

MEMO# 32074

December 5, 2019

CFTC Adopts Amendments to CPO and CTA Regulations

[32074]

December 5, 2019 TO: ICI Members
Closed-End Investment Company Committee
Derivatives Markets Advisory Committee
Registered Fund CPO Advisory Committee SUBJECTS: Alternative Investments
Closed-End Funds
Compliance
Derivatives
Investment Advisers RE: CFTC Adopts Amendments to CPO and CTA Regulations

Last week, the CFTC adopted amendments to Part 4 of its regulations, which govern commodity pool operators (CPOs) and commodity trading advisors (CTAs). The CFTC's amendments, which were adopted in two separate releases,[\[1\]](#) are based on a proposal the CFTC issued in October 2018.[\[2\]](#) The amendments, consistent with no-action and exemptive letters previously issued by the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO):

- Provide an exemption from registration for CPOs and CTAs of family offices;
- Adopt exemptive relief consistent with the Jumpstart Our Business Startups Act of 2012 (JOBS Act) by permitting general solicitation under CFTC Regulations 4.7(b) and 4.13(a)(3);
- Clarify that non-US persons, regardless of financial sophistication, are permitted participants in pools exempt under Regulation 4.13(a)(3);
- Clarify that the exclusion from the CPO definition for a registered investment company (registered fund) under CFTC Regulation 4.5 should be claimed by the fund's investment adviser, not the fund;
- Add an exclusion under Regulation 4.5 for investment advisers to business development companies (BDCs); and
- Revise the definition of "Reporting Person" under Regulation 4.27 to eliminate filing requirements for Forms CPO-PQR and CTA-PR for certain classes of CPOs and CTAs.

While most of the amendments do not directly apply to registered fund advisers, we wanted to focus your attention on three of the amendments.

Filing Entity under Regulation 4.5

The CFTC made technical amendments to Regulation 4.5 to clarify that the fund's investment adviser, rather than the fund, is the entity required to claim the CPO exclusion on behalf of a particular fund. The CFTC acknowledged that, based on the current language of Regulation 4.5, many entities relying on the exclusion previously filed a notice of exclusion in the name of the registered fund.

To address compliance burdens that would be created by the amendments, the CFTC provided an interpretation of Regulation 4.5 in the adopting release that addresses the following issues:

- If the registered fund previously claimed the Regulation 4.5 exclusion through the required notice filing, Regulation 4.5(d)(1)-(d)(2) will not require an amended notice filing with NFA within 15 business days to reflect changing the excluded CPO entity to the fund's adviser. Instead, when the excluded CPO is next required to annually affirm the Regulation 4.5 exclusion (i.e., within 60 days of the calendar year-end), the excluded CPO entity should allow the existing notice (in the name of the registered fund) to expire, and the adviser of the fund should file a new notice pursuant to Regulation 4.5(c), prior to the expiration of the other existing notice. Where a registered fund adviser claimed the exclusion with respect to a fund through a notice filing, the adviser should continue to affirm the notice as usual.
- The CFTC recognizes that it may be overly burdensome for registered fund advisers to file the revised annual notices required by Regulation 4.5(c)(5) (i.e., file in the name of the adviser rather than the fund) when they are due in early 2020. The CFTC therefore has provided that registered fund advisers will not be required to comply with the amendment to Regulation 4.5(a)(1) until within 60 days of the end of the calendar year 2020, i.e., March 1, 2021.
- The CFTC acknowledged commenters' concern that changing the excluded CPO to the fund's adviser could constitute a material change necessitating an "off-cycle amendment to [the fund's] registration statements." The CFTC explains that it is not in a position to make a determination as to whether this is, in fact, a material change for the fund because each fund must make that determination. It clarifies, however, that, from the CFTC's perspective, there is no substantive change with respect to the fund's legal posture under the CFTC's regulations.

CPO Exclusion for Advisers to BDCs

The CFTC amended Regulation 4.5 so that the exclusion also covers registered investment advisers to BDCs. This amendment is consistent with relief the DSIO staff provided in a 2012 no-action letter.[\[3\]](#) Consistent with the existing requirements under Regulation 4.5(c)(5), advisers to BDCs will be required to affirm the exclusion on an annual basis.

Reporting Exclusion for Certain CPOs and CTAs

The CFTC amended the definition of "Reporting Person" in Regulation 4.27 to exclude certain registered CPOs and CTAs from being required to file Forms CPO-PQR and CTA-PR, respectively. The amendments are consistent with exemptive relief DSIO previously provided in CFTC Letters Nos. 14-115 and 15-47,[\[4\]](#) and expands that relief to additional categories of CTAs, whose Form CTA-PR filings have limited utility for the CFTC. The amendments exclude:

- Registered CPOs that operate only pools for which they rely on Regulation 4.5 and/or Regulation 4.13;

- CTAs that are registered, but do not direct the trading of any commodity interest accounts;
- CTAs that are registered, but direct only the accounts of commodity pools for which they are registered as a CPO and, though registered, comply with Regulation 4.14(a)(4); and
- CTAs that are registered, but direct only the accounts of commodity pools for which they are exempt from registration as a CPO, and though registered, comply with Regulation 4.14(a)(5).

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endnotes

[1] See <https://www.cftc.gov/PressRoom/PressReleases/8084-19>.

[2] See *Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors*, 83 Fed.Reg. 52902 (Oct. 18, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-10-18/pdf/2018-22324.pdf>.

[3] CFTC Letter No. 12-40 (Dec. 4, 2012).

[4] CFTC Letter No. 14-115 is available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/14-115.pdf>; CFTC Letter No. 15-47 is available at <https://cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/15-47.pdf>.

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