

MEMO# 28560

December 8, 2014

Funds Relying on CFTC Rule 4.5 Must Reaffirm the Exclusion by March 2, 2015; NFA Provides Guidance on Filing

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TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 32-14
COMPLIANCE MEMBERS No. 16-14
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 85-14
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 16-14
ETF ADVISORY COMMITTEE No. 16-14
INVESTMENT ADVISER MEMBERS No. 31-14
SEC RULES MEMBERS No. 46-14
SMALL FUNDS MEMBERS No. 25-14
UNIT INVESTMENT TRUST MEMBERS No. 7-14
VARIABLE INSURANCE PRODUCTS ADVISORY COMMITTEE No. 12-14 RE: FUNDS RELYING ON CFTC RULE 4.5 MUST REAFFIRM THE EXCLUSION BY MARCH 2, 2015; NFA PROVIDES GUIDANCE ON FILING

Pursuant to amended Rule 4.5 under the Commodity Exchange Act, 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 2, 2015.

Earlier this 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- Failure to affirm an active exclusion from CPO registration will result in the exclusion being automatically withdrawn after the 60-day period has ended, and may result in enforcement action by the CFTC (if a fund’s investment adviser does not subsequently register as a CPO).
- If NFA’s records reflect an exclusion for a fund that is no longer active, you can update NFA’s records in one of two ways:

- If your firm is a registered CPO, you must withdraw the exclusion by accessing the Exemption System. After you withdraw the exclusion, you will be directed to the firm's Annual Questionnaire "to delete or cease the pool."
- If your firm is not registered with NFA, you must send written notification to exemptions@nfa.futures.org that you wish to withdraw the exclusion. The written notification should include the full name of your firm and the fund along with any identifying NFA ID number.

The NFA notice also includes other helpful guidance regarding the reaffirmation process, including ensuring compliance with NFA Bylaw 1101.

Sarah A. Bessin
Senior Counsel

Rachel H. Graham
Senior Associate Counsel

endnotes

[1] Rule 4.5(c)(5) 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 Commodity Futures Trading Commission 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-14-34 (Dec. 3, 2014), available at <http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4504>.