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RECENT DEVELOPMENTS AFFECTING COMMODITY POOL OPERATORS AND COMMODITY TRADING ADVISORS

In this article, the authors lay out the various recent changes the CFTC has made to simplify certain regulations applicable to CPOs and CTAs and to close a perceived regulatory gap, as well as reporting relief measures that the CFTC and the NFA have afforded to CPOs and CTAs. They also discuss branch office registration relief for firms with APs temporarily away from their firm's main office and fingerprinting relief when obtaining fingerprint cards would be difficult or dangerous. They close with a description of the CFTC's proposed amendments related to its periodic systemic risk reports.

By Philip T. Hinkle and Audrey Wagner *

Late 2019 and the first half of 2020 saw several regulatory developments relevant to commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”), some resulting from the Commodity Futures Trading Commission planned rulemaking agenda while others came as a result of the CFTC staff and the National Futures Association (“NFA”) response to challenges the COVID-19 pandemic created for CPO and CTA registration and ongoing compliance. In December 2019, the CFTC finalized some, but not all, of the rule amendments to its Part 4 rules that it had proposed in October 2018 under former CFTC Chairman Christopher Giancarlo’s Project KISS initiative.¹ The Project KISS initiative was intended to examine where

CFTC rules could be simplified and made less costly for compliance.²

As the COVID-19 pandemic, and related market and business disruptions swept the world, the CFTC provided various reporting relief to CPOs and CTAs, which relief the NFA echoed. In addition, the NFA provided branch office registration relief to firms with Associated Persons (“APs”) temporarily in alternate locations from their firm’s main business address. The CFTC and NFA also provided fingerprinting relief to allow registrations of associated persons and listing of principals to continue despite social distancing and lockdown efforts that would make obtaining fingerprint cards for personnel difficult and potentially dangerous.

¹ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (Oct. 18, 2018).

² CFTC Requests Public Input on Simplifying Rules, CFTC Press Release (May 3, 2017), available at <https://www.cftc.gov/PressRoom/PressReleases/pr7555-17>.

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FORTHCOMING

- SEC ENFORCEMENT AND TRENDS

Finally, the CFTC proceeded with proposing certain amendments related to its periodic systemic risk reports on Form CPO-PQR. This article reviews each of these developments in turn.

CFTC PART 4 RULE AMENDMENTS

As noted above, the CFTC published in the Federal Register on December 10, 2019 several amendments to the regulatory framework applicable to certain CPOs and CTAs that the CFTC had initially proposed in October 2018.³ The amendments:

- codified a CPO exclusion for investment advisers of business development companies (“BDCs”) that had been relying on CFTC staff no-action relief, requiring a CFTC Rule 4.5 notice of exclusion filing with the NFA as soon as was practicable following January 9, 2020;
- clarified that the CPO exclusion for an entity operating as an investment company registered under the Investment Company Act of 1940 is available to the registered fund’s *investment adviser*;
- provided a CPO and CTA registration exemption for family offices and/or family clients as defined under Securities and Exchange Commission regulations;
- codified relief permitting general solicitation with respect to commodity pools operated by CPOs claiming relief under CFTC Rules 4.7(b) and 4.13(a)(3), as contemplated by the Jumpstart Our Business Startups Act (“JOBS” Act) and related SEC rules; and

- provided relief from filing CFTC Forms CPO-PQR and CTA-PR for certain classes of registered CPOs and CTAs.

These rule changes were intended to simplify certain regulations applicable to CPOs and CTAs. However, some of the amendments still required action on the part of a CPO or CTA in order to avail itself of the benefits of the relevant amendments, as described herein.

Business Development Companies

Part of this rulemaking effort directly affected investment companies that have elected to be exempt from registration under the 1940 Act as a BDC. Specifically, the CFTC amended Rule 4.5(a)(1) and (b)(1) to codify a CPO exclusion under CFTC No-Action Letter No. 12-40 for investment advisers to BDCs that trade in commodity interests.

The term “commodity interest” includes all futures, options on futures, commodity options, and swaps. BDCs generally do not trade more than a *de minimis* amount of commodity interests. However, the commodity interests that they do trade (typically interest rate and currency swaps) cause such BDCs to be deemed to be commodity pools pursuant to the CFTC’s regulations, especially since swaps came under the CFTC’s regulatory jurisdiction in 2012 following the 2008 financial crisis.

New Filing Requirement for BDCs. The amendments to CFTC Rule 4.5 superseded Letter 12-40. As a result, investment advisers to BDCs that currently trade commodity interests to a *de minimis* extent were required to file an electronic notice of exclusion with the NFA as soon as practicable after these amendments went into effect after January 9, 2020.⁴ Going forward,

³ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, 84 Fed. Reg. 67343 (Dec. 10, 2019); Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Family Offices and Exempt CPOs, 84 Fed. Reg. 67355 (Dec. 10, 2019). Although proposed together in October 2018, the CFTC published the rule amendments in these two separate releases.

⁴ CFTC Rule 4.5(c)(2)(iii) requires that the investment adviser claiming the exclusion under CFTC Rule 4.5(b)(1) must operate the BDC in such a manner that the commodity interest trading of the BDC, other than for *bona fide* hedging purposes, meets one of two *de minimis* trading tests and the BDC may not market participations in the BDC to the public as a commodity pool or as a vehicle for trading in commodity interests. Under the first *de minimis* commodity interest trading test, the initial

investment advisers to new BDCs trading commodity interests and existing BDCs that begin trading commodity interests will need to file the electronic notice of exclusion with the NFA prior to operating in this capacity.

New Annual Reaffirmation Requirement for BDCs. After filing an initial notice of exclusion, investment advisers to BDCs will be required to reaffirm the electronic notice of exclusion with the NFA annually, within 60 days following each calendar year-end. This is a noteworthy change for BDCs, as the relief under Letter 12-40 did not require annual reaffirmation.

Historically, the NFA has sent e-mail reminders regarding the reaffirmation process to entities relying on CPO or CTA registration exclusions and/or exemptions that are subject to reaffirmation. These reminders typically have been sent in early December of each year. When setting up a filing account with the NFA, investment advisers to BDCs may wish to provide a compliance group e-mail address as part of the contact information, in order to ensure that multiple individuals receive such reminders. Investment advisers to BDCs also may want to establish log-in credentials for several individuals for the NFA filing account as a backup, in case the individual responsible for the process departs the firm or is otherwise unavailable during the reaffirmation period.

New Disclosure Requirement for BDCs. CFTC Rule 4.5(c)(2) requires BDCs to disclose in writing to each participant, whether existing or prospective, that the BDC is operated by a person who has claimed an exclusion from the definition of the term CPO and therefore is not subject to registration or regulation as a CPO. The relief under Letter 12-40 was not subject to a condition requiring similar disclosure. Such disclosure should be included in the notes to the BDC's next regular financial statements, as well as in its next offering document update produced in the normal course after making the initial notice of exclusion filing with the NFA. This disclosure also should be included in such documents on a going-forward basis.

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margin required to establish the commodity interests cannot exceed 5% of the liquidation value (net asset value) of the BDC. Under the alternative test, the net notional value of commodity interests cannot exceed 100% of the liquidation value of the BDC. These same conditions applied under Letter 12-40.

Registered Investment Companies

The CFTC amended Rule 4.5(a)(1) to change the entity that is excluded from the definition of CPO from “the investment company registered as such under” the 1940 Act to *the investment adviser* to the registered fund. This change aligns the exclusion with the CFTC's stated expectation that the registered fund's investment adviser would be the appropriate entity to operate, in a registered CPO capacity, a registered fund that cannot meet the conditions of the CFTC Rule 4.5 exclusion.⁵ New CFTC Rule 4.5 exclusion notices that are filed electronically with the NFA on or after the January 9, 2020 effective date of the rule change need to identify the investment adviser (rather than the registered fund) as the excluded CPO.

CFTC Rule 4.5(a)(1) historically has identified the registered fund as the excluded CPO, and CFTC Rule 4.5(b)(1) identified the “qualifying entity” as the registered fund as well. As a result, for a registered fund that is a series of a multi-series Delaware or Massachusetts statutory or business trust or Maryland corporation (or has a similar structure), the CFTC Rule 4.5 exclusion notices often identified the trust or corporation as the excluded CPO, and the individual series as the commodity pool or “qualifying entity” for which the CPO was excluded. For a registered fund that is a stand-alone trust or corporation and does not use the series structure (including many registered closed-end funds), the CFTC Rule 4.5 exclusion notices often have identified the registered fund as both the excluded CPO and the commodity pool. However, other CFTC Rule 4.5 exclusion notices have identified the investment adviser to the registered fund as the excluded CPO and the registered fund (whether a separate series or a stand-alone entity) as the qualifying entity, consistent with amended Rule 4.5(a)(1).

Compliance Period. Recognizing the potential burden of changing the required filings in the NFA exemptions system, the CFTC is permitting registered funds currently relying on CFTC Rule 4.5 until March 1, 2021 to come into compliance. During the exclusion reaffirmation process at the end of 2020 and beginning of 2021, the CFTC expects that investment advisers will file new notices identifying the relevant investment adviser as the excluded CPO and then allow the existing notice identifying the trust/corporation/registered fund as the excluded CPO to expire. Registered funds also will

⁵ Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012).

need to review their related disclosures to ensure that this change is reflected, if necessary.

It is suggested that investment advisers not try to effect this change prior to the 2020-2021 reaffirmation period. Rather, they should wait until the NFA has had the time to make updates to its Electronic Filings System to accommodate the changes to CFTC Rule 4.5(a)(1). The process will involve creating a co-CPO relationship in the NFA exemptions system between the investment adviser and the trust or company, as applicable; and filing a new notice with the NFA.

Family Offices

The CFTC amended Rules 4.13 and 4.14 to codify CPO and CTA registration exemptions, respectively, for family offices and family clients meeting the definitions of the same terms under Rule 202(a)(11)(G)-1 of the Investment Advisers Act of 1940 and which trade in commodity interests. These amendments codify CFTC staff no-action relief under No-Action Letters No. 12-37 and 14-143, on which family offices have been able to rely since 2012 and 2014, respectively. The CPO and CTA registration exemptions are self-executing. As such, there is no notice filing requirement in order to rely on these exemptions.

Recordkeeping Considerations for Family Offices. Exempt family offices are now subject to the same recordkeeping requirements and special call authority of the CFTC, as set forth in Rules 4.13 and 4.14, which are applicable to all other exempt CPOs and CTAs relying on these rules. With regard to records, an exempt family office is required to maintain records prepared in connection with its activities as an exempt CPO or CTA for five years after the first date of preparation (during the first two of which, the records must be kept in a readily accessible location). In addition, as of the compliance date of January 9, 2020, because the rule amendments supersede the no-action relief, exempt family offices need to create and maintain an internal record documenting the exemption on which they are relying, as well as their qualifications for the relevant exemption.

Implications of Changes for Registered CPOs and CTAs Doing Business with Registered Funds, BDCs, and Family Offices

The CFTC exclusion and exemption changes could have implications for the registered CPOs and CTAs where registered funds, BDCs, or family offices invest with registered CPOs and CTAs. NFA Bylaw 1101 prohibits any NFA member (which would cover all

registered CPOs and most registered CTAs) from doing futures trading-related business with any entity that is required to be registered with the CFTC, unless the latter entity is registered with the CFTC and an NFA member, or is appropriately exempt. Registered CPOs and CTAs generally establish the registered or excluded/exempt status of investors and clients by requesting that certain representations be made in subscription agreements and/or other account-opening documents. Because the registered CPO or CTA must assess the reasonableness of the response the investor or client provides, these representations often require the investor or client to cite the exemption or no-action relief on which it is relying. To the extent that these CFTC Part 4 rule changes would change those representations (*e.g.*, because BDCs will no longer be relying on no-action relief but instead will rely on an exclusion that the BDC's investment adviser has claimed), registered CPOs and CTAs may need to amend the representations they request from their investors and clients.

JOBS Act Amendments

The CFTC amended CFTC Rules 4.7(b) and 4.13(a)(3) to codify relief permitting general solicitation as contemplated by the JOBS Act, and each of SEC Regulation D and SEC Rule 144A under the Securities Act of 1933 for commodity pools operated by CPOs that claim relief under such CFTC rules. The amendments also eliminate the need to submit any additional notice beyond that already required to claim relief under such CFTC rules in order to engage in such permitted solicitation activities.

The amendments removed marketing restrictions from Rules 4.7(b) and 4.13(a)(3), which historically have prevented a CPO operating a commodity pool under such rules from engaging in general solicitation or general advertising. Certain general solicitation and advertising activities are otherwise permissible in accordance with provisions of Regulation D and Rule 144A that were adopted in accordance with the requirements of the JOBS Act. CFTC Exemptive Letter No. 14-116 provided relief for CPOs to rely on Rules 4.7(b) and 4.13(a)(3) even if the CPOs or their resellers engaged in certain general solicitation and marketing activities in accordance with Regulation D or Rule 144A. Among other things, the relief had been conditioned on the CPO filing a notice with the CFTC staff, claiming the relief in writing.

The rule amendments supersede the relief under CFTC Exemptive Letter No. 14-116. Under the amended rules, the ability for CPOs operating pools in reliance on CFTC Rules 4.7(b) and 4.13(a)(3) to engage

in general solicitation and general advertising as contemplated by the JOBS Act, Regulation D, and Rule 144A is now self-executing.

Changes to the Definition of “Reporting Person” for CFTC Forms CPO-PQR and CTA-PR

The CFTC amended Rule 4.27(b) to remove the requirement that registered CPOs and registered CTAs, which operate only in the capacity as exempt CPOs or CTAs, file CFTC Forms CPO-PQR and CTA-PR. These changes codify exemptive relief that has been available to such registered CPOs and CTAs through CFTC Exemptive Letters Nos. 14-115 and 15-47.

The Rule 4.27(b) amendment narrows the types of CTAs that must file Form CTA-PR to those CTAs operating in a registered capacity. As a result, the rule amendment goes further than the previous exemptive relief. The amendment also excludes from the Form CTA-PR filing requirement a registered CTA that acts only in an exempt capacity in reliance on Rule 4.14(a)(4) and (a)(5), because the CTA is advising commodity pools for which it also serves as the registered or exempt CPO, respectively. Under the previous exemptive relief, Form CTA-PR relief was only available to CTAs that were not considered to be directing any client accounts. Registered CTAs that also conducted registered or exempt CPO business could not qualify for the relief and thus needed to file a Form CTA-PR, generally consisting of all zeros. The CFTC had determined that the value of such a filing would be outweighed by the additional burden imposed on the CTA to make this extra filing.

Taking Advantage of the New Reporting Relief. The NFA administers the CFTC Forms CPO-PQR and CTA-PR filing process. On March 2, 2020, the NFA published a Notice to Members that provides instructions for CTAs on how to take advantage of the Form CTA-PR filing relief. CTAs that are eligible for the CFTC Form CTA-PR reporting relief should so indicate in their annual NFA CTA Questionnaire by answering “No” to the question “Does the firm currently direct any trading of commodity interest accounts?”⁶ This is the same question that CTAs that do not direct any trading of commodity interest accounts answer in the negative to turn off their Form CTA-PR filing requirement.⁷ As of this writing, the NFA had not issued

⁶ Relief from CTA-PR filing requirement for CTAs that solely direct trading of pools for which the firm operates as a registered or exempt CPO, NFA Notice to Members No. I-20-09 (Mar. 2, 2020).

⁷ Relief from CTA-PR Filing Requirement for Commodity Trading Advisors that DO NOT Direct Trading of Commodity

public guidance on how CPOs are to take advantage of the Form CPO-PQR relief.

Amendment to CFTC Rule 4.13(a)(3) Investor Eligibility Condition

The CFTC also amended Rule 4.13(a)(3) to provide that any investor that meets the definition of a “qualified eligible person” in Rule 4.7, which would include any “non-United States person” (as defined in the rule regardless of that investor’s sophistication), would be eligible to invest in a Rule 4.13(a)(3) commodity pool. Many CPOs already had been operating their pools in reliance on certain CFTC staff FAQs or staff guidance allowing such investors to participate in a Rule 4.13(a)(3) commodity pool.⁸

Application of Statutory Disqualification Prohibitions for Exempt CPOs

In the CFTC’s December 2019 rulemaking, it notably withdrew an aspect of the October 2018 proposed rulemaking that would have codified an exemption from CPO registration based on CFTC Advisory 18-96.⁹ At that time, the CFTC also did not act on another aspect of the proposed rulemaking to add a statutory disqualification prohibition applicable to CPOs and their principals operating under the CPO registration exemptions under Rules 4.13(a)(1) through (a)(5). However, in a subsequent rulemaking announced and unanimously voted for on June 4, 2020, the CFTC finalized this rule with some modifications from the proposal. In contrast to the original proposal, the applicable statutory disqualifications will be limited to those enumerated in Commodity Exchange Act Section 8a(2) rather than those listed in Sections 8a(2) and (3).¹⁰

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Interest Accounts, NFA Notice to Members No. I-15-19 (July 30, 2015).

⁸ CFTC Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations. *See also* CFTC Letter No. 04-13 (Apr. 14, 2004).

⁹ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 Fed. Reg. 52902 (Oct. 18, 2018).

¹⁰ Registration and Compliance Obligations for Commodity Pool Operators and Commodity Trading Advisors: Prohibiting Exemptions on Behalf of Persons Subject to Certain Statutory Disqualifications; 85 Fed. Reg. 40877 (July 8, 2020). Some

Under the amended rule, CPOs claiming or reaffirming an exemption under CFTC Rule 4.13(a)(1), (2), (3), or (5) will be required to represent that neither the CPO nor any of its principals has in its background a statutory disqualification that would require disclosure under Section 8a(2), unless the matter was previously disclosed in an application for registration where such registration was granted. Alternatively, the CPO must request exemptive letter relief or apply for CPO registration. In adopting this amendment, the CFTC noted that, prior to this rulemaking, CPOs and their principals generally have not been able to register as such if they have the relevant statutory disqualifications, but CPOs operating in reliance on CFTC Rule 4.13 have not been subject to such a restriction. Unlike the balance of the December 2019 rulemakings, which sought to reduce burdens and simplify CFTC regulations, the amended rule “seeks to close that regulatory gap.”

The CFTC’s application of certain statutory disqualifications to CFTC Rule 4.13 exempt CPOs and their principals will require such exempt CPOs to develop and implement a process to classify all applicable individuals and entities as principals or not, and then identify whether any identified principals are subject to a statutory disqualification. This will likely create significant new compliance costs for the affected CPOs.¹¹

For new claims of exemption from CPO registration, the effective date of this rulemaking is September 6, 2020. CPOs currently relying on a CFTC Rule 4.13

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examples of the statutory disqualifications in CEA Section 8a(2) include (among others): a prior registration with the CFTC having been suspended (and the period of the suspension has not expired) or having been revoked; a listing or registration with the NFA having been refused within the previous five years; and a felony criminal conviction or plea of guilty within the preceding 10 years of a crime related to trading commodity interests, a crime related to conducting a business in the financial services sector or in the course of being employed by an entity in the financial services sector (examples: securities broker/dealer, investment adviser, transfer agent, clearing agency, investment company, commodity pool operator, commodity trading advisor, etc.), or a crime involving embezzlement, theft, extortion, fraud, fraudulent conversion, misappropriation of funds, securities or property, forgery, counterfeiting, false pretenses, bribery, or gambling.

¹¹ Press Release, CFTC to Hold an Open Commission Meeting on June 4, *available at* <https://www.cftc.gov/PressRoom/Events/opaeventopenmeeting060420>.

exemption will need to come into compliance by March 1, 2021, which compliance date coincides with the end of the annual reaffirmation period for CPOs operating under these exemptions.

Conclusion Regarding the CFTC Part 4 Regulatory Changes

Although implementing these changes necessitated relevant CPOs and CTAs taking certain actions, the rulemakings, with the exception of the application of the statutory disqualification to CPOs exempt from registration under CFTC Rule 4.13, are intended to: (1) simplify the regulatory landscape for CPOs and CTAs without reducing the protections or benefits provided by those regulations; (2) increase public awareness about registration and filing relief available, by incorporating commonly relied-upon no-action or exemptive relief in CFTC regulations; and (3) generally reduce the regulatory burden of CFTC regulations without sacrificing the CFTC’s customer protection and other regulatory interests.

CFTC AND NFA RELIEF FOR REGISTERED CPOS AND CTAS IN RESPONSE TO DISRUPTIONS CAUSED BY COVID-19 PANDEMIC

On March 20, 2020, the CFTC Division of Swap Dealer and Intermediary Oversight (“DSIO”) issued industry-wide no-action relief to permit registered CPOs additional time to make certain regulatory filings and issue certain reports that would otherwise have been due in the near term.¹² On March 23, 2020, the NFA issued a companion Notice to Members addressing the NFA filing requirements that correspond to those covered in the CFTC relief.¹³ In addition, the NFA stated to the industry on March 13, 2020 that it would not take disciplinary action against NFA members, if those firms do not list as branch offices home offices or other remote locations where their associated persons are temporarily working for business continuity purposes due to the COVID-19 pandemic.¹⁴ Finally, in late April, the CFTC and NFA provided relief from the fingerprinting

¹² No-Action Positions for Commodity Pool Operators in Response to the COVID-19 Pandemic, CFTC No-Action Letter No. 20-11 (Mar. 20, 2020).

¹³ Coronavirus (COVID-19) Update – Regulatory Relief for CPOs and CTAs, NFA Notice to Members I-20-15 (Mar. 23, 2020).

¹⁴ Coronavirus Update — NFA Branch Office Requirements, NFA Notice to Members I-20-12 (Mar. 13, 2020).

requirement for registering APs and listing principals, which was extended in July.¹⁵

CFTC and NFA Reporting Relief in Recognition of COVID-19 Disruptions

In CFTC No-Action Letter No. 20-11, DSIO stated that it would not recommend that the CFTC take enforcement action against any registered CPO for failure to comply with certain regulatory deadlines related to upcoming Form CPO-PQR filings, annual report filings, and distribution of periodic account statements. Specifically, the relief provided for the following CFTC Form CPO-PQR:

- Small and Mid-Sized CPOs could file their annual Form CPO-PQR risk report as late as May 15, 2020. Otherwise, this filing would have been due at the end of March (90 days following calendar year-end).
- Large CPOs could file their quarterly report on Form CPO-PQR for the first quarter of 2020 as late as July 15, 2020. Otherwise, this filing would have been due at the end of May (60 days following first calendar quarter-end). Note that as of the date the CFTC provided this no-action relief, Large CPOs' Form CPO-PQR for the period ended December 31, 2019 had already been filed.
- The NFA provided corresponding relief for its Form PQR filing requirements under NFA Compliance Rule 2-46. The NFA also automatically extended the filing period in its Easyfile system for applicable commodity pools' reports.

Commodity Pool Annual Reports:

- For any pool annual report that was due on or before April 30, 2020, CPOs had an additional 45 days past the due date of the filing in which to file the report with the NFA and distribute the report to

participants. This would cover commodity pools with a fiscal year-end of December 31 or January 31, and commodity pools that ceased trading on or before January 31. CPOs could still request an additional 90 days to file beyond the original due date of the annual report in order to have a total of 180 days from the end of the pool's fiscal year to file and distribute an annual report. This request must be submitted to the NFA in accordance with the process set forth in CFTC Rule 4.22(f).

- The NFA provided corresponding relief for its commodity pool annual report filing requirement under NFA Compliance Rule 2-13. The NFA also automatically extended the filing period in its Easyfile system for applicable commodity pools' reports.

Commodity Pool Periodic Account Statements:

- For any commodity pool periodic account statement for periods ending on or before April 30, 2020, CPOs had 45 days from the end of the reporting period to distribute to participants such statement. For commodity pools operated under the full CFTC Part 4 regime (retail commodity pools), these periodic account statements are distributed monthly for commodity pools with net assets of more than \$500,000. For retail commodity pools with net assets of \$500,000 or less and commodity pools operated under CFTC Rule 4.7(b), these periodic account statements are distributed quarterly. In each case, the relief provides CPOs an additional 15 days to distribute the statements.

Additional NFA Form PR Reporting Relief

In its March 23, 2020 Notice to Members, the NFA also granted registered CTAs an additional 45 days to file their NFA Form PR filing for the quarter ended March 31, 2020. Generally, CTAs would have 45 days to make the filing, meaning NFA Form PR must be filed by May 15, 2020, and the NFA granted CTAs until June 30, 2020 to do so.¹⁶ At the time of this writing, it is unclear whether the industry will need and request similar reporting relief for systemic risk reports and

¹⁵ No-Action Position in Response to the COVID-19 Pandemic for Persons Required to Submit Fingerprints in Connection with Applying for Registration as an Associated Person or Being Listed as a Principal of a Registrant, CFTC No-Action Letter No. 20-16 (Apr. 24, 2020); Coronavirus (COVID-19) Update — Relief from Fingerprinting Requirements, NFA Notice to Members No. I-20-20 (Apr. 27, 2020); Time Extensions for No-Action Position in Response to the COVID-19 Pandemic for Person Required to Submit Fingerprints in Connection with Applying for Registration as an Associated Person or Being Listed as a Principal of a Registrant, CFTC No-Action Letter No. 20-20 (July 14, 2020).

¹⁶ Because CFTC Form CTA-PR is an annual filing for all registered CTAs (except those discussed above) and because the annual report deadline of February 15, 2020 had already passed, there was no relief for the CFTC to provide on its corresponding Form CTA-PR reporting requirement for the period ended December 31, 2019.

reporting to participants for future periods from the CFTC and NFA as the COVID-19 pandemic continues.¹⁷

NFA Guidance on APs Working Away from Their Sponsor's Main Office during the COVID-19 Crisis

On March 13, 2020, the NFA provided market-wide relief intended to help firms (including CPOs and CTAs) that are permitting APs to temporarily work remotely from home offices or other locations that are not the main business address or a listed branch office of the firm, and without a branch office manager.

Generally, if an AP is located in a location other than the firm's main business address that location must be listed as a branch office with the NFA on the firm's NFA Form 7-R; the branch office must have a branch office manager who has taken and passed the Series 30 licensing exam or qualified for an alternative; and the firm must audit the branch office on a periodic basis.¹⁸ These requirements apply whether or not the AP is engaged in activity requiring the AP registration from the remote location.

With many firm employees working from home or other remote locations as contingencies pursuant to their firms' business continuity plans, the movement of APs to remote locations could have the potential to create many new branch offices and introduce new compliance burdens for firms. Recognizing that this is anticipated to be a temporary situation due to the COVID-19 pandemic, and expecting that these APs will return to their respective firms' main offices once the firms no longer are operating under their business continuity plans or otherwise, the NFA has determined not to take disciplinary action against firms for not listing these remote AP locations as branch offices and not taking the additional steps that would otherwise be necessary to operate these locations as branch offices. However, the NFA expects that firms relying on this guidance will: (1) implement alternative supervisory methods to

adequately supervise their remote APs' activities; (2) meet recordkeeping requirements; and (3) document the procedures drafted to cover these arrangements.

CFTC and NFA Fingerprinting Relief during the COVID-19 Crisis

On April 24, 2020, the DSIO issued no-action relief that allows a registrant to complete the NFA Form 8-R application for a principal or AP without obtaining fingerprints so long as certain conditions are met and fingerprints are ultimately submitted to the NFA within 30 days of the NFA's public announcement of its resumption of fingerprint processing. The two significant conditions of the relief are that the registrant would need (1) to conduct a criminal background check and (2) to certify that a background check had been completed and that the background check did not disclose any matter listed under Sections 8a(2)(D), or 8a(3)(D), (E), or (H) of the CEA, other than those disclosed to the NFA.

On April 27, 2020, the NFA issued a Notice to Members that provided relief from the corresponding NFA fingerprinting requirements. The background check certification should be sent to the NFA via e-mail at PrintcardAlternativeFilings@nfa.futures.org. The CFTC rules provide for a similar process for registering as APs and listing as principals "foreign natural persons."¹⁹ As extended, the relief provided in the CFTC no-action letter will expire on the earlier of September 30, 2020, or the NFA's public announcement of its resumption of fingerprint processing.

CFTC PROPOSED CHANGES TO CFTC FORM CPO-PQR

On April 14, 2020, the CFTC announced a proposal to amend certain compliance requirements for CPOs under Rule 4.27 and Form CPO-PQR, as codified at Appendix A to its Part 4 rules.²⁰ This proposal is the first substantive amendment to Form CPO-PQR since it was adopted in 2012. The CFTC requested comments (due by June 15, 2020) on the proposed rule and made specific requests for comments in the notice of proposed rulemaking. Specifically, the proposed amendments would:

¹⁷ On June 9, 2020, DSIO and the CFTC Division of Market Oversight extended various previously-issued COVID-19 no-action relief for certain commodity interest market intermediaries, but did not include extensions of the relief CPOs and CTAs had received (except as discussed above in July). No-Action Positions to Facilitate Physical Separation of Registrant Personnel in Response to COVID-19 Pandemic, CFTC No-Action Letter No. 20-19 (June 9, 2020).

¹⁸ NFA Compliance Rule 2-9; *see also*, Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBs, NFA Interpretive Notice No. 9019.

¹⁹ CFTC Rule 3.21(e).

²⁰ Amendments to Compliance Requirements for Commodity Pool Operators on Form CPO-PQR, 85 Fed. Reg. 26378 (May 4, 2020).

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- eliminate the pool-specific reporting requirements in existing Schedules B and C of Form CPO-PQR, except for the pool schedule of investments (question 6 of Schedule B);
 - amend the information requested in existing Schedule A of Form CPO-PQR to request Legal Entity Identifiers (“LEIs”) for CPOs and their operated pools (if LEIs have been obtained); and
 - eliminate from Schedule A questions regarding pool auditors and marketers.

If the above proposals are adopted, going forward all CPOs would be required to file the revised Form CPO-PQR on a quarterly basis, regardless of a CPO’s size. This will be a departure from the current requirement where Large CPOs file Form CPO-PQR quarterly and all other CPOs (Small and Mid-Sized CPOs) file Form CPO-PQR on an annual basis.²¹ However, because the NFA has required Small and Mid-Sized CPOs to file NFA Form PQR for the first, second, and third quarters of each calendar year, all CPOs have already effectively had a quarterly filing obligation.²² As such, the filing schedule will not change.

Further, the CFTC is proposing to amend Rule 4.27(d) to no longer permit the filing of the SEC’s Form PF to serve as substituted compliance for filing Schedules B and C of Form CPO-PQR. Because CPOs dually-registered with the SEC as investment advisers nevertheless have been subject to the NFA Form PQR quarterly filing requirement, substituted compliance has been of fairly limited practical use to eligible CPOs. The deletion of most of Schedule B and all of Schedule C should have the effect of bringing amended Form CPO-PQR filing requirements into alignment with what CPOs relying on substituted compliance have been filing all along.

In addition to eliminating a significant number of questions from Form CPO-PQR, the amendments would add certain questions to enable the data the CFTC collects to be used conjunctively with other data regarding the commodity interest markets. Specifically, the inclusion of reporting LEIs for CPOs and their pools would enable the CFTC to leverage other data sets it receives more frequently than Form CPO-PQR filings from other sources regarding the swaps market (e.g., swap data repositories). Note, however, that reporting LEIs on amended Form CPO-PQR would be required only where a person or entity is trading swaps, and thus already has an LEI as required by regulation. CPOs and their pools will not be required to obtain LEIs if they are not trading swaps.

If adopted, the CFTC anticipates that the elimination of existing pool-specific reporting requirements in Schedules B and C will focus Form CPO-PQR on data elements that facilitate the CFTC’s oversight of CPOs and their pools, while reducing overall data collection requirements for market participants in favor of relying on data the CFTC already receives from other sources.

CONCLUSION

The CFTC and NFA remain active in addressing industry concerns through rulemaking and relief. The CFTC’s recent final and proposed rule amendments encompass a rationalization of its post-2008 financial crisis regulation of CPOs and CTAs informed by the experience of the CFTC and the institutional buy-side of the commodity interest trading market in operating with those regulations and no-action and exemptive relief in place for several years. The COVID-19 pandemic relief reflects an effort to assist CPOs and CTAs with registering and operating in unprecedented times both in the markets and in society. ■

²¹ A Large CPO has CFTC-regulated assets under management equal to or greater than US\$1.5 billion.

²² NFA Form PQR consists of most of Schedule A and the schedule of investments from CFTC Form CPO-PQR. It also includes several NFA-specific questions that do not appear in CFTC Form CPO-PQR.

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