

MEMO# 27976

March 24, 2014

Action Required by Funds Relying on CFTC Rule 4.5 That Have Not Reaffirmed the Exclusion

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TO: ACCOUNTING/TREASURERS COMMITTEE No. 8-14
CLOSED-END INVESTMENT COMPANY MEMBERS No. 8-14
COMPLIANCE MEMBERS No. 5-14
DERIVATIVES MARKETS ADVISORY COMMITTEE No. 18-14
ETF (EXCHANGE-TRADED FUNDS) COMMITTEE
ETF ADVISORY COMMITTEE No. 2-14
INVESTMENT ADVISER MEMBERS No. 8-14
SEC RULES MEMBERS No. 9-14
SMALL FUNDS MEMBERS No. 7-14
UNIT INVESTMENT TRUST MEMBERS No. 1-14 RE: ACTION REQUIRED BY FUNDS RELYING ON CFTC RULE 4.5 THAT HAVE NOT REAFFIRMED THE EXCLUSION

Registered investment companies (“funds”) whose advisers are currently excluded from commodity pool operator (“CPO”) registration under CFTC Rule 4.5 are required to reaffirm the notice of exclusion 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 was required by March 3, 2014. [\[2\]](#) The National Futures Association (“NFA”) has informed us that over 1,200 Rule 4.5 notices were not reaffirmed by March 3. NFA has asked us to remind our members of the requirement to complete the affirmation process as soon as possible if you have not yet done so. NFA also asks that you update your firm’s contact information promptly when changes occur, to ensure that your firm receives NFA’s email reminders.

For your convenience, we reiterate below the general guidance NFA has issued regarding how to complete the affirmation process through the NFA’s Exemption System. [\[3\]](#) 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- Failure to affirm an active exclusion from CPO registration will result in the exclusion being withdrawn after the 60-day period has ended.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.

Please contact us if you have any questions.

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Senior Counsel

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Senior Associate Counsel

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 ICI Memorandum No. 27747 (Dec. 6, 2013), available at http://www.ici.org/my_ici/memorandum/memo27747.

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