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CFTC Staff Issues Revised No-Action Relief from CPO Registration for Certain Delegating CPOs

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On October 15, 2014, the Division of Swap Dealer and Intermediary Oversight (“Division”) of the US Commodity Futures Trading Commission (“CFTC”) issued a no-action letter (“Letter 14-126”)¹ providing conditional relief from the requirement to register with the CFTC as a commodity pool operator (“CPO”) for certain persons that have delegated their duties as a CPO of a commodity pool (“Delegating CPO”) to a permissible third-party CPO (“Designated CPO”).

Background

Earlier this year, the Division issued a no-action letter (“Letter 14-69”)² that established a streamlined process by which the Division would grant CPO registration no-action relief to certain Delegating CPOs, provided they and their respective Designated CPOs satisfied several criteria specified in Letter 14-69. Those criteria included, among other things, the requirements that (i) the Delegating CPO have delegated to the Designated CPO all of its investment management authority for the relevant pool, (ii) the Delegating CPO not participate in the solicitation of participants for the pool, and (iii) the Delegating CPO not manage any property of the pool (those three requirements, collectively, the “Restricted CPO Activities”). In addition, the relief made available by Letter 14-69 was not self-executing. Rather, a Delegating CPO wishing to rely on such relief was required to submit to the Division a formal request for no-action relief pursuant to CFTC Rule 140.99 in the form provided in Letter 14-69.

In the intervening months, the Division received numerous requests for CPO registration no-action relief pursuant to Letter 14-69’s streamlined process. The Division also received numerous inquiries concerning the availability of similar relief under circumstances not specifically addressed by Letter 14-69. Citing the administrative burdens that such requests

¹ CFTC Letter No. 14 126 (Oct. 15, 2014).

² CFTC Letter No. 14-69 (May 12, 2014).

and inquiries imposed on the Division, the Division issued Letter 14-126 to (i) clarify (and effectively expand) the activities in which a Delegating CPO can engage without being deemed to have engaged in Restricted CPO Activities, and (ii) make the CPO registration no-action relief self-executing.

Relief Granted

Letter 14-126 permits a CPO to delegate its duties as a CPO of a commodity pool to a registered CPO, provided that the Delegating CPO and the Designated CPO satisfy the criteria specified in Letter 14-126. Those criteria are set forth below and largely track the criteria that were specified in Letter 14-69, with the exception of the above-noted clarifications to the scope of the Restricted CPO Activities. Those clarifications are underscored in the text below.

1. a. Pursuant to a legally binding document,³ the Delegating CPO has delegated to the Designated CPO all of its investment management authority with respect to the commodity pool at issue; provided, however, that satisfaction of this criterion is not precluded where: (i) a Delegating CPO or the Designated CPO appoints one or more third parties to serve as investment manager(s) of the pool; and (ii) each such third party investment manager is registered as a commodity trading advisor (“CTA”) or is exempt from such registration pursuant to the US Commodity Exchange Act (“CEA”) or the CFTC’s rules;
- b. The Delegating CPO does not participate in the solicitation of participants for the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is registered as an associated person (“AP”) of the Designated CPO or is exempt from registration as such pursuant to the CEA or the CFTC’s rules; and (ii) participates in the solicitation of pool participants solely in its capacity as an AP of the Designated CPO; and
- c. The Delegating CPO does not manage any property of the pool; provided, however, that satisfaction of this criterion is not precluded where the Delegating CPO: (i) is a principal or employee of the Designated CPO or of a CTA of the pool at issue; and (ii) has management responsibilities over pool property; provided further, however, that such Delegating CPO: (1) exercises these management responsibilities solely in the capacity of a principal or employee of the Designated CPO or as a CTA of the pool and not as the Delegating CPO of the pool; and (2) in connection with exercising these management responsibilities, is subject to supervision as a principal or an employee by either the Designated CPO or a CTA of the pool in accordance with CFTC Rule 166.3. For purposes of this condition, management of pool property does not include responsibilities with respect to pool property of an administrative, clerical or ministerial nature.
2. The Designated CPO is registered as a CPO.
3. The Delegating CPO is not subject to a registration disqualification pursuant to CEA Sections 8a(2) and 8a(3).

³ The legally binding document could include, but is not limited to, a separate delegation agreement, a document that establishes the pool, or an investment management agreement between the Delegating CPO and the Designated CPO.

4. **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 the CFTC's rules.**
5. **The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO.⁴**
6. **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.**
7. **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 or the CFTC's rules by the other in connection with the operation of the commodity pool.**
8. **If a Delegating CPO is a natural person and is not an "Unaffiliated Board Member,"⁵ 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 or the CFTC's rules by the other in connection with the operation of the commodity pool.**
9. **If a Delegating CPO is an Unaffiliated Board Member, then such Delegating CPO must remain fully responsible as a board member in accordance with the laws under which the commodity pool is established.**

⁴ Unlike Letter 14-69, Letter 14-126 does not further specify that such records must be maintained in accordance with CFTC Rule 1.31.

⁵ Letter 14-126 defines the term "Unaffiliated Board Member" to include a natural person who is a voting member of the board of directors, board of trustees, board of managers 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 director has an interest or relationship under clause (iii) will be based on the relevant facts and circumstances. For example, interests or relationships that are indicative of an affiliation with the Designated CPO that could trigger clause (iii) may include: the director being a material service provider or investment counterparty to the Designated CPO or any of its affiliates, or being, or within the past three years having been, employed in an executive capacity by, or having been a principal or employee of, a material service provider or investment counterparty to, the Designated CPO or any of its affiliates.

Other Considerations

Importantly, the Division also stated in Letter 14-126 that it will continue to evaluate requests submitted pursuant to CFTC Rule 140.99 for CPO registration no-action relief from persons that cannot satisfy the criteria specified in Letter 14-126, but that it will no longer consider new requests for CPO registration no-action relief submitted pursuant to Letter 14-69, and it will not respond to any requests previously submitted pursuant to Letter 14-69 that are still pending. The Division further clarified that any person that has already received a no-action letter pursuant to Letter 14-69 may continue to rely on such relief.

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