

CLIENT ALERT

CFTC Adopts Family Office Exemption, BDC Exclusion, JOBS Act Consistency

Amendments include additional relief for CPOs and CTAs

December 6, 2019

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In a recent open meeting that included robust discussions among the Commissioners, the Commodity Futures Trading Commission adopted several Part 4 rule amendments initially proposed in October 2018.¹ These amendments codify certain no-action and exemptive relief previously provided to commodity pool operators and commodity trading advisors.

Notably, two proposals included in the October 2018 release have been withdrawn pending further consideration by the CFTC and its Staff. Deferred for the time being is the portion of the proposal regarding offshore pools. CFTC Staff indicated at the meeting that it would submit to the Commissioners recommendations with respect to non-U.S. managers and their non-U.S. pools.² This aspect of the rule proposal generated significant commentary, including from long time practitioners who identified the need for clarity around this issue. As a result, CFTC Advisory 18-96 remains in place.³

Also not adopted at this time is the proposal that would have subjected most claims of exemption from CPO registration under Rule 4.13 to certain statutory disqualification provisions. The Commodity Exchange Act permits the CFTC to refuse

¹ Please see our client memorandum entitled “CFTC Proposes to Codify Prior Relief For CPOs and CTAs” (Oct. 10, 2018), available [here](#).

² The CFTC had proposed to rescind CFTC Advisory No. 18-96 and promulgate a rule to exempt from registration certain non-U.S. domiciled CPOs with respect to their wholly non-U.S. offered investment vehicles and subject them to a filing requirement.

³ CFTC Rule 3.10(c)(3), which was raised indirectly and became relevant to the October 2018 proposal, remains unchanged as well.

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to register or to condition the registration of persons who have engaged in certain bad acts. Commenters had recommended that the Commission clarify the process around the application of statutory disqualifications.⁴

Family Offices

The CFTC has adopted new registration exemptions for CPOs and CTAs to family offices. Consistent with previous no-action relief issued in 2012 and 2014, the new rules will exempt CPOs of pools offered privately to *family clients* and the CTAs that advise them, provided such CPOs and CTAs comply with the SEC's exclusion for *family offices* from the definition of investment adviser.⁵ In a change from the proposal, the family office exemptions will be self-executing. As a result, a family office will not be required to make initial or annual filings with either the Commission or the National Futures Association in order to perfect a claim for exemption as a family office. The SEC's family office rule is also self-executing.

Each family office CPO and CTA must maintain records and submit to special calls from the Commission and its Staff to substantiate its eligibility to rely on the exemption.

The CFTC also confirmed that the line of letters issued over the years to family investment entities will remain valid.

JOBS Act Consistency

CFTC Rules 4.7(b) and 4.13(a)(3) have been amended to eliminate language that conditioned the relief on not marketing the pool to the public. These amendments harmonize CFTC rules with SEC Rule 506(c) of Regulation D and SEC Rule 144A, which permit general solicitation or advertising, subject to specific conditions. The SEC rules were amended pursuant to the Jumpstart Our Business Startups Act of 2012 (aka the JOBS Act). Advertising undertaken with respect to any such pool must comply with the provisions of either Regulation D or Rule 144A.

Business Development Companies

Business development companies (BDCs) that engage in swap transactions were brought within the scope of the Commodity Exchange Act as a result of Dodd Frank's inclusion of swaps in the definition of commodity interest. CFTC Staff provided no-action relief to the operators of BDCs in 2012, conditioned on, among other things, filing a notice and complying with *de minimis* commodity interest trading thresholds similar to those that apply to registered investment companies (RICs). The CFTC has amended Rule 4.5 to specifically exclude the operator of a BDC from the definition of

⁴ The October 2018 release did not propose to subject family offices to the statutory disqualification provision.

⁵ SEC Rule 202(a)(11)(G)-1. The SEC defines "family client" generally to include current and former family members and their estates, certain family office employees, charities funded by family clients, trusts funded by or existing for the benefit of family clients, and companies owned exclusively by, and operated for the sole benefit of, family clients.

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CPO. Among other conditions, the BDC must elect to be treated as a BDC under the Investment Company Act of 1940 and the BDC may not be marketed as a commodity pool or otherwise as a vehicle for trading in commodity interests.

RIA is the CPO

The CFTC also amended Rule 4.5 to identify the registered investment adviser to a BDC or RIC as the excluded CPO. This is a change from the way the rule has operated in the past, where the rule called for claims to be filed by the RIC itself. Any RIC with a previously filed claim of exclusion will have until March 1, 2021 to comply with this provision.

PQR and PR Reporting Relief

The definition of “reporting person” in Rule 4.27 has been amended to provide that any registered CPO that operates only pools for which it is excluded or exempt from registration is not required to file Form CPO-PQR. Similarly, any registered CTA that advises solely its own commodity pools or has no discretion at all over client accounts is not required to file Form CTA-PR.

Non-U.S. Investors

To date, non-U.S. persons have been permitted to invest in a 4.13(a)(3) pool as a result of no-action relief and Staff guidance. The CFTC has amended the rule to permit all “qualified eligible persons,” which term includes non-U.S. persons, to participate in a 4.13(a)(3) pool.

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