

CLIENT MEMORANDUM

CFTC Adopts Amendments to CPO Reporting Rules

December 6, 2016

AUTHORS

Rita M. Molesworth | Deborah A. Tuchman | James E. Lippert | Michael A. DeNiro

The Commodity Futures Trading Commission has approved amendments to rules governing commodity pool financial reports.¹ While the CFTC has adopted the changes to such rules largely as proposed, it has expanded the available relief in response to comments. Most notably, the final amendments permit the use of certain enumerated non-U.S. accounting principles on Form CPO-PQR and provide audit relief with respect to “insider” pools.

The amendments become effective on December 27, 2016. The adopting release indicates that CFTC staff will continue to grant bespoke relief from the financial reporting requirements with respect to stub year reports, but only in “*exceptional circumstances involving unique situations.*”

U.S. GAAP Alternatives

CFTC Rule 4.22 currently permits a commodity pool operator (“CPO”) to use International Financial Reporting Standards (“IFRS”) in lieu of U.S. GAAP in the preparation and computation of the annual and periodic financial statements of a

¹ Commodity Pool Operator Financial Reports, 81 Fed. Reg. 85147 (Nov. 25, 2016). For more information on the CFTC’s proposal to amend the CPO reporting rules, please see our client memorandum entitled “CFTC Proposes Amendments to CPO Reporting Rules” (Aug. 11, 2016), available [here](#).

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non-U.S. pool, subject to certain conditions. The amendments expand such relief to permit the use of accounting principles, standards or practices followed in the United Kingdom, Ireland, Luxembourg and Canada. Specifically, under amended Rule 4.22, a CPO is permitted to use such enumerated alternatives to U.S. GAAP (in addition to IFRS) if the jurisdiction under whose laws the pool was organized follows such principles and certain other criteria, substantially similar to those currently required to use IFRS, are satisfied.

In order to claim the relief, a CPO must file a notice with the National Futures Association (“NFA”).

Form CPO-PQR

In response to comments on the proposal, the CFTC has also amended CFTC Rule 4.27 to permit the CPO of a non-U.S. pool to use such alternative accounting principles in connection with reporting on Form CPO-PQR, provided the CPO has also elected to use such alternative accounting principles when preparing the qualifying pool’s annual and periodic financial statements. The relief will be available immediately upon the effectiveness of the amendments notwithstanding anything to the contrary contained in Form CPO-PQR or its instructions.

Initial (Stub) Year Annual Reports

Rule 4.22 will now permit the CPO of a commodity pool that was formed shortly before the end of the pool’s first fiscal year to deliver an unaudited annual report for that year, provided, among other things:

- i. the period from the date on which the pool first received funds to the end of the pool’s first fiscal year (the “stub period”) is four months or less;
- ii. the pool had no more than 15 participants during such period;
- iii. the gross capital contributions during such period did not exceed \$3 million;
- iv. the CPO obtains waivers from pool participants;² and
- v. the audited annual report for the pool’s subsequent fiscal year also covers the stub period.³

² The CPO may obtain the waiver in advance by including it in the pool’s subscription agreement, provided the waiver is separately signed and dated by the participant.

³ As a result of the amendments to Rule 4.22, a CPO of a liquidating pool may not rely on the relief from the audit requirement if it has not previously prepared an audited annual report for the pool.

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A CPO may exclude certain “insider” participants and their contributions in determining whether the exemption is available. In addition to those persons originally enumerated in the proposal, the category of insiders now includes affiliates of the pool’s CPO or CTA, and their principals. A CPO is not required to obtain waivers from certain insiders.

The stub year audit relief is not self-executing and requires the CPO to file a notice with NFA.

“Insider” Pools

Under Rule 4.22, as amended, a CPO will be permitted to deliver an unaudited annual report for any fiscal year during which the only participants in the relevant pool were the CPO, the pool’s CTA, any person controlling, controlled by or under common control with the CPO or CTA, or any principal of the foregoing. The CPO would have to obtain waivers from each of the pool’s participants in order to claim such relief. Notably, the CPO would be required to deliver an audited annual report at least once during the life of the pool.

If you have any questions regarding this memorandum, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), James E. Lippert (212-728-8945, jlippert@willkie.com), Michael A. DeNiro (212-728-8147, mdeniro@willkie.com) or the Willkie attorney with whom you regularly work.

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