

MEMO# 27747

December 6, 2013

Fund Advisers Relying on CFTC Rule 4.5 Must Reaffirm the Exclusion by March 3, 2014; Reminder Regarding Periodic Filing Obligations for Fund CPOs

[27747]

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TO: ACCOUNTING/TREASURERS COMMITTEE No. 32-13
CLOSED-END INVESTMENT COMPANY MEMBERS No. 98-13
COMPLIANCE MEMBERS No. 45-13
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 86-13
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 36-13
ETF ADVISORY COMMITTEE No. 36-13
INVESTMENT ADVISER MEMBERS No. 75-13
SEC RULES MEMBERS No. 111-13
SMALL FUNDS MEMBERS No. 63-13
UNIT INVESTMENT TRUST MEMBERS No. 20-13 RE: FUND ADVISERS RELYING ON CFTC RULE 4.5 MUST REAFFIRM THE EXCLUSION BY MARCH 3, 2014; REMINDER REGARDING PERIODIC FILING OBLIGATIONS FOR FUND CPOs

This memorandum briefly discusses the annual affirmation requirement for registered investment companies (“funds”) whose advisers are currently excluded from commodity pool operator (“CPO”) registration under CFTC Rule 4.5. It also reminds fund advisers that are registered CPOs about their obligations to file certain periodic reports with the National Futures Association (“NFA”).

Annual Affirmation Requirement for Fund Advisers Relying on Rule 4.5

Under CFTC Rule 4.5, 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 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 CPO is required). [\[1\]](#) For funds currently relying on Rule 4.5, reaffirmation or withdrawal of the existing notice is required by March 3, 2014.

NFA has 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Failure to affirm an active exclusion from CPO registration will result in the exclusion being withdrawn after the 60-day period has ended. For registered CPOs, withdrawal of the exclusion will result in the firm being subject to part 4 of the CFTC's regulations for that fund regardless of whether the firm otherwise remains eligible for the exclusion. For advisers that are not CPOs, the withdrawal of the exclusion may result in enforcement action by the CFTC.

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 (if your firm is not registered with NFA).

Any new exclusions filed during the affirmation period (December 3, 2013 through March 3, 2014) will not need to be affirmed until the calendar year ending December 31, 2014.

Reminder to Fund CPOs Regarding Their Periodic Reporting Obligations

Amended in February 2012, CFTC Rule 4.27 requires all CPOs to file periodic reports with NFA on new Form CPO-PQR, which was modeled on Form PF (filed by advisers to private funds/hedge funds). Fund CPOs will be required to file their first Form CPO-PQR with respect to the period ending December 31, 2013. [3] Fund CPOs that are required by SEC rules to file Form PF have the option of including information about funds that do not comply with Rule 4.5 on Form PF, in lieu of filing Schedules B and/or C of Form CPO-PQR. This does not relieve fund CPOs, however, of the obligation to file Schedule A of Form CPO-PQR.

NFA Compliance Rule 2-46 requires quarterly reporting by all CPOs, including all fund CPOs. For those filers considered to be Large CPOs (i.e., at least \$1.5 billion in assets under management), quarterly filing on Form CPO-PQR will likewise satisfy their NFA reporting requirement. [4]

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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).

[2] See NFA Notice to Members I-13-38 (Dec. 5, 2013), available at <http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4346>.

[3] 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 the timing of the first filing by fund CPOs).

[4] More information about the NFA Form PQR filing obligation is provided in NFA Notice to Members I-13-12, Effective Date of Amendments to NFA Compliance Rule 246: GPO and CTA Quarterly Reporting Requirements, dated April 24, 2013, available at <http://www.nfa.futures.org/%5C/NFA-regulation/regulationNotice.asp?ArticleID=4218>. See also ICI [Memorandum](#) 27201, dated April 26, 2013 (summarizing the NFA notice).