

CLIENT ALERT

CFTC to Prohibit CPOs with Prior Infractions from Claiming Exemptions

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The Commodity Futures Trading Commission has adopted a final rule¹ that will generally prohibit a commodity pool operator from relying on most of the CPO registration exemptions in CFTC Rule 4.13 if the CPO or its principals have engaged in certain bad acts.² The relevant bad acts include financial crimes and violations of investment-related statutes or regulations. These offenses are the same as those that may be used by the CFTC as a basis, without a hearing, to deny a person's application for registration with the CFTC. The CFTC reasoned that the new prohibition will further enhance the customer protection of exempt pool participants and serve to eliminate the existing inconsistent treatment between exempt and registered CPOs.

Effective and Compliance Dates

The rule will become effective 60 days after publication in the Federal Register. Subject to an exception described below, a CPO filing a new Rule 4.13 exemption with respect to its operation of a pool will be required to represent that neither the CPO nor any of its principals has a statutory disqualification in its background that would require disclosure under Section 8a(2) of the Commodity Exchange Act if such person were seeking registration. With respect to an existing claim of exemption, the CPO may make the representation with its next annual affirmation, but no later than March 1, 2021. We

¹ The voting draft of the final rule is available [here](#).

² The approved amendment is similar to one proposed in 2018. For more information on that proposal, please see our client memorandum entitled "CFTC Proposes to Codify Prior Relief for CPOs and CTAs" (October 10, 2018), available [here](#).

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note that NFA generally permits Rule 4.13 affirmation notices for the following year to be filed beginning in December of the prior year.

If a CPO successfully applied for, and was granted, registration, and in connection therewith disclosed a statutory disqualification that would be required to be disclosed under the amendment to Rule 4.13, such matter would not disqualify a CPO from filing an exemption under the Rule. Because the purpose of the amendment is to have the same conduct that disqualifies a CPO from registration also disqualify it from claiming a 4.13 exemption, the CFTC reasoned that an act that was not sufficient to prevent registration also should not prevent a CPO from claiming a 4.13 exemption.

Under CFTC rules, the term “principal” generally includes individuals and entities with management authority over the CPO as well as anyone who is a 10% or greater owner of the CPO or entitled to 10% or more of its profits. The category typically includes general partners, managing members, directors, CEOs, CFOs and CCOs, in addition to the 10% owners.

Implications for Family Offices

The final amendment applies to all CPO exemptions in Rule 4.13, including the de minimis exemption in Rule 4.13(a)(3), other than the family office exemption in Rule 4.13(a)(6). The CFTC determined that given that family offices serve only their respective families, they pose little customer risk to the investing public. At the meeting, however, the CFTC announced that the Division of Swap Dealer and Intermediary Oversight will be conducting a special call of family offices to assess the prevalence of statutory disqualifications within family offices.

Petitions for Exemptive Relief

A CPO that has committed, or has principals who have committed, a disqualifying act may petition the CFTC for exemptive relief that would allow the CPO to claim an exemption despite being subject to disqualification. The CPO would have to demonstrate to the CFTC’s satisfaction that granting relief (i) would be consistent with the public interest, and (ii) would not be contrary to the specific purpose of the newly adopted statutory disqualifications prohibition. The CFTC noted that it does not expect to grant many requests for exemptive relief.

If you have any questions regarding this client alert, please contact one of the authors, any member of our CFTC team listed below, or the Willkie attorney with whom you regularly work.

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Willkie has a dedicated team of attorneys with extensive knowledge and experience in all aspects of the Commodity Exchange Act and the CFTC regulatory regime. We would be pleased to assist on your matters.

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