

MEMO# 28124

May 15, 2014

CFTC Staff Announces Streamlined Approach to Delegation Relief for CPOs to Private Funds, Including Registered Fund Subsidiaries

[28124]

May 15, 2014

TO: CLOSED-END INVESTMENT COMPANY MEMBERS No. 18-14
COMPLIANCE MEMBERS No. 10-14
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 34-14
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE No. 9-14
ETF ADVISORY COMMITTEE No. 8-14
INVESTMENT ADVISER MEMBERS No. 17-14
SEC RULES MEMBERS No. 17-14
SMALL FUNDS MEMBERS No. 11-14
UNIT INVESTMENT TRUST MEMBERS No. 4-14 RE: CFTC STAFF ANNOUNCES STREAMLINED APPROACH TO DELEGATION RELIEF FOR CPOS TO PRIVATE FUNDS, INCLUDING REGISTERED FUND SUBSIDIARIES

When the Commodity Futures Trading Commission (“CFTC”) adopted amendments to CFTC Rule 4.5, it confirmed that the investment adviser to a registered investment company (“registered fund”) is the entity that should register as the commodity pool operator (“CPO”) for the registered fund. [\[1\]](#) The analysis of which entity should register with respect to a private fund, however, including a wholly-owned subsidiary of a registered fund (a controlled foreign corporation) is more complex. In some cases, CPOs have sought and obtained no-action relief from the Division of Swap Dealer and Intermediary Oversight (“Division”) to permit a person that would be deemed a CPO under the Commodity Exchange Act (“CEA”), and otherwise required to register as a CPO under Section 4m(1) of the CEA, to “delegate” the CPO function to another person, subject to specified conditions. Many requests for delegation relief currently are pending with the Division.

On May 12, the Division issued a letter providing a standardized, streamlined approach for requesting delegation relief on an expedited basis for CPOs that can satisfy the criteria set forth in the letter. [\[2\]](#) The Division recognizes that there may be CPO delegation situations in which relief may be warranted, but in which the criteria in the letter may not be met. The

Division will continue to evaluate such requests on an individualized, non-expedited basis. It also may expand the streamlined approach to additional scenarios in the future as appropriate.

The Division explains that it is instituting a streamlined approach to requests for delegation relief because many of the fact patterns presented in prior relief requests are similar. The streamlined approach includes the use of a simplified form of request, a template of which is attached to the letter. The Division will provide no-action relief from the registration requirement in Section 4m(1) of the CEA to a Delegating CPO, [\[3\]](#) if the Delegating CPO has delegated its investment management authority over a commodity pool to a Designated CPO and the following requirements are satisfied:

1. Pursuant to a legally binding document, [\[4\]](#) the Delegating CPO has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool; the Delegating CPO does not participate in the solicitation of participants for the commodity pool; and the Delegating CPO does not manage any property of the commodity pool.
2. The Designated CPO is registered as a CPO.
3. The Delegating CPO is not subject to a Statutory Disqualification.
4. There is a business purpose for the Designated CPO being a separate entity from the Delegating CPO that is not solely to avoid registration by the Delegating CPO under the CEA and the CFTC's regulations.
5. The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO in accordance with CFTC Rule 1.31.
6. If the Delegating CPO and the Designated CPO are each a non-natural person, then one such CPO controls, is controlled by, or is under common control with the other CPO.
7. If a Delegating CPO is a non-natural person, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or the CFTC's regulations by the other in connection with the operation of the commodity pool.
8. If a Delegating CPO is a natural person and is not an Unaffiliated Board Member, [\[5\]](#) then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA or the CFTC's regulations by the other in connection with the operation of the commodity pool.
9. If a Delegating CPO is an Unaffiliated Board Member, then such Delegating CPO must be subject to liability as a Board member in accordance with the laws under which the commodity pool is established.

The relief in the letter is not self-executing. The Delegating CPO(s) must submit a request for relief to the Division pursuant to CFTC Rule 140.99 in the form of the Attachment to the letter that includes specified identifying information and representations set forth in the letter.

Please contact us if you have any questions.

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endnotes

[1] See Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed.Reg. 11252, 11259 (Feb. 24, 2012).

[2] See CFTC Staff Letter No. 14-69 (May 12, 2014), available at <http://www.cftc.gov/ucm/groups/public/@lrlettergeneral/documents/letter/14-69.pdf>.

[3] For purposes of the letter, “Delegating CPO” is defined as a CPO that has delegated investment management authority as a CPO of a commodity pool to another person who is registered as a CPO (a “Designated CPO”).

[4] The letter states that this may include, but is not limited to, a separate delegation agreement, a document that establishes the pool, or an investment management agreement between the Delegating CPO and the Designated CPO.

[5] For purposes of the letter, “Unaffiliated Board Member” is defined as a natural person who is a voting member of the board of directors or an equivalent governing body of the commodity pool who: (i) is not a member of the management or an employee of the Designated CPO or any affiliate thereof; (ii) is not a substantial beneficial owner of the Designated CPO or any affiliate thereof or of any company holding more than 5% of such Designated CPO’s beneficial ownership interests or any affiliate thereof; and (iii) has no other interest or relationship that could interfere with his/her ability to act independently of management of the Designated CPO or any affiliate thereof or of any company holding more than 5% of such Designated CPO’s beneficial ownership interests or any affiliate thereof. The Division explains that whether a director has an interest or relationship under clause (iii) will be based on the relevant facts and circumstances. For example, interests or relationships that are indicative of an affiliation with the Designated CPO that could trigger clause (iii) may include: the director being a material service provider or investment counterparty to the Designated CPO or any of its affiliates, or is, or within the past three years was, employed in an executive capacity by, or was a principal or employee of, a material service provider or investment counterparty to, the Designated CPO or any of its affiliates.