

Investment Management Alert

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CFTC Adopts Bad Actor Disqualifications for CPO Exemptions

June 11, 2020

Key Points:

- A CPO will be prohibited from claiming an exemption from registration under CFTC Regulation 4.13 if it or any of its principals has in their backgrounds a statutory disqualification under the Commodity Exchange Act.
- A CPO that currently claims the 4.13(a)(3) *de minimis* exemption will no longer be able to rely on such exemption if as of March 1, 2021, it cannot certify that neither it nor any of its principals have in their backgrounds a statutory disqualification.

On June 4, 2020, the Commodity Futures Trading Commission (CFTC) unanimously voted to amend Regulation 4.13(b) to require any person claiming an exemption from registration as a commodity pool operator (CPO) pursuant to Regulation 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) (i.e., the *de minimis* exemption) or 4.13(a)(5) (“4.13 Exemptions”), to certify that neither it nor any of its principals have in their backgrounds a statutory disqualification that would require disclosure under the Commodity Exchange Act (CEA) section 8a(2) (“Statutory Disqualifications”),¹ unless such Statutory Disqualification arises from a matter that was disclosed in connection with a previous application for registration where such registration was granted.²

Effective 60 days after the final rule is published in the Federal Register, a CPO newly claiming a 4.13 Exemption through the National Futures Association (NFA) online exemption system will be required to certify that neither it nor its principals have any Statutory Disqualifications in their backgrounds. CPOs that have already claimed a 4.13 Exemption will be required to make the Statutory Disqualification certification beginning with their reaffirmation notices to be filed with the NFA within 60 days of December 31, 2020 (i.e., by no later than March 1, 2021). Any CPO who is unable to affirmatively make the certification regarding Statutory Disqualifications can appeal to the CFTC for relief—although the CFTC noted that it expects such relief “to be infrequent and supported by a strong factual and legal basis, so as to avoid undermining the purposes of the [rule].”

Notably, the new knock-out for Statutory Disqualifications in Regulation 4.13(b) does not apply to CPO exemption claims for family offices under Regulation 4.13(a)(6), which the CFTC noted do not give rise to the same investor protection concerns. The

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CFTC will, however, issue a “special call” to family offices for information regarding whether their CPOs and principals are subject to any Statutory Disqualifications and consider such information in determining whether to extend the exemption knock-out for Statutory Disqualifications to family offices in the future.

¹ 7 U.S.C. § 12a(2). Such disqualifications include, among others, if (a) any prior CFTC registration status has been suspended or revoked; (b) registration in any capacity has been denied by the CFTC within the past five years for any reason under CEA section 8a(3); (c) a person has been permanently or temporarily enjoined from acting in various capacities that are regulated by the CFTC or Securities and Exchange Commission or engaging in activity involving crimes such as embezzlement, theft, fraud or misappropriation; or (d) within the past 10 years a person has been convicted of (i) any felony involving commodities or securities activity or a crime such as embezzlement, theft, fraud or misappropriation, or (ii) any violation of the commodities or securities laws of the United States (among other federal laws) involving a crime such as embezzlement, theft, fraud or misappropriation (including aiding or abetting such a crime).

² The CFTC notes that this exception to the rule will only be available to registered CPOs who disclosed the Statutory Disqualifications in connection with their CPO registrations applications, and were granted registration nonetheless, and are wanting to claim a 4.13 Exemption on behalf of certain commodity pools that otherwise meet the relevant 4.13 Exemption’s criteria.

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