

Investment Management Alert

Akin Gump
STRAUSS HAUER & FELD LLP

CFTC Proposes to Codify Existing Staff-Issued Relief from Registration and Other Compliance Requirements for CPOs and CTAs

October 16, 2018

Key Points

- CPOs and CTAs of offshore commodity pools, family offices and business development companies would be exempt from registering with the CFTC.
- Certain registered CPOs and CTAs would not be required to file Form CPO-PQR and/or Form CTA-PR.
- Existing 4.13(a)(3) exempt CPOs would be required to certify that neither they nor their principals are subject to any statutory disqualifications under the CEA.

In response to comments received from its “Project KISS” initiative, the Commodity Futures Trading Commission (CFTC) is proposing to codify in Part 4 of its rules, several existing staff letters and advisories concerning registration exemptions as well as reporting and recordkeeping requirements applicable to certain commodity pool operators (CPOs) and commodity trading advisors (CTAs).¹ In addition, the proposal, if adopted, would also require any person claiming the *de minimis* exemption from registration as a CPO pursuant to § 4.13(a)(3) (among others) to certify that neither it nor any of its principals is subject to any statutory disqualifications under the Commodity Exchange Act (CEA), section 8a(2) or 8a(3)². While the proposal would not provide much significant new relief from CFTC requirements, the proposal is an important step towards providing greater regulatory certainty for many CPOs and CTAs who currently rely on relief issued through staff letters and interpretive guidance that can be revoked or modified without notice, or worse, ignored by CFTC commissioners in determining whether to bring an enforcement action for non-compliance with the underlying CFTC rules.³

Registration Relief

The proposal, if adopted, is intended to codify and would supersede several existing staff letters and advisories. CPOs and CTAs relying on such existing letters and advisories would be required to claim the codified relief pursuant to the procedures set

Contact

Jan-Paul Bruynes

Partner
jpbruynes@akingump.com
+1 212.872.7457
New York

Jason M. Daniel

Partner
jdaniel@akingump.com
+1 214.969.4209
Dallas

Mereen Miran

Director of Business
Development
mmiran@akingump.com
+1 212.407.3050
New York

forth in the proposal which are generally consistent with current exemption claim procedures under the CFTC's CPO and CTA regulations in Part 4.

Offshore Commodity Pools (Would Replace Advisory 18-96⁴). Proposed § 4.13(a)(4) would allow a person to claim an exemption from registration as a CPO with respect to any commodity pool organized and operated outside of the United States, with no meetings or administrative activities occurring within the United States, where solely non-U.S. capital and investors are solicited or accepted and there is generally no other nexus to the United States. The proposed § 4.13(a)(4) exemption criteria is based on staff Advisory 18-96, which provides relief for registered CPOs of qualifying offshore commodity pools with respect to certain CFTC disclosure, reporting and recordkeeping requirements. Importantly, the proposed § 4.13(a)(4) would go farther than Advisory 18-96 in that the relief provided would be an actual exemption not conditioned on the CPO being registered. It could be claimed on a pool-by-pool basis so that a CPO could claim the exemption with respect to any qualifying offshore pools while simultaneously registering as a CPO (and complying with applicable CFTC regulatory requirements) with respect to other pools for which CPO registration is required. The CFTC specifically requests comment as to whether CPOs who would rely on the proposed § 4.13(a)(4) should be subject to the disclosure requirements in § 4.13 regarding reliance upon the exemption, the reduced regulatory requirements applicable when relying upon the exemption and a description of the criteria that must be satisfied to rely upon the exemption.

Relatedly, the proposal would also codify the recordkeeping location relief in Advisory 18-96 for offshore commodity pools. Proposed amendments to § 4.23 would allow a registered CPO whose main business address is in the United States to maintain the original books and records of any offshore commodity pool that it operates at the main business address of such pool located outside the United States, subject to certain conditions consistent with Advisory 18-96.

Family Offices (Would Replace Letter 12-37⁵ and Letter 14-143⁶). Proposed § 4.13(a)(8) would exempt from CPO registration any person operating a commodity pool that meets the "family office" definition under the Securities and Exchange Commission (SEC) "family office" rule that excludes family office investment advisers from the Investment Advisers Act of 1940 (the Family Office Rule) and who restricts its investment advisory and solicitation activities solely to "family clients," as defined under the Family Office Rule. Proposed § 4.14(a)(11) would similarly exempt from CTA registration any person whose commodity trading advice is directed solely to "family clients," as defined in the Family Office Rule. The CFTC notes its expectation that family offices relying on the proposed § 4.13(a)(8) CPO exemption would already be eligible for relief from CTA registration pursuant to existing § 4.14(a)(5), which provides an exemption from CTA registration for persons exempt from CPO registration that only advises commodity pools for which they are exempt under § 4.13.

Business Development Companies (Would Replace Letter 12-40⁷). Proposed amendments to § 4.5 would exclude from the definition of a CPO, any registered investment adviser with respect to a business development company (BDC), that has elected an exemption from registration as an investment company with the SEC under the Investment Company Act of 1940 and meets the other applicable requirements of § 4.5, such as the limitation on use derivatives primarily for bona fide hedging purposes and annual notice filing with the National Futures Association. These amendments would also clarify that the registered investment adviser of a registered

investment company is also excluded from the CPO definition (as opposed to the registered investment company itself being excluded). The CFTC expects that registered investment advisers of BDCs would be able to rely upon the existing exclusion from the CTA definition in § 4.6 for CTAs whose commodity interest trading advice is solely incidental to its operation of an investment vehicle for which it is excluded from the CPO definition pursuant to § 4.5.

General Solicitation (Would Replace Letter 14-116⁸). The proposal would amend §§ 4.7(b) and 4.13(a)(3) so that CPOs eligible to engage in general solicitation or marketing activities with respect to the sale or resale of units in a commodity pool under Rule 506(c) or Rule 144A under the Securities Act of 1933, as amended, can still qualify for the CPO exemptive relief in either Part 4 regulation. The relief is in response to the SEC's rule amendments implementing the JOBS Act of 2012.

Forms CPO-PQR and CTA-PR Reporting Relief (Would Replace Letters 14-115⁹ and 15-47¹⁰)

The proposal would amend the definition of "reporting person" in the Part 4 regulation that requires the filing of the CFTC's Forms CPO-PQR and CTA-PR, § 4.27. The revised definition would exclude certain persons who, despite qualifying for an exclusion or exemption from CPO registration under §§ 4.5 or 4.13, or an exemption from CTA registration under §§ 4.14(a)(4) or 4.14(a)(5), register nonetheless. As a result of such amendments, Form CPO-PQR would not be required to be filed by any registered CPO that only operates pools for which such person is either exempt from CPO registration or excluded from the CPO definition, and Form CTA-PR would not be required to be filed by any registered CTA that either does not direct client accounts or directs only the accounts of commodity pools for which such person is registered as a CPO (and thus already is required to file Form CPO-PQR) or exempt from registration as a CPO (and thus is not required to file Form CPO-PQR).

4.13(a)(3) Pool Participants

The proposal would amend § 4.13(a)(3) to confirm staff's position as stated in a previous advisory that non-U.S. persons, regardless of financial sophistication, are eligible to participate in 4.13(a)(3) pools.

New Requirement for CPO Exemptions

The proposal would add a new § 4.13(a)(6), which would require persons claiming an exemption from CPO registration pursuant to §§ 4.13(a)(1) through 4.13(a)(5) to represent that neither the person nor any of its principals is subject to any statutory disqualifications, unless such statutory disqualifications arise from a matter which was disclosed in connection with a previous registration application (if such applications was granted) or which was disclosed more than 30 days prior to such claim of CPO exemption. Notably, while the statutory disqualifications would apply to CPO exemption claims for offshore commodity pools under the proposed § 4.13(a)(4), they would not apply to CPO exemption claims for family offices under the proposed § 4.13(a)(8), which the CFTC noted do not give rise to the same investor protection concerns because family offices are prohibited from soliciting the general public.

¹ The Notice of Proposed Rulemaking is available at <https://www.cftc.gov/sites/default/files/2018-10/Federalregister100918.pdf>. Public comments from interested parties are due 60 days after the proposal is published in the Federal Register.

² 7 U.S.C. §§ 12a(2)-(3). For instance, the CFTC may refuse to register a person who has been temporarily or permanently enjoined by order not to act as a CFTC registrant, or to refrain from engaging in financially criminal activities, or who, within ten years preceding the application for registration with the CFTC, has been convicted of a felony for criminal activities involving commodity interests or securities, or been found by the CFTC or another governmental body or agency to have violated the CEA, CFTC regulations, or securities laws.

³ See recent statement from the Securities and Exchange Commission Chairman Jay Clayton regarding the limitations of staff guidance for information regarding status of guidance (available at <https://www.sec.gov/news/public-statement/statement-clayton-091318>).

⁴ Advisory 18-96, available at <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm>.

⁵ CFTC Staff Letter 12-37 (Nov. 29, 2012), available at <https://www.cftc.gov/idc/groups/public/%40llettergeneral/documents/letter/12-37.pdf>.

⁶ CFTC Staff Letter 14-143 (Nov. 5, 2014), available at <https://www.cftc.gov/idc/groups/public/%40llettergeneral/documents/letter/14-143.pdf>.

⁷ CFTC Staff Letter 12-40, available at <https://www.cftc.gov/idc/groups/public/%40llettergeneral/documents/letter/12-40.pdf>.

⁸ CFTC Staff Letter 14-116, available at <https://www.cftc.gov/idc/groups/public/@llettergeneral/documents/letter/14-116.pdf>.

⁹ CFTC Staff Letter 14-115 (Sept. 8, 2014), available at <https://www.cftc.gov/idc/groups/public/%40llettergeneral/documents/letter/14-115.pdf>.

¹⁰ CFTC Staff Letter 15-47, available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@llettergeneral/documents/letter/15-47.pdf>.