

CLIENT ALERT

CFTC and NFA Regulatory Reminders and Annual Overview for Commodity Pool Operators and Commodity Trading Advisors

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This memo summarizes certain Commodity Futures Trading Commission and National Futures Association annual regulatory requirements and common practice concerns impacting commodity pool operators and commodity trading advisors.

Annual CPO and CTA Affirmation Window Is Open

The CFTC requires each entity or person claiming an exemption from CPO registration under CFTC Rule 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5), an exclusion from CPO registration under CFTC Rule 4.5, or an exemption from CTA registration under CFTC Rule 4.14(a)(8) to affirm, on an annual basis, whether such exemption or exclusion is or remains applicable. Affirmation filings are due within 60 days after the calendar year end. The annual affirmation filings may be made at this time by accessing NFA's Exemptions System, and must be made no later than February 29, 2024.

Relatedly, each CPO reaffirming an exemption under Rule 4.13(a)(1), 4.13(a)(2), 4.13(a)(3) and 4.13(a)(5) will be required to attest that neither the CPO nor any of its principals would be subject to any statutory disqualifications listed under Section 8a(2) of the Commodity Exchange Act.

Failure to affirm an active exemption or exclusion from CPO or CTA registration will result in its withdrawal on March 1, 2024.

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NFA Self-Examination Questionnaire and NFA Bylaw 1101 Diligence

Each NFA Member is required to conduct an annual review of its business, including a review of the firm's compliance with NFA Bylaw 1101. Such NFA Member must review its operations in accordance with the most recent and relevant NFA Self-Examination Questionnaire. In reviewing its business, each NFA Member should perform any necessary diligence to ensure compliance with NFA Bylaw 1101. That bylaw prohibits an NFA Member from doing business with a person that should be registered with the CFTC, but is not. Relatedly, each NFA Member should confirm that any CPO or CTA with which it is doing business has reaffirmed any of the applicable exemptions or exclusions described above.

NFA Survey of Common Deficiencies

Earlier this year, NFA released a survey of common deficiencies and highlighted the following requirements:

- *Self-Examination Questionnaire*—As described above, NFA Members are required to review their business on an annual basis, and in accordance with the most recent Self-Examination Questionnaire available on NFA's website.
- *Digital Assets*—NFA Members that engage in activities related to digital assets or their derivatives must comply with disclosure requirements specified in Interpretive Notice 9073.
- *Third-Party Service Providers*—In accordance with NFA Interpretive Notice 9079, NFA Members must adopt and implement written policies and a supervisory framework designed to provide oversight with respect to any third-party service provider to which an NFA Member outsources a regulatory function. NFA Members are also required to maintain records sufficient to demonstrate compliance with this supervisory requirement, and are expected to conduct ongoing diligence, on a periodic basis, of such service providers.¹
- *Cybersecurity*—NFA Members are required to establish and maintain a written information systems security program, or ISSP, governing a firm's cybersecurity protocol. Additionally, NFA Members must notify NFA upon the occurrence of certain cyber-related incidents via NFA's Cyber Notice Filing System. Cybersecurity training is required for employees both upon hiring and on an annual basis.
- *Pool Financial Reporting; Notification Requirements*—NFA highlighted a number of notice reporting requirements for NFA Members, including: (i) a CPO's notice obligation with respect to a distress event in accordance with NFA Compliance Rule 2-50 and Interpretive Notice 9080, (ii) changes in fiscal year end (for a year end other than the calendar year end), (iii) changes in the CPO's independent CPA that has been engaged to audit pool financial

¹ Last year, the SEC proposed a similar framework that would require SEC-registered investment advisers to conduct diligence and oversight with respect to certain third party service providers.

See <https://www.willkie.com/-/media/files/publications/2022/secproposesnewruletorequireinvestmentadviserstococon.pdf> (Outsourcing by Investment Advisers, Advisers Act Release No. 6,176 (Oct. 26, 2022)), <https://www.sec.gov/rules/proposed/2022/ia-6176.pdf>.

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statements, (iv) extension requests with respect to filing a pool's financial statement, and (v) notices regarding a pool's cessation of trading, including an update to the Annual Questionnaire and a final audit filing.

- *Calculation of Financial Ratios; Financial Reporting*—NFA provided a reminder that CPOs and CTAs must use the accrual method of accounting and GAAP (or another internationally recognized accounting standard) when computing financial ratios. Subject to a few exceptions, Members must distribute to pool participants an annual report certified by an independent public accountant within 90 days of the pool's fiscal year end. Members must also submit Pool Quarterly Reports (Form PQR) containing information about the firm and its pools, within 60 days of each calendar quarter end. CTA Members that direct trading of commodity interests are required to file a quarterly CTA Report (Form PR) within 45 days of the quarter end. NFA assesses fines on CPOs and CTAs for late filings.

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.

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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