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Skadden, Arps, Slate, Meagher & Flom LLP
& Affiliates

CFTC Staff Issues More No-Action Letters to Commodity Pool Operators

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Anastasia T. Rockas
New York
212.735.2987
anastasia.rockas@skadden.com

Mark D. Young
Washington, D.C.
202.371.7680
mark.d.young@skadden.com

Heather Cruz
New York
212.735.2772
heather.cruz@skadden.com

Maureen A. Donley
Washington, D.C.
202.371.7570
maureen.donley@skadden.com

Daniel S. Konar II
Chicago
312.407.0509
daniel.konar@skadden.com

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Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

Over the last month, the Division of Swap Dealer and Intermediary Oversight (DSIO) of the Commodity Futures Trading Commission (CFTC) issued four letters providing exemptive, no-action and interpretative relief to commodity pool operators (CPOs) on a variety of issues. This alert briefly summarizes the relief provided.

Self-Executing CPO Delegation Relief

In CFTC Staff Letter 14-126, DSIO granted no-action relief concerning the delegation of CPO registration that relaxes some of the conditions in the similar no-action letter issued by DSIO earlier this year (CFTC Staff Letter 14-69). CFTC Staff Letter 14-69 provided a streamlined process by which an entity that CFTC staff views to be the CPO of a commodity pool (the Delegating CPO) can have a third party (the Designated CPO) register as the commodity pool's CPO in lieu of the Delegating CPO.[1]

CFTC Staff Letter 14-126 revises certain conditions from Letter 14-69 as a result of concerns that had been raised by industry trade groups. Most notable among the changes is that the relief available is now self-executing, eliminating the need to submit any filing to DSIO staff (and the need for DSIO staff to respond to each such filing) in order to claim CPO delegation relief.

The conditions relaxed under CFTC Staff Letter 14-126 include:

- Pursuant to a legally binding document, the Delegating CPO has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool.

  CFTC Staff Letter 14-126 makes clear that a Delegating CPO and Designating CPO each may satisfy this condition even if additional parties have been appointed as investment managers of the commodity pool, as long as the additional parties are properly registered, or exempt or excluded from registration as commodity trading advisors (CTAs).

- The Delegating CPO does not participate in the solicitation of participants for the commodity pool.

  CFTC Staff Letter 14-126 makes clear that a Delegating CPO may satisfy this condition even if it participates in the solicitation of participants in the commodity pool in its capacity as a registered (or exempt) associated person of the Designated CPO.

- The Delegating CPO does not manage any property of the commodity pool.

  CFTC Staff Letter 14-126 makes clear that management of property would not include responsibilities of an administrative, clerical or ministerial nature. CFTC Staff Letter 14-126 also makes clear that

1 See our May 13, 2014, Client Alert "CFTC Staff issues Long-Awaited CPO Delegation Relief," which provides an overview of the conditions needed to claim relief under Letter 14-69.

this condition may be satisfied even if a Delegating CPO that is a principal or employee of the Designated CPO or of the commodity pool's CTA has management responsibilities over the commodity pool's property, provided that (1) such management authority is exercised in the capacity as principal or employee of the Designated CPO or of the commodity pool's CTA, and (2) such management authority is subject to supervision as a principal or employee of the Designated CPO or of the commodity pool's CTA.

- The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO.

  CFTC Staff Letter 14-126 revises this condition to remove any reference to CFTC Rule 1.31.

The other conditions in Letter 14-69 were not revised and continue to apply.

DSIO stated in this letter that it will no longer consider requests for CPO delegation no-action relief under CFTC Staff Letter 14-69, and that anyone with a pending request for relief under CFTC Staff Letter 14-69 should consider withdrawing the request and instead relying on the self-executing relief under CFTC Staff Letter 14-126.

JOBS Act-Related Relief

In CFTC Staff Letter 14-116, DSIO provided CPOs with exemptive relief from the public marketing restrictions in CFTC Rules 4.7(b) and 4.13(a)(3) in order to facilitate the CPOs' related commodity pools ability to make use of the recent amendments to Rules 144A(d)(1) and 506(c) under the Securities Act of 1933 (part of the JOBS Act), which now permit general solicitation and general advertising in limited circumstances.

Each commodity pool for which the CPO is claiming this relief must be relying on the exemption under Rule 506(c) permitting general solicitation or general advertising in offering the commodity pool's securities or must be relying on amended Rule 144A(d)(1) to resell the commodity pool's securities using general solicitation or general advertising.

The relief under CFTC Staff Letter 14-116 is not self-executing. In order for a CPO to claim this relief, it must make a filing with DSIO identifying each commodity pool for which the CPO is claiming relief.

Wholly Owned Subsidiary Annual Financial Statement and Form CPO-PQR Relief

In CFTC Staff Letter 14-112, DSIO provided no-action relief that will allow the CPO of a "Parent Pool" to consolidate the financial statements of a wholly owned trading subsidiary into the Parent Pool's annual report in lieu of filing a separate annual report for the wholly owned trading subsidiary. Similarly, this relief allows the CPO of a Parent Pool to consolidate the Form CPO-PQR data for a wholly owned trading subsidiary onto the Parent Pool's Form CPO-PQR in lieu of reporting the data for the wholly owned trading subsidiary separately on the Form CPO-PQR.

This relief is only available where the CPO of the Parent Pool is also the CPO of the wholly owned trading subsidiary and where the investors in the Parent Pool share pro rata in exposure to the wholly owned trading subsidiary.

A CPO claiming this relief must (1) prepare and file the annual reports for the Parent Pool containing audited financial statements for the Parent Pool that include the holdings, gains and losses, and other financial statement amounts attributable to the wholly owned trading subsidiary; and (2) provide a consolidated Form CPO-PQR for the Parent Pool that includes the data for the wholly owned trading subsidiary.

The relief available under CFTC Staff Letter 14-112 is not self-executing. In order for a CPO to claim this relief, it must make a filing with DSIO identifying each commodity pool for which the CPO is claiming relief. Accordingly, advisers and fund sponsors that routinely structure funds using wholly owned trading subsidiaries may want to add these filings as a part of their fund compliance checklists.

Additional Third-Party Recordkeeper Relief

The exemptive relief in CFTC Staff Letter 14-114 effectively broadens the list of permissible third-party recordkeepers that appears in CFTC Rules 4.7(b)(4) and 4.23(c). Under the relief, a CPO is permitted to use any non-enumerated third-party recordkeeper as long as the CPO continues to satisfy the remaining applicable requirements of CFTC Rules 4.7(b)(4) and 4.23(c). No filing is necessary to claim this relief (other than satisfying the existing filing requirements in CFTC Rules 4.7(b)(4) and 4.23(c)).

CPO-PQR Filing Relief

In CFTC Staff Letter 14-115, DSIO provided exemptive relief from the Form CPO-PQR filing requirement to any CPO that has claimed an exclusion under CFTC Rule 4.5 or an exemption under CFTC Rule 4.13(a)(3) for all of its commodity pools. No filing is necessary to claim this relief.