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*Practice Group:**Investment
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NFA Issues Guidance on Reaffirmation of CPO/CTA Exemptions

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Introduction

Earlier this year, the Commodity Futures Trading Commission (“CFTC”) promulgated amendments to its regulations governing commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) that now require, among other conditions, any person that claims an exclusion from the CPO definition under CFTC Regulation 4.5, an exemption from CPO registration under CFTC Regulation 4.13, or an exemption from CTA registration under CFTC Regulation 4.14(a)(8), to annually reaffirm the applicable notice of exclusion or exemption within 60 days of the calendar year end. Accordingly, any such notice on file as of December 31, 2012, must be reaffirmed by March 1, 2013. Failure to do so will be deemed to be a request to withdraw the exemption or exclusion and, therefore, will result in the automatic withdrawal of the exemption or exclusion on March 1, 2013.¹

When the CFTC added the reaffirmation requirement, it also reimposed commodity interest trading limits for registered investment companies under Regulation 4.5 and, in accordance with the Dodd-Frank Act, included most swaps in the definition of commodity interests for purposes of that regulation and Regulation 4.13. The CFTC also rescinded the CPO registration exemption for private fund operators under Regulation 4.13(a)(4), so CTAs that had been advising such pools may no longer claim exemption under Regulation 4.14(a)(8) on that basis. Persons that have previously filed notices claiming exemptions from registration must therefore review their operations in light of these regulatory amendments to determine if they may reaffirm the notices.²

Reaffirming Relief

The National Futures Association (“NFA”), which the CFTC has authorized to process applications for registration and claims for exemption, has now issued [guidance](#) regarding the reaffirmation process. Persons with exemption notices on file may now access NFA’s Exemption System at <http://www.nfa.futures.org/NFA-electronic-filings/exemptions.HTML> to complete the reaffirmation process. It is important to note that, while CTA exemption may be claimed at the firm level only, CPO exemptions must be claimed on a pool-by-pool basis.

Failure to reaffirm exemption notices may have serious consequences. For registered CPOs or CTAs, withdrawal of the exemption/exclusion caused by the failure to reaffirm will result in the firm being subject to the CFTC’s Part 4 regulations for that pool regardless of whether the firm otherwise remains eligible for the exemption/exclusion. For non-registrants, the withdrawal of the exemption may subject the firm to enforcement action by the CFTC.

¹ See *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations*, 77 Fed. Reg. 11252 (Feb. 24, 2012); correction notice published at 77 Fed. Reg. 17328 (March 26, 2012).

² For more information regarding the CFTC amendments to Regulations 4.13 and 4.5, please see our prior alerts from [February 16, 2012](#) and [February 17, 2012](#).

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Firms That Relied Upon Rescinded Regulation 4.13(a)(4)

Many firms that previously relied upon the exemption in rescinded Regulation 4.13(a)(4) may be able to claim an exemption instead under Regulation 4.13(a)(3) if the pools in question abide by the commodity interest trading limits in the latter. If firms make this switch and file the new exemption claim under Regulation 4.13(a)(3) by December 31, 2012, they will be required to reaffirm the new claim by March 1, 2013. If the new exemption is filed after December 31, 2012 (*e.g.*, in connection with a newly formed pool), the first reaffirmation thereof will be required by March 1, 2014. Other firms that previously relied upon the exemption in rescinded Regulation 4.13(a)(4) will now be required to register as CPOs, but, due to the highly sophisticated nature of the investors in their pools, these CPOs may be able to claim relief under Regulation 4.7 from certain disclosure, recordkeeping and reporting requirements otherwise applicable. A notice to claim this regulatory relief must be filed in accordance with Regulation 4.7, which is *not* subject to annual reaffirmation.

NFA Notification and Recordkeeping

NFA will provide an annual email reminder of the reaffirmation requirement, which will be sent to the email contact on file in NFA's Exemption System. Firms should therefore keep that contact information current in case of personnel changes and also maintain a tickler system regarding the new annual reaffirmation requirement to avoid inadvertent lapses of exemption/exclusion claims.

NFA will also maintain records in its BASIC System regarding the reaffirmation process so that investors and other entities with which the person claiming exemption does business can review that information. This information will be important for those entities conducting their due diligence for NFA Bylaw 1101 compliance.

Conclusion

Given the upheaval in the regulatory landscape for CPOs and CTAs coming in 2013, it is important that firms claim all of the exemptions/exclusions available to them.³ For commodity pools, this may be done on a pool-by-pool basis. Firms that must register for the first time or that are already registered may continue to operate certain pools as if they were unregistered, if certain conditions are met. One of those conditions is to maintain a proper exemption/exclusion claim, which is now an annual requirement rather than a one-time matter.

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³ The CFTC staff recently provided a deferred compliance date for operators of funds of funds and no-action relief from CPO registration for certain family offices. Please see our alerts dated [December 5, 2012](#) and [December 7, 2012](#).

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