

CLIENT ALERT

CFTC Permits Registered Investment Advisers to Avoid Registration

Private Fund Advisers May Rely on the No Action Pending Further Agency Action

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Commodity Futures Trading Commission Staff issued a no-action letter to relieve certain private fund advisers from having to register as a CPO or CTA.¹ The relief also anticipates a formal rulemaking to potentially reinstate former CFTC Rule 4.13(a)(4), with certain new conditions. The principal requirement in the no-action letter (the “NAL”) is that the party claiming the relief be registered with the SEC as an investment adviser. The relief is immediately available to commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) that are registered investment advisers and operate and advise privately offered commodity pools in which each participant is a qualified eligible person (“QEP”) as defined in CFTC Rule 4.7.²

¹ See CFTC Staff No-Action Letter 25-50.

² https://www.cftc.gov/PressRoom/PressReleases/9160-25?utm_source=govdelivery

The Relief

The NAL grants relief provided the following conditions are satisfied:

1. The person is currently, or otherwise would be, required to be registered as a CPO for its commodity pool operations, or relies on an existing registration exemption;
2. The person is currently an SEC registered investment adviser;
3. The interests of the pool are privately offered;
4. Each pool participant is a QEP;
5. The person files a Form PF with the SEC with respect to the pool(s) covered by the NAL (Form PF is a joint form between the CFTC and the SEC); and
6. The person files a notice with the CFTC via email (and not through the NFA's exemption notice filing system, which is typical for certain other CFTC exemptions).

The filing of a claim of relief consistent with the NAL is considered effective upon filing. The relief would exempt the CPO from registration as a CPO, and also from registration as a CTA with respect to the pool for which it also provides commodity trading advice (analogous to the relief currently available to CTAs to exempt pools under CFTC Rule 4.14(a)(5)).

Redemption Right Not Required

Under the current exemption framework, a registered CPO of a pool generally must offer investors a right to redeem from such pool in the event the CPO later decides to operate such pool pursuant to a registration exemption. Notably, the NAL provides that a CPO relying on the NAL would not be required to offer a redemption right to current investors.

Potential Reinstatement of CFTC Rule 4.13(a)(4)

CFTC Staff issued the NAL to provide interim relief in anticipation of a formal rulemaking to reinstate former CFTC Rule 4.13(a)(4). That rule provided similar registration relief to CPOs that operated pools privately offered to certain sophisticated investors. Rule 4.13(a)(4) was first enacted in 2003, and later rescinded in the wake of Dodd Frank in 2012. Prior to its rescission, the rule was widely relied upon by hedge fund and private equity fund managers. Notably, old Rule 4.13(a)(4) did not require registration as an SEC investment adviser as a condition to claiming the exemption.

Next Steps

It is anticipated that the availability of the NAL relief will have an immediate impact on a number of private fund managers, including hedge fund managers that are currently registered as CPOs and rely on CFTC Rule 4.7

compliance exemptions. In addition, private equity fund managers that currently claim relief from CPO registration under CFTC Rule 4.13(a)(3) (*de minimis* relief) may choose to rely instead on the NAL relief to avoid limitations on their commodity interest trading. CPOs and CTAs should carefully consider whether claiming the relief is appropriate for their business at this time.

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If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

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