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CFTC Staff Issues Long-Awaited CPO Delegation Relief

On May 12, 2014, the Division of Swap Dealer and Intermediary Oversight (Division) of the Commodity Futures Trading Commission (CFTC) released its long-awaited commodity pool operator (CPO) delegation no-action letter (No-Action Letter).¹ The No-Action Letter is intended to provide a streamlined process by which the entity that CFTC staff views to be the CPO of a commodity pool (the Delegating CPO)² may request no-action relief effectively permitting a third party (the Designated CPO) to register as the commodity pool's CPO in lieu of the Delegating CPO. To this end, the No-Action Letter includes a standard form letter (Form Letter) for the Delegating CPO to submit to the Division in order to claim the relief provided by the No-Action Letter.³

In order to qualify for the relief provided, a Delegating CPO and Designated CPO must satisfy the following criteria, some of which may pose problems for certain Delegating CPOs and/or Designated CPOs:

- 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 (Pool).
- The Delegating CPO does not participate in the solicitation of participants for the Pool.
- The Delegating CPO does not manage any property of the Pool.
- The Designated CPO is registered with the CFTC as a CPO.
- The Delegating CPO is not subject to statutory disqualification.
- There is a business purpose for the Designated CPO being a separate entity from the Delegating CPO that is not solely to avoid CPO registration by the Delegating CPO;
- The books and records of the Delegating CPO with respect to the Pool are maintained by the Designated CPO in accordance with CFTC Rule 1.31.
- If the Delegating CPO and the Designated CPO each is a non-natural person, then one of the CPOs controls, is controlled by, or is under common control with the other CPO.

¹ See [CFTC Staff Letter 14-69](#).

² CFTC staff historically has viewed the CPO to be the general partner of a pool organized as a partnership, the managing member of a pool organized as a limited liability company, and the board of directors of a pool organized as a corporation. However, in February 2012 the CFTC determined that the directors of a registered investment company that is a commodity pool are not the CPOs of such pool. See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252, 11259 (Feb. 24, 2012). Notwithstanding this conclusion, the No-Action Letter makes clear that the directors of a pool that is not a registered investment company continue to be viewed by CFTC staff as the CPOs of such pool.

³ For a Word version of the Form Letter, please contact any of the Skadden attorneys listed on this client alert or your regular Skadden contact. Additionally, please note that the Division stated that it also will evaluate requests for delegation no-action relief from CPOs that cannot satisfy the criteria for this streamlined process.

- If the Delegating CPO is a non-natural person, then the Delegating CPO and the Designated CPO must execute a legally binding document in which each undertakes to be jointly and severally liable for each other's violations of the CEA or the CFTC's rules in connection with the operation of the Pool.
- If the Delegating CPO is a natural person and is not an unaffiliated member of the Pool's board of directors,⁴ then the Delegating CPO and the Designated CPO must execute a legally binding document in which each undertakes to be jointly and severally liable for each other's violations of the CEA or the CFTC's rules in connection with the operation of the Pool.
- If the Delegating CPO is an unaffiliated member of the Pool's board of directors, then the Delegating CPO must be subject to liability as a board member in accordance with the laws under which the Pool is established.

The Form Letter requires that a Delegating CPO represent that each of the applicable criteria are satisfied, so CPOs that may be unable to make this representation might be required to request individualized no-action relief.

The No-Action Letter states that the Division intends to issue responses to each Form Letter submitted by a Delegating CPO.

⁴ The No-Action Letter defines an unaffiliated member of a Pool's board of directors as "a natural person who is a voting member of the board of directors or an equivalent body of [the Pool] who: (i) is not a member of the management or an employee of the Designated CPO or any affiliate thereof; (ii) is not a substantial beneficial owner of the Designated CPO or any affiliate thereof or of any company holding more than 5% of such Designated CPO's beneficial ownership interests or any affiliate thereof; and (iii) has no other interest or relationship that could interfere with his/her ability to act independently of management of the Designated CPO or any affiliate thereof or any company holding more than 5% of such Designated CPO's beneficial ownership interest or any affiliate thereof." The No-Action Letter explains that examples of affiliations that could implicate clause (iii) may include the director being a "material service provider" or investment counterparty to the Designated CPO or any of its affiliates, or within the prior three years the director having been employed by, or served as a principal of, a material service provider or investment counterparty to the Designated CPO or any of its affiliates.