\[1\]](#) For funds currently relying on Rule 4.5, reaffirmation or withdrawal of the existing notice is required by March 1, 2013.

Last month, the National Futures Association (“NFA”) issued guidance on how to complete the affirmation process through the NFA’s Exemption System. [\[2\]](#) Among other things, the NFA notice emphasizes the following points:

- Failure to affirm an active exclusion from CPO registration will result in the exclusion being automatically withdrawn after the 60-day period has ended, and may result in enforcement action by the CFTC (if a fund’s investment adviser does not subsequently register as a CPO).
- NFA will provide an annual email reminder of the affirmation process, which will be sent to the email contact on file in the NFA’s Exemption System. If this contact information changes during the year, firms are urged to promptly update it.

- If NFA's records reflect an exclusion for a fund that is no longer active, you can update NFA's records electronically (if your firm is a registered CPO) or by sending written notification to [exemptions@nfa.futures.org](mailto:exemptions@nfa.futures.org) (if your firm is not registered with NFA).

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**endnotes**

[1] Regulation 4.5(c)(5) under the Commodity Exchange Act states: "Each person who has filed a notice of exemption from registration under this section must affirm on an annual basis the notice of exemption from registration, withdraw such exemption due to the cessation of activities requiring registration or exemption therefrom, or withdraw such exemption and apply for registration within 60 days of the calendar year end through National Futures Association's electronic exemption filing system." The CFTC imposed similar requirements on persons claiming an exemption from CPO registration under Regulation 4.13(a)(3) or from commodity trading advisor registration under Regulation 4.14(a)(8). See also Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012) (release adopting these requirements); correction notice published at 77 Fed. Reg. 17328 (Mar. 26, 2012).

[2] See NFA Notice to Members I-12-30 (Dec. 3, 2012), available at <https://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4158>.

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