CLIENT MEMORANDUM

CFTC Proposes Amendments to CPO Reporting Rules

August 11, 2016

AUTHORS

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

The Commodity Futures Trading Commission recently proposed amendments to its rules governing commodity pool annual reports and periodic account statements.[1] Such amendments, if adopted, would generally permit the commodity pool operator ("CPO") of a pool organized in a non-U.S. jurisdiction to use certain enumerated non-U.S. accounting principles in lieu of U.S. GAAP when preparing the pool's financial statements.[2] In addition, the amendments would permit the CPO of a newly formed commodity pool to distribute an unaudited annual report with respect to the pool's first fiscal year if certain conditions are met. These amendments would generally codify exemptive relief previously provided by the CFTC staff.[3]

---

1 Commodity Pool Operator Annual Report, 81 Fed. Reg. 51828 (Aug. 5, 2016) (the "Proposal").

2 While the Proposal would permit the use of non-U.S. accounting principles for both annual reports and periodic account statements, the Proposal does not address Form CPO-PQR. Form CPO-PQR is currently required to be prepared in accordance with U.S. GAAP.

3 *See, e.g.*, CFTC Exemptive Letter No. 14-10 (Jan. 31, 2014) (permitting the use of Luxembourg GAAP); CFTC Exemptive Letter No. 16-50 (Mar. 31, 2016) (permitting the CPO of a fund that commenced operations in November 2015 to deliver an annual report for the period covering the date of the fund's commencement of trading through December 31, 2016).

Comments on the CFTC's proposed rules are due on or before September 6, 2016.

U.S. GAAP Alternatives

In 2009, the CFTC adopted rules to permit CPOs to use International Financial Reporting Standards ("IFRS") in lieu of U.S. GAAP for the financial statements of non-U.S. pools, subject to certain conditions. The CFTC now proposes to expand such relief and permit the CPO to a non-U.S. pool to also use accounting principles, standards or practices followed in the United Kingdom, Ireland, Luxembourg and Canada in the preparation and computation of annual and periodic financial statements. Specifically, the CFTC is proposing to amend CFTC Rule 4.22 to permit the use of such accounting principles (in addition to IFRS) provided that (i) the jurisdiction under whose laws the pool was organized follows such principles and (ii) certain other criteria, substantially similar to those currently required to use IFRS, are satisfied.

The relief would not be self-executing. A CPO would be required to file a notice with the National Futures Association ("NFA") that would include, among other things, a representation by the CPO that the criteria described above have been satisfied.

Initial (Stub) Year Annual Reports

The proposed amendments would also permit the CPO to a pool that was formed[4] shortly before the end of its first fiscal year to deliver an unaudited annual report for such fiscal year.[5] This audit exemption would be available to the CPO of a pool that was formed three or fewer months prior to the end of the pool's fiscal year. This exemption would be conditioned upon the pool having no more than 15 participants and no more than $1.5 million in capital contributions. The CPO would also be required to: (i) obtain a written waiver from each pool participant of the right to receive an audited annual report[6] and (ii) attach a specified legend to both the unaudited annual report and the pool's first audited annual report. In addition, the pool's first audited annual report would be required to cover the period from the date of the pool's formation to the end of the pool's first 12-month fiscal year.

Notably, a CPO would be permitted to disregard certain participants and their contributions in determining whether the exemption is available, including: (i) the pool's CPO and commodity trading advisor and any principal thereof; (ii) children,

---

4 CFTC Rule 4.22(g)(1) provides that a pool is deemed to be formed on the date on which the CPO first receives funds, securities or other property for the purchase of an interest in the pool, rather than the date on which the pool commences trading operations. We note, however, that the CFTC staff has also granted relief from the audit requirement with respect to certain pools based on the date on which such pools commenced trading.

5 Under the Proposal, a CPO that has not previously delivered an audited annual report to a pool's participants would not be able to avail itself of existing liquidation audit relief.

6 The CPO would have to maintain such waivers in accordance with the recordkeeping requirements of Rule 4.23.

siblings or parents of any of the foregoing; (iii) spouses of any of the foregoing; (iv) relatives of any of the foregoing with the same principal residence; and (v) entities wholly owned by any of the foregoing (collectively, "Insiders").

The exemption would not be self-executing. A CPO would be required to file a notice with the NFA of its intent to deliver an unaudited annual report to participants in a qualifying pool.

Other "Insider" Funds

In the Proposal, the CFTC seeks comment on whether it should amend its rules to permit the CPO of a pool whose only participants are Insiders to claim relief from the audit requirement with respect to such pool. The CFTC has also asked whether such an amendment, if adopted, should impose a capital contribution limit or any other conditions.

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.

Willkie Farr & Gallagher LLP is an international law firm with offices in New York, Washington, Houston, Paris, London, Frankfurt, Brussels, Milan and Rome. The firm is headquartered at 787 Seventh Avenue, New York, NY 10019-6099. Our telephone number is (212) 728-8000 and our fax number is (212) 728-8111. Our website is located at www.willkie.com.

August 11, 2016