

CFTC Announces Streamlined CPO Delegation Process

May 20, 2014

On May 12, 2014, the Commodity Futures Trading Commission (CFTC) issued a no-action relief letter adopting a streamlined approach for commodity pool operator (CPO) delegation.[\[1\]](#) The letter clarifies the conditions under which a CPO otherwise required to register (Delegating CPO) may delegate its CPO functions to another CPO (Designated CPO) and be relieved of its obligation to register. In particular, whereas prior CFTC no-action letters and guidance required a Delegating CPO and its Designated CPO to be jointly and severally liable for violations of the Commodity Exchange Act (CEA) and/or CFTC regulations, the streamlined approach allows a board member who is a natural person to delegate CPO functions without having to assume joint and several liability, so long as the board member is not affiliated with the Designated CPO.

Background

A CPO of a commodity pool is required to register with the CFTC, unless it is excluded or exempted from registration. However, a CPO could choose to delegate its CPO functions to another person that is registered as a CPO in certain cases. For example, the general partner or managing member of a private fund that is a commodity pool could delegate its obligations as CPO to an affiliated investment adviser that would serve as the fund's CPO. A Delegating CPO could avoid registration by obtaining no-action relief from the CFTC. Over the past few years, particularly after the rescission of CFTC Regulation 4.13(a)(4), CPOs have increasingly sought such registration relief. To address the growing number of requests, the CFTC has adopted a streamlined process with a fixed set of criteria for granting relief.

Criteria for Relief under the Streamlined Process

To request relief under the streamlined process, the Delegating CPO and its Designated CPO must satisfy the following criteria:

1. The Delegating CPO must have delegated to the Designated CPO all of its investment management authority with respect to the commodity pool pursuant to a legally binding document;[\[2\]](#)
2. The Delegating CPO does not participate in the solicitation of participants for the commodity pool;
3. The Delegating CPO does not manage any property of the commodity pool;
4. The Designated CPO is registered as a CPO;
5. The Delegating CPO is not subject to a statutory disqualification from registration under CEA Sections 8a(2) and 8a(3);
6. There is a business purpose for the Designated CPO being a separate entity from the Delegating CPO that is not solely to avoid registration by the Delegating CPO under the CEA and CFTC regulations;
7. The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO in accordance with CFTC Regulation 1.31;
8. If the Delegating CPO and the Designated CPO are each a non-natural person, then one such CPO controls, is controlled by, or is under common control with, the other CPO;
9. If a Delegating CPO is a non-natural person, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA and/or CFTC regulations by the other in connection with the operation of the commodity pool;
10. If a Delegating CPO is a natural person and is not an Unaffiliated Board Member, [\[3\]](#) then such Delegating CPO and the Designated CPO must have executed a legally binding document whereby each undertakes to be jointly and severally liable for any violation of the CEA and/or CFTC regulations by the other in connection with the operation of the commodity pool; and
11. If a Delegating CPO is an Unaffiliated Board Member, then such Delegating CPO must be subject to liability as a board member in accordance with the laws under which the commodity pool is established.

A Delegating CPO seeking relief through the streamlined process must submit a request to the Division using the form application attached to the letter. In addition to providing identifying information on the Delegating CPO, the Designated CPO and the commodity pool with respect to which relief is being sought, each of the Delegating CPO and the Designated CPO must certify that all applicable criteria have been met, and the Designated CPO must acknowledge its designation as the registered CPO of the commodity pool.

The Division indicated in the letter that it will continue to review no-action relief requests that do not meet the criteria to take advantage of the streamlined process. The letter does not affect previously-issued no-action letters. The Division may in the future expand the streamlined approach to other scenarios.

Although the letter is helpful in several respects, it represents a step back for the CFTC staff from a position previously taken in a Frequently Asked Question posted on its website over a year ago, which provided similar relief without the requirement that a letter be submitted to the CFTC.

If you have any questions regarding CPO delegation and the new streamlined process, please feel free to contact your usual contact at Proskauer or any of the Proskauer attorneys listed in this alert.

[\[1\]](#) The letter was issued by the Division of Swap Dealer and Intermediary Oversight (Division) and a copy of it can be obtained from the [CFTC's website](#).

[\[2\]](#) The legally binding document could include, without limitation, a separate delegation agreement, a constituent document of the commodity pool or an investment management agreement between the Delegating CPO and the Designated CPO.

[3] The letter defines "Unaffiliated Board Member" as a natural person who is a voting member of the board of directors or an equivalent governing body of the commodity 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 of any company holding more than 5% of such Designated CPO's beneficial ownership interests or any affiliate thereof. Whether a board member has an interest or relationship under (iii) above will be based on the relevant facts and circumstances but may include a board member who is (i) a material service provider or investment counterparty to the Designated CPO or any of its affiliates, or (ii) is, or within the past 3 years was, employed in an executive capacity by, or was a principal or employee of, a material service provider or investment counterparty to, the Designated CPO or any of its affiliates.

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