

## CLIENT MEMORANDUM

# CPO Delegation Alert: Action Required

May 13, 2014

## AUTHORS

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The Division of Swap Dealer and Intermediary Oversight of the Commodity Futures Trading Commission yesterday issued a letter setting forth the criteria upon which a delegating commodity pool operator<sup>1</sup> may request no-action relief from registration on an expedited basis.<sup>2</sup> The letter was issued following the receipt of numerous requests for registration no-action relief from delegating CPOs.

A CPO (the “Delegating CPO”) that delegates its investment management authority to another person who is registered as a CPO (the “Designated CPO”), and which delegation meets the criteria in the letter, may avail itself of the expedited process. The relief is not self-executing. A Delegating CPO must file a no-action request in the form attached to the

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<sup>1</sup> A general partner, managing member, trustee and director, among others, would be considered a commodity pool’s CPO.

<sup>2</sup> CFTC Staff Letter No. 14-69 (May 12, 2014). On August 14, 2012, the Division of Swap Dealer and Intermediary Oversight provided guidance relating to delegation by a CPO in its responses to several frequently asked questions on the then recent amendments to the CPO and commodity trading advisor compliance obligations (the “FAQ”). The letter seems to qualify the prior FAQ to the extent that it requires (i) that the delegation of investment management authority and, to the extent applicable, provision of joint and several liability be memorialized in a written agreement and (ii) the submission of a request for no-action relief. For more information, please see our memorandum dated August 15, 2012, entitled [CFTC Releases Guidance for CPOs and CTAs](#).

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## **CPO Delegation Alert: Action Required**

Continued

letter. The request must include specified certifications and acknowledgments from both the Delegating CPO and Designated CPO. CFTC Staff will respond to each request for relief made pursuant to the letter.

CFTC Staff noted in the letter that no-action relief may be appropriate even where the criteria set forth in the letter are not satisfied. In such circumstances, CFTC Staff will continue to consider requests for relief on an individual and non-expedited basis.

### **Criteria for Expedited Relief**

The criteria for requesting expedited relief generally are as follows:

1. A CPO's delegation of investment management authority is made pursuant to a legally binding document.
2. The Designated CPO is registered as a CPO.
3. The Delegating CPO:
  - a) does not participate in the solicitation of participants for the commodity pool;
  - b) does not manage any property of the commodity pool; and
  - c) is not subject to a registration disqualification under Section 8a(2) or 8a(3) of the Commodity Exchange Act ("CEA").
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.
5. The books and records of the Delegating CPO with respect to the commodity pool are maintained in accordance with CFTC recordkeeping rules.
6. If the Delegating CPO and the Designated CPO are each a non-natural person, they must be under common control.
7. If the Delegating CPO is a non-natural person, then the Delegating CPO and the Designated CPO each must undertake to be jointly and severally liable for any violation of the CEA or CFTC rules in connection with the operation of the commodity pool.
8. If the Delegating CPO is a natural person who is not an Unaffiliated Board Member (as defined in the letter), then the Delegating CPO and Designated CPO each must undertake to be jointly and severally liable for any violation of the CEA or CFTC rules in connection with the operation of the commodity pool.

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## CPO Delegation Alert: Action Required

Continued

9. If the Delegating CPO is an Unaffiliated Board Member, then the Delegating CPO must be subject to liability as a member of the board of directors or other governing body in accordance with the laws under which the commodity pool is established.

CFTC Rule 140.99 governs the CFTC's no-action process. The request should be sent electronically and in hard copy to the Division of Swap Dealer and Intermediary Oversight.

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If you have any questions concerning the foregoing or would like additional information, please contact Rita M. Molesworth (212-728-8727, [rmolesworth@willkie.com](mailto:rmolesworth@willkie.com)), Deborah A. Tuchman, (212-728-8491, [dtuchman@willkie.com](mailto:dtuchman@willkie.com)), Lisa J. Eskenazi (212-728-8509, [leskenazi@willkie.com](mailto:leskenazi@willkie.com)), Jonathan C. Burwick (212-728-8108, [jburwick@willkie.com](mailto:jburwick@willkie.com)), James E. Lippert (212-728-8945, [jlippert@willkie.com](mailto:jlippert@willkie.com)) or the Willkie attorney with whom you regularly work.

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May 13, 2014

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