

CFTC Votes to Propose Repeal of Popular Registration Exemptions

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On January 26, 2011, the Commodity Futures Trading Commission (the "CFTC") voted unanimously to propose several changes to the CFTC rules that, if approved, will have a direct and potentially significant impact on funds that are currently operated as exempt commodity pools.

Repeal of Registration Exemptions

Most significantly, the CFTC proposes to repeal two popular exemptions relied on by commodity pool operators ("CPOs"), the commodity funds themselves, and a related exemption relied upon by commodity trading advisors ("CTAs"), the fund's managers or advisers. Specifically, the CFTC would repeal:

- Rule 4.13(a)(3), which provides an exemption for CPOs that engage in only de minimus commodity trading activity;
- Rule 4.13(a)(4), which provides an exemption for CPOs that only accept investors that are qualified eligible persons or, solely for entities either qualified eligible persons or accredited investors; and
- Rule 4.14(a)(8)(i)(D), which currently provides an exemption for CTAs of commodities funds exempt under Rule 4.13(a)(3) or 4.13(a)(4).

If the CFTC proposal becomes effective in its current form, CPOs and CTAs that previously relied on these exemptions may be required to register with the CFTC through the National Futures Association ("NFA"), become NFA members and comply with disclosure and periodic reporting requirements about commodities trading activities. In addition, key personnel may be required to register with the NFA and comply with continuing education and certification requirements.

In taking this action, which is currently only a proposal, the CFTC said the changes are necessary to synchronize with changes to the US securities laws mandated by the Dodd-Frank Act and to avoid regulatory arbitrage.

Reporting by CPOs and CTAs

The CFTC has also proposed new reporting Forms CPO-PQR and CTA-PR. These reporting forms are similar to the Form PF proposed by the Securities and Exchange Commission (the "SEC") to be used by private fund advisers that are subject to SEC oversight. The reporting forms proposed by the CFTC and SEC are coordinated to avoid duplicative reporting by dually-registered entities. The CFTC has said that the information required by these reports will provide basic information about the operations and strategies of private funds that will allow the CFTC and SEC to formulate a baseline picture of potential systematic risk across the entire private funds industry. The information required by Forms CPO-PQR and CTA-PR would be confidential (non-public) to the extent permitted under applicable law.

Other Proposals

The CFTC is also proposing to:

- Amend Rule 4.7 to require CPOs that offer interests only to qualified eligible persons to include certified financial statements in annual reports to investors;
- Amend Rule 4.7 to conform the CFTC definition of accredited investor to the changes adopted by the SEC;
- Require all individuals and entities claiming exemption under rules 4.5, 4.13 and 4.14 to reaffirm their notice of claim of exemption or exclusion on an annual basis; and
- Amend required risk disclosure statements to include a description of certain risks specific to swap transactions.

Finally, the CFTC has proposed changes that are applicable only to registered investment companies.

The CFTC proposals will be published in the Federal Register and are subject to public comment before becoming effective. It is anticipated that

the proposals will be final and binding before the effective date of the Dodd-Frank Act in July 2011. We will continue to monitor the progress of these proposals and will release further client updates as events warrant.

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