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CFTC Proposes to Streamline CPO and CTA Regulations by Codifying Prior Relief

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Introduction

On October 9, 2018, the Commodity Futures Trading Commission (CFTC) proposed new rules in connection with the CFTC's Project KISS Initiative directed at simplifying Commodity Pool Operator (CPO) and Commodity Trading Advisor (CTA) regulations. The proposed rules codify several forms of no-action letter relief previously granted related to Part 4 of the CFTC regulations. The proposed rules would codify exemptions for certain family offices and non-U.S. funds. The proposed rules would also provide relief for investment advisers of Business Development Companies (BDCs), as well as take a step toward harmonizing rules with the Securities and Exchange Commission (SEC) by aligning Part 4 of the regulations with the JOBS Act of 2012.

The 18-96 Exemption for Non-U.S. Funds

The proposed rules amend § 4.13 of the regulations by adding a new CPO registration exemption for commodity pools outside of the United States, based on CFTC Advisory No. 18-96. Currently, Advisory No. 18-96 exempts CPOs of non-U.S. funds from many of the regulatory obligations that normally would apply. Because this is a location-based exemption, in order to qualify the pool must (a) be organized and operated outside of the United States; (b) not hold meetings or conduct administrative activities within the Unites States; (c) not have shareholders or participants that are or will be U.S. persons; (d) not receive, hold or invest any direct or indirect capital from sources within the Unites States; and (e) not be marketed in a way that would solicit participation by U.S. persons.

Family Office Registration

The proposed rules codify the CPO and CTA Family Office No-Action Letters (CFTC No-Action Letters No. 12-37 and No. 14-143, respectively) which provide relief from registration to CPOs and CTAs of family offices. The proposed CPO registration exemption in new § 4.13(a)(8) and CTA registration exemption in § 4.14(a)(11) are contingent on the family office meeting the requirements of the SEC family office exclusion in 17 CFR § 275.202(a)(11)G-1, including restricting its investing activities to family clients (as defined in such section) and not soliciting persons other than family clients.

Jobs Act Relief

The JOBS Act Relief Letter (CFTC No-Action Letter No. 14-116) provides relief from certain provisions of § 4.7(b) and § 4.13(a)(3), which restrict marketing and solicitation to the public. The no-action letter intended to harmonize the CFTC Rules with SEC Regulation D and SEC Rule 144A, which permit general solicitation and advertising subject to specific conditions. These SEC rules were amended pursuant to the Jumpstart Our Business Startups Act of 2012 (the JOBS Act). The proposed rules remove the restrictive language in the relevant provisions of § 4.7(b) and § 4.13(a)(3) to permit marketing in compliance with the provisions of either Regulation D or Rule 144A.

Investment Advisers of Business Development Companies

The BDC No-Action Letter (CFTC No-Action Letter No. 12-40) extended to investment advisers (IAs) of BDCs the same exemption as applies to CPOs of investment companies registered under the Investment Company Act of 1940 from the requirement to register as a CPO. Under the proposed rule, § 4.5 would be amended to include IAs of BDCs in the list of entities excluded from the CPO definition and include BDCs as a "qualifying entity" for which a CPO exclusion may be claimed.

Definition of Reporting Person

Lastly, the CFTC proposes to amend the definition of "reporting person" in § 4.27 to exclude certain CPOs and CTAs. In particular, registered CPOs or CTAs that only operate exempt or excluded pools or accounts under §§ 4.5 or 4.13 would be relieved from the obligation to file Forms CPO-PQR or CTA-PQR.