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CFTC Adopts Final Harmonization Rules for Registered Investment Company Advisors Required to Register as CPOs Under 4.5; Also Adopts Changes Applicable to All CPOs

On August 13, 2013, the Commodity Futures Trading Commission issued its final rules (“Final Rules”)¹ applicable to registered investment companies whose advisers are now required to dually register as commodity pool operators (“Dually Registered CPOs”) as a result of changes made to CFTC Regulation 4.5 finalized in February 2012 (as described in a [Katten Client Advisory](#) of February 22, 2012).² The CFTC earlier had proposed to amend Part 4 of its regulations (“Part 4 Regulations”) to harmonize compliance obligations of such commodity pool operators (CPOs) (“Proposed Rules”)³ that were already subject to compliance requirements imposed by the Securities and Exchange Commission. Responding to comments received on the Proposed Rules, the CFTC altered its original approach to harmonize CFTC and SEC regulatory requirements applicable to Dually Registered CPOs and instead adopted a “substituted compliance”⁴ regime approach in the Final Rules.

The Final Rules permit compliance with the SEC requirements relating to disclosure, reporting and recordkeeping applicable to registered investment companies and their advisers (“SEC Regulatory Regime”) in lieu of compliance with substantially all of the CFTC’s relevant Part 4 Regulations. This approach stems from the CFTC’s determination that compliance with the regulatory objectives in its Part 4 Regulations largely can be accomplished by compliance with the SEC Regulatory Regime. In addition, the provisions of the Final Rules respond to many concerns raised in comments to the Proposed Rules that Dually Registered CPOs, if required to comply with existing Part 4 Regulations in addition to their obligations under the SEC Regulatory Regime, “may be subject to duplicative, inconsistent and possibly conflicting, disclosure and reporting requirements.”⁵

The Final Rules also amend certain provisions of Part 4 Regulations that will be applicable to all CPOs and commodity trading advisors (CTAs), including those relating to (i) signed acknowledgements to evidence receipt of disclosure documents, (ii) disclosure document updating time periods and (iii) third-party service providers for books and records.

¹ 17CFR Part 4, RIN 3038-AD75 (referred to herein as the “Final Rules Release”) is available [here](#).

² 17 CFR 4.5; *see* 77 F.R. 17328 (corr March 26, 2012).

³ 77 FR 11345 (Feb. 24, 2012).

⁴ Final Rules Release at 7.

⁵ Final Rules Release at 74.

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The use of the SEC Regulatory Regime in substituted compliance with Part 4 Regulations is not automatic, but elective. Therefore, Dually Registered CPOs electing to comply with the SEC Regulatory Regime must file a notice with the National Futures Association (NFA).⁶ Importantly, reliance upon the SEC Statutory Regime in lieu of compliance with Part 4 Regulations is conditioned upon a CPO's fulfillment of its obligations under the SEC Regulatory Regime; failure to do so may subject such CPO to both CFTC and SEC enforcement actions.⁷

Certain of the Final Rules' requirements will become effective immediately upon their publication in the Federal Register, whereas others will become effective 30 days after such publication. Effective dates may differ from compliance dates which, in some instances, occur not on a stated date but upon the happening of a specific event, such as when a disclosure document must be updated.⁸

Highlights of the Final Rules

Compliance with the SEC Regulatory Regime, together with certain other CFTC conditions mentioned below, will be deemed compliance with 4.21, 4.22(a) and (b), 4.24, 4.25 and 4.26 of the Part 4 Regulations

- Dually Registered CPOs of open-end management investment companies may satisfy the updating deadlines for disclosure documents contained in 4.26 of the Part 4 Regulations by complying with the applicable timeframes in excess of 12 months contained in the SEC Regulatory Regime.
- Although disclosure documents used by Dually Registered CPOs must be made available to NFA, there will not be a requirement to file such documents with NFA in accordance with the relevant Part 4 Regulations or concurrently with their SEC filings, and such documents will not be subject to NFA approval. Note that this relief will be conditioned on a notice filing with NFA claiming such relief.
- The use of a statutory prospectus and/or summary prospectus in connection with a registered investment company, if compliant with applicable provisions of the SEC Regulatory Regime, will be deemed compliant with the provisions of 4.24 and 4.25 of the Part 4 Regulations.
- The use of "break even disclosure" required by 4.24 of the Part 4 Regulations will be deemed satisfied if the disclosures comply with the relevant provisions of the SEC Regulatory Regime.
- The account statement distribution provisions of 4.22 of the Part 4 Regulations will be deemed satisfied if the current net asset value for a registered investment company is available and such company provides semi-annual and annual reports to its investors in compliance with the relevant provisions of the SEC Regulatory Regime.

New Obligations of Dually Registered CPOs in Addition to Those Imposed Under the SEC Regulatory Regime

- Dually Registered CPOs must file notice of use of the substituted compliance regime with NFA.
- A registered investment companies subject to the substituted compliance that has an operating history of less than three years must disclose the performance of all accounts and pools that are managed by its Dually Registered CPO and that have investment objectives, policies and strategies substantially similar to those of the offered pool.
- A registered investment company subject to the substituted compliance must file its financial statements (prepared in compliance with SEC requirements) with NFA and file notice requesting an extension to align the CFTC's financial statement filing deadline with that of the SEC.

⁶ Final Rules Release at 12 and 76.

⁷ Final Rules Release at 8.

⁸ Final Rules Release at 1.

Provisions Applicable to All CPOs and CTAs

- Signed acknowledgements to evidence receipt of disclosure documents will no longer be required.
- Third-party service providers will be permitted to maintain books and records.
- Disclosure documents subject to Part 4 Regulations may be updated on a 12-month cycle (replacing a nine-month update cycle).
- CPOs will be required to file a notice with NFA if a third-party service provider will be, or is intended to be, used for record keeping.

A “Fact Sheet” prepared by the CFTC about the Final Rules is available [here](#); a set of “Questions and Answers” is available [here](#).

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