



## News & Resources

[HIGHLIGHTS](#) | [SEARCH](#) | [SIDLEY UPDATES](#) | [NEWS & MEDIA](#) | [PUBLICATIONS](#) | [EVENTS](#)

### Sidley Updates

#### CFTC Adopts Final Rules Amending CPO/CTA Registration and Compliance Obligations Investment Funds

February 14, 2012

[Email](#) | [Print](#)

On February 9, 2012, the Commodity Futures Trading Commission (“CFTC”) issued final rules (the “Final Rules”) eliminating a number of exclusions and exemptions relied on by commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) in connection with many privately offered funds and investment companies registered under the Investment Company Act of 1940 (“RICs”). The Final Rules (a) eliminate the exemption from CPO registration that is currently available under CFTC Rule 4.13(a)(4) for CPOs of certain privately offered funds, (b) reinstate prior trading criteria for RICs under CFTC Rule 4.5 (adding an alternative trading threshold and including CFTC-regulated swaps in the trading criteria), (c) require that under CFTC Rule 4.7 CPOs may no longer claim an exemption from the requirement of including certified financial statements in pool annual reports, (d) require the filing of annual reaffirmation notices to claim relief under CFTC Rules 4.5, 4.13 or 4.14, (e) require additional reporting on Forms CPO-PQR and CTA-PR and (f) amend the boilerplate risk disclosure statements required by CPOs and CTAs to include risks posed by the trading of swaps, among other changes. The CFTC’s release has not yet been published in the Federal Register but is available on the CFTC’s website at <http://cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister020912b.pdf>.

In a separate release, the CFTC proposed harmonizing its rules regarding the requirements applicable to RICs whose advisers will be subject to registration as CPOs due to the changes in the Final Rules to CFTC Rule 4.5 (the “Proposed Rules”). Under the Proposed Rules, CFTC Rule 4.12(c) would be amended to provide that the CPO of any commodity pool whose units will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933 may claim relief from the disclosure document delivery and acknowledgment requirements under CFTC Rule 4.21. The proposal would also allow RICs to claim relief from certain periodic reporting obligations under CFTC Rule 4.22 and the requirement that records be maintained at the CPO’s main office under CFTC Rule 4.23. Comments are due 60 days after the release is published in the Federal Register. The proposing release has not yet been published in the Federal Register but is available on the CFTC’s website at <http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/federalregister020912.pdf>

#### Important Dates

April 14, 2012*	Last date to file CFTC 4.13(a)(4) Notice of Claim for pools
April 14, 2012*	Date on and after which pool offering documents and CTA disclosure documents required to be filed with the NFA for review must contain the new swap risk disclosure
April 14, 2012*	Last date to submit comment letters to the CFTC on the Proposed Rules
November 29, 2012, and 60 days from the end of every fiscal quarter thereafter	Filing deadline for Form CPO-PQR for Large CPOs (those with Gross AUM of \$5 billion or more attributable to pools as of the last fiscal quarter-end before September 15, 2012)
The later of December 31, 2012 or 60 days after the effective date of the final CFTC rulemaking defining the term “swap”	Last date to register in compliance with Rule 4.5
December 31, 2012	End of the phase-in period for existing Rule 4.13(a)(4) exempt CPOs to find a new exemption or for the CPO to register
60 days following the Effective Date of a final	Last date to comply with CFTC Rule 4.5 recordkeeping requirements

#### PRACTICES

[Investment Funds, Advisers and Derivatives](#)

#### AREAS OF FOCUS

[Derivatives](#)

[View Archive](#)



#### Financial Regulatory Reform

Click here to view Sidley’s Financial Regulatory Reform resources.

[MORE](#)



#### Sign Up - Sidley Updates

Stay up-to-the-minute with Sidley Updates for your industry.

[MORE](#)

rule implementing the proposed rules

January 30, 2013 and each year thereafter	Annual re-certification deadline for CPOs of Rule 4.13(a)(3) exempt pools
March 31, 2013, and 90 days from the end of every fiscal year thereafter	Filing deadline for Form CPO-PQR for Mid-Sized and Small CPOs (those with Gross AUM under \$5 billion attributable to pools as of the last fiscal quarter-end before September 15, 2012)

*\* These dates are approximations. The Proposed Rules and Final Rules specify these deadlines as 60 days after their respective publication in the Federal Register. As of today, neither the Final Rules nor the Proposed Rules have been published in the Federal Register.*

### **Amendments to Exemptions from CPO Registration under CFTC Rule 4.13**

#### *Elimination of the Sophisticated Investor Exemption*

The Final Rules rescind the CFTC Rule 4.13(a)(4) “sophisticated investor” exemption from CPO registration (“Rule 4.13(a)(4)”), which has been widely used since it was first introduced in 2003 and tied into the Section 3(c)(7) “qualified purchaser” exclusion under the Investment Company Act of 1940. Rule 4.13(a)(4) formerly provided an exemption from CPO registration with respect to operators of pools that were privately offered, were restricted to participants who met certain investor sophistication standards, and complied with certain other requirements. While there is no “grandfathering” provision for CPOs currently claiming relief under Rule 4.13(a)(4), there is a delayed phase-in of the new rules. Such CPOs have until December 31, 2012 to either register or file a notice of claim under another exemption. For all other CPOs, the rescission of Rule 4.13(a)(4) will be effective 60 days from publication of the Final Rules in the Federal Register. Accordingly, there may be a rash of Rule 4.13(a)(4) filings in the next two months.

#### *Preservation of, and Amendments to, the Limited Trading Exemption*

Contrary to earlier proposals, in the Final Rules, the CFTC retained the CFTC Rule 4.13(a)(3) “limited trading” exemption from CPO registration (“Rule 4.13(a)(3)”). Under Rule 4.13(a)(3), a pool operator is exempt from registration as a CPO with respect to a pool if: (i) interests in the pool are exempt from registration under the Securities Act of 1933, and offered and sold without marketing to the public in the United States; and (ii) at all times, the pool meets either the “5% Test” or the “100% Test,” as described below. Such CPOs also must meet certain filing and investor notice requirements, as well as making books and records available for regulatory inspection.

*The 5% Test.* A pool meets the “5% Test” if the aggregate initial margin and premiums (as well as the required minimum security deposit for any retail forex transactions) required to establish the pool’s commodity interest positions, whether or not for bona fide hedging purposes, does not exceed five percent of the liquidation value of the pool’s portfolio, after taking into account unrealized profits and losses.

While the Final Rules did not modify the terms of the 5% Test, CPOs intending to rely on this exemption should be aware that the CFTC has proposed modifying the definition of “commodity interest” to include not only all futures and security futures positions, but also all swaps (excluding securities-based swaps that are regulated by the Securities and Exchange Commission (“SEC”). The CFTC’s final definition of “swap” is still pending.

*The 100% Test.* A pool meets the “100% Test” if the aggregate net notional value of the pool’s commodity interest positions, whether or not for bona fide hedging purposes, does not exceed 100 percent of the liquidation value of the pool, after taking into account unrealized profits and losses.

The Final Rules modify the 100% Test to permit the CPO to net swaps that are cleared on the same designated clearing organization, where appropriate. CPOs that intend to use multiple designated clearing organizations (“DCOs”) for risk management and other purposes should be aware that netting is on a DCO-by-DCO basis. CPOs continue to be permitted to net futures contracts with the same underlying commodity across contract markets. A futures contract may not be netted against a similar swap contract.

#### *Remaining Alternatives*

In addition to registering as CPOs or relying on Rule 4.13(a)(3), CPOs which formerly relied on Rule 4.13(a)(4) may also decide to cease trading futures, commodity options, foreign exchange contracts and most swaps in order to avoid CPO registration. CPOs that register may still receive certain disclosure, recordkeeping and reporting relief under CFTC Rule 4.7 or CFTC Advisory 18-96.

#### *Implications for Family Offices*

In the Final Rules, despite the call for harmonization and the CFTC’s legacy of granting “not a pool” relief letters to family vehicles,<sup>1</sup> the CFTC declined to provide a specific exemption from CPO registration for family offices. The Rule 4.13(a)(3)

“limited trading” exemption, as amended, remains available to family offices that meet its criteria. In addition, family offices may, on a firm-by-firm basis, request interpretive relief from registration and compliance obligations under the CFTC’s rules and may continue to rely on applicable interpretative letters that the CFTC has previously issued.<sup>2</sup>

Family offices were also not provided a specific exemption from the new Form CPO-PQR and Form CTA-PR reporting and data collection regime, under Rule 4.27. This reporting regime only applies to CFTC registrants. The CFTC has stated that it intends to review the data collected from the Forms CPO-PQR submitted by family offices before determining whether to pursue a family office exemption and the appropriate scope and nature of any such exemption.

In the meantime, CFTC staff has been instructed to explore the possibility of adopting a family office exemption that is similar to the rule recently adopted by the SEC and the CFTC is soliciting public comment on the matter. At this point, it is unclear whether such an exemption, if considered, would be an exemption from the definition of CPO and CTA, in line with the SEC’s rule that exempted family offices from the definition of “investment adviser,” or if it would merely be an exemption from registration and/or the reporting regime. Please contact your Sidley lawyer if you would like to submit a comment on these potential CFTC proposals.

#### *Implications for Fund-of-Funds*

The CFTC takes the position that funds that do not trade futures directly, but which have indirect exposure to futures through investments in other pools managed by third parties, are themselves “commodity pools” and that, absent an exemption from registration, the managers of such funds must register as CPOs. The definitions of “commodity pool” and CPO will soon be expanded to include swaps, and the CFTC has confirmed that it will treat funds that are exposed to swaps through investments in underlying funds as being commodity pools and their operators as CPOs. Comment letters submitted to the CFTC had requested that the CFTC retain 4.13(a)(4) with respect to such managers, however, the CFTC expressly declined to do so due to a “lack of information regarding the activities” of these managers. The CFTC indicated, however, that it will consider granting exemptive relief for managers of funds-of-funds on a case-by-case basis.

Fund-of-fund managers that will no longer be able to rely on Rule 4.13(a)(4) may seek to rely on Rule 4.13(a)(3). However, many fund-of-fund managers have to date found it difficult to rely on Rule 4.13(a)(3). In 2003, when the CFTC adopted the 4.13(a)(3) and 4.13(a)(4) exemptions, it also adopted Appendix A to the CFTC’s Part 4 regulations, entitled “Guidance on the Application of Rule 4.13(a)(3) in the Fund-of-Funds Context.” The Appendix provided six sample fact patterns in which a fund-of-funds manager operating pools may rely on 4.13(a)(3). However, the fact patterns are difficult to apply in practice as many fund-of-fund managers have facts that diverge from those described in the Appendix. In the Final Rules, the CFTC eliminated Appendix A, leaving fund-of-funds with little guidance on how to comply with Rule 4.13(a)(3). The CFTC provided no explanation for its deletion of Appendix A. The CFTC has not indicated formally if or when it intends to adopt a replacement for Appendix A, but we expect it will do so well before year-end.

#### *Implications for Foreign Advisers*

The CFTC rejected public comments that it adopt a registration exemption for non-U.S. based advisers and CPOs similar to the exemption for foreign investment advisers set forth in section 403 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”). Public commentators feared that the rescission of the exemption under Rule 4.13(a)(4) would result in nearly all non-U.S. based CPOs operating a commodity pool with at least one U.S. investor being required to register with the CFTC, and also require non-U.S. based CPOs to report the entirety of their pool activities to the CFTC notwithstanding that their home country regulators may oversee their activities pursuant to comparable regulatory schemes. Nevertheless, the CFTC concluded that it does not have a comprehensive view of the commodity interest positions held by currently exempt advisers and will withhold consideration of a foreign adviser exemption until it receives data regarding such non-U.S. advisers on new forms CPO-PQR and/or CTA-PR, as applicable.

Non-U.S. based CPOs whose commodity pools meet the criteria of Rule 4.13(a)(3) will be able to operate pursuant to that exemption if they previously filed a claim of exemption or now file a notice of a claim of exemption under Rule 4.13(a)(3). Non-U.S. CPOs may also determine to exclude U.S. investors from their pools or restructure their pools to utilize a registered CPO unaffiliated with the foreign adviser.

#### **Amendments to CFTC Rule 4.5**

Largely in response to a petition for rulemaking by the National Futures Association, the CFTC proposed to amend CFTC Rule 4.5 (“Rule 4.5”) which provides an exclusion from the definition of CPO for certain persons, including RICs, their principals and employees. The CFTC’s principal concern addressed by the proposed amendments was then, and remains, that RICs are offering managed futures strategies without CFTC oversight and without making disclosures to both the CFTC and investors regarding pertinent facts associated with an investment in the RIC. The CFTC believes that entities offering services substantially identical to those of a registered CPO should be subject to substantially identical regulatory obligations. Accordingly, the CFTC’s Final Rules include amendments to Rule 4.5 narrowing the application of the exclusion from the term CPO with respect to RICs (but not other persons covered by Rule 4.5). Specifically, the amendments add a new section (c)(2)(iii) which requires that a RIC claiming the exclusion from the term CPO represent:

(1) that it will use commodity futures or commodity options contracts or swaps solely for bona fide hedging purposes within the meaning and intent of CFTC Rules 1.3(z)(1) and 151.5, provided that (i) with respect to positions in commodity futures,

commodity option contracts or swaps which do not come within the meaning and intent of CFTC Rules 1.3(z)(1) and 151.5, the aggregate initial margin and premiums required to establish such positions will not exceed five percent of the liquidation value of the qualifying entity's portfolio or, alternatively, (ii) the aggregate net notional value of commodity futures, commodity options contracts or swaps positions not used solely for bona fide hedging purposes (determined at the time the most recent position was established) does not exceed 100 percent of the liquidation value of the pool's portfolio; and

(2) that it will not be, and has not been, marketing participations to the public as or in a commodity pool or otherwise as or in a vehicle for trading in the commodity futures, commodity options or swaps markets.

New section 4.5(c)(2)(iii) provides guidance for calculating "notional value" and netting futures positions and cleared swaps, and new section 4.5(c)(5) requires that the notice claiming an exclusion under Rule 4.5 be affirmed annually or withdrawn.

Rule 4.5 does not provide any "grandfathering" for RICs affected by the amendments. However, the CFTC issued the Proposed Rules detailing proposed modifications to Part 4 of the CFTC regulations to harmonize the CFTC's disclosure and reporting regime with that of the SEC

#### *Entity Required to Register*

The CFTC stated its belief that the investment adviser is the most logical entity to serve as the RIC's CPO and that to require a member or members of the RIC's board of directors to register would raise operational concerns for the RIC. Thus, the CFTC has concluded that, for a RIC not eligible for relief under Rule 4.5, the investment adviser is the entity required to register as the CPO.

#### *The Marketing Restriction*

The CFTC believes that the following factors are indicative of marketing a RIC as a commodity pool or otherwise as a vehicle for trading in the commodity futures, commodity options, or swaps markets:

- The name of the fund;
- Whether the fund's primary investment objective is tied to a commodity index;
- Whether the fund makes use of a controlled foreign corporation ("CFC") for its derivatives trading;
- Whether the fund's marketing materials, including its prospectus or disclosure document, refer to the benefits of the use of derivatives in a portfolio or make comparisons to a derivatives index;
- Whether, during the course of its normal trading activities, the fund or entity on its behalf has a net short speculative exposure to any commodity through a direct or indirect investment in other derivatives;
- Whether the futures/options/swaps transactions engaged in by the fund or on behalf of the fund will directly or indirectly be its primary source of potential gains and losses; and
- Whether the fund is explicitly offering a managed futures strategy.

The CFTC's position with respect to such factors is, however, that they should be instructive and that no single factor is dispositive. The CFTC has stated that it will give more weight to the last factor in the list. However, if a RIC offers a strategy with several indicia of a managed futures strategy, yet avoids explicitly describing the strategy as such in its offering materials, that RIC may still be found to have violated the marketing restriction, but the CFTC will not consider the mere disclosure to investors or potential investors that the RIC may engage in derivatives trading incidental to its main investment strategy and the risks associated therewith as being a violation of the marketing restriction.

#### *Controlled Foreign Corporations*

The CFTC stated that, while it does not oppose the use of CFCs by RICs, CFCs wholly owned by RICs and used for trading commodity interests are properly considered commodity pools. Moreover, the CFTC believes that each separate legally cognizable entity must be assessed on its own characteristics and that a CFC should not be entitled to exclusion simply because its parent company is a RIC that may be entitled to exclusion under Rule 4.5. Therefore, such CFCs will be required to have their CPOs register with the CFTC unless they may claim exemption or exclusion therefrom on their own merits.

#### *Compliance Schedule*

Compliance with Rule 4.5 for registration purposes only will be required not later than the later of December 31, 2012 or 60 days after the effective date of the final rulemaking further defining the term "swap," which the CFTC will publish in the Federal Register at a future date. Entities required to register due to the amendments to Rule 4.5 will be subject to the CFTC's recordkeeping, reporting, and disclosure requirements pursuant to part 4 of the CFTC's regulations within 60 days following the effectiveness of a final rule implementing the CFTC's proposed harmonization effort pursuant to the concurrent Proposed Rules.

#### **Amendments to CFTC Rule 4.7**

The Dodd-Frank Act required that changes be made by the SEC to the definition of an "accredited investor" ("AI") under the federal securities laws. In order to facilitate consistency between CFTC Rule 4.7 ("Rule 4.7") and the SEC's "accredited investor" ("AI") definition and any future changes made by the SEC, the CFTC eliminated the current CFTC Rule 4.7(a)(3)(ix) and (a)(3)(xi) direct inclusion of the terms of an AI definition because it may from time to time become inconsistent with

changes made by the SEC, revising Rule 4.7 to incorporate by reference the AI standard for the SEC’s Regulation D under the Securities Act of 1933. The Final Rules also rescind the relief in Rule 4.7 from the requirement of including certified financial statements in the annual reports of pools.

**Annual Notices Required for CFTC Rule 4.5, 4.13 and 4.14 Exemptions**

The Final Rules require any person or entity that files a claim of exclusion or exemption from registration under any of CFTC Rules 4.5, 4.13 or 4.14 to either file a reaffirmation of the exclusion or exemption on an annual basis at calendar year end, withdraw the exclusion or exemption due to a cessation of the underlying activities, or withdraw the exclusion or exemption and apply for registration within 30 days of the anniversary of the initial filing. The failure to comply with the new annual notice reaffirmation requirement will be deemed to be a withdrawal of the applicable exclusion or exemption and a violation of the requirement. This annual reaffirmation filing requirement will become effective 60 days from publication of the Final Rules in the Federal Register.

**Reporting Requirements on Forms CPO-PQR and CTA-PR**

On October 31, 2011, the CFTC adopted CFTC Rule 4.27(d) that, jointly with the SEC, established new confidential information reporting requirements with respect to private funds on Form PF.<sup>3</sup> In the Final Rules, the CFTC adopted the remainder of CFTC Rule 4.27 (“Rule 4.27”), which requires CPOs and CTAs that are registered or required to be registered with the CFTC to report certain information to the CFTC on Forms CPO-PQR and CTA-PR, respectively.

*Who Reports*

The new CFTC reporting requirements on Form CPO-PQR are a supplement to Form PF for advisers that are dually registered with the SEC and the CFTC and file Sections 1 and 2 of Form PF. Such dual registrants will only be required to submit Schedule A of Form CPO-PQR. Non-dual registrants, however, will be required to file all the relevant sections of Form CPO-PQR based on certain reporting thresholds. All CTAs (regardless of registration status with the SEC) will be required to file Form CTA-PR.

With respect to co-CPOs, the CPO with the greater assets under management is required to report for the pool. Furthermore, if a pool is operated by co-CPOs and one of the CPOs is also a registered investment adviser that files Sections 1 and 2 of Form PF (and thus would only be required to file Schedule A of Form CPO-PQR), the non-investment adviser CPO will still be obligated to file the applicable sections of Form CPO-PQR.

*Categories of Reporting CPOs; Frequency of Reporting; Filing Deadlines*

Filing requirements differ based on the aggregated gross pool assets under management (“Gross AUM”) of a CPO. This differs from the SEC’s use of “regulatory assets under management” to determine adviser thresholds under Form PF. Similar to the instructions provided on Form PF, Form CPO-PQR contains certain aggregation rules that require CPOs to aggregate parallel pool structures, parallel managed accounts and master-feeder arrangements. The reporting frequency and deadlines for different categories of reporting CPOs are summarized in the chart on page 8.

	<i>Large CPO</i>	<i>Mid-Sized CPO</i>	<i>Smaller CPO</i>
<i>Gross AUM Threshold</i>	<i>\$1.5 billion or more attributable to aggregated pools as of the close of business on any day during the preceding fiscal quarter</i>	<i>\$150 million or more (but less than the applicable “large” CPO threshold) attributable to aggregated pools as of the close of business on any day during the preceding fiscal year</i>	<i>Less than \$150 million attributable to aggregated pools as of the close of business on each day during the preceding fiscal year</i>
<i>Reporting Frequency</i>	<i>Quarterly</i>	<i>Annually</i>	<i>Annually</i>
<i>Reporting Deadline</i>	<i>60 days from end of fiscal quarter</i>	<i>90 days from end of fiscal year</i>	<i>90 days from end of fiscal year</i>
<i>Applicable CPO-PQR Schedules</i>	<i>Schedules A, B and C (dual registrants that file Sections 1 and 2 of Form PF only need to file Schedule A)</i>	<i>Schedules A and B (dual registrants that file Sections 1 and 2 of Form PF only need to file Schedule A)</i>	<i>Schedule A</i>
<i>Initial Filing Deadline Date</i>	<i>November 29, 2012 - if Gross AUM is \$5 billion or more attributable to pools as of the last fiscal quarter-end before September 15, 2012 (i.e., June 30, 2012 in most cases)</i>	<i>March 31, 2013</i>	<i>March 31, 2013</i>
	<i>March 1, 2013 - if Gross AUM is under \$5 billion attributable to pools as of the last fiscal quarter-end before September 15, 2012</i>		

### *Investing in an Unaffiliated Commodity Pool; Funds of Funds*

The treatment of investments in unaffiliated pools and of “funds of funds” (i.e., any pool that invests substantially all of its assets in the equity of other pools or private funds and, aside from those investments, holds only cash, cash equivalents and instruments acquired for the purpose of hedging currency exposure) is inconsistent with the instructions adopted as part of joint Form PF. A CPO may exclude any pool assets invested in other unaffiliated pools but must do so consistently for purposes of both the reporting thresholds and responding to questions (except for Schedule A Questions 10 and 11). The CPO may not, however, disregard liabilities, even if incurred in connection with such investments. Any “fund of funds” is required to be reported only in Schedule A and otherwise should be disregarded.

### *Summary of Information Required on Form CPO-PQR*

Schedule A seeks basic identifying information about the CPO, each of its pools and any service providers used. Major revisions from the CFTC’s original proposed rules include the addition of a question whether the pool is operated by co-CPOs (and names of such other CPOs) and moving the question regarding trading strategies from Schedule A to Schedule B in an effort to ensure that dual registrants are not providing duplicative information in Schedule A that they are already providing in Form PF.

Schedule B solicits information about each pool operated by a CPO including: (i) breakdown of the assets of the pool by investment strategies; (ii) borrowings of the pool and types of creditors; (iii) pool counterparty and credit exposure; and (iv) pool trading and clearing mechanisms.

Schedule C solicits information from Large CPOs on an aggregate basis (Section 1) as well as on an individual pool basis for each “Large Pool” operated by a Large CPO (Section 2). “Large Pool” means any pool that has a net asset value individually, or in combination with any parallel pool structure, of at least \$500 million as of the close of business on any day during the reporting period. Section 1 requires a geographical breakdown of all of the pools of the CPO and the aggregate turnover rate of such CPO’s pools. Section 2 requires for each Large Pool information regarding: (i) its liquidity, holding of unencumbered cash, number of open positions; (ii) counterparty credit exposure; (iii) risk metrics; (iv) secured and unsecured borrowing information; (v) derivative positions and the collateral posted to secure such positions; and (vi) duration of fixed income assets.

### *Form CTA-PQ*

Only Schedule A of Form CTA-PQ was adopted, which requires all CTAs to provide basic information about such CTA and the pools under its advisement. Form CTA-PQ will need to be filed on an annual basis within 45 days after the end of a fiscal year.

### *Additional Requirements*

- All financial information required to be reported must be presented and computed in accordance with U.S. generally accepted accounting principles.
- All questions asking for amounts or investments must be reported in U.S. dollars and any amounts converted must use the conversion rates applicable on the relevant reporting date.
- All forms must be filed electronically using NFA’s EasyFile System.

### **Risk Disclosure Statement**

Section 721(a) of the Dodd-Frank Act revised the Commodity Exchange Act’s statutory definitions of CPO and CTA to include the use of CFTC-regulated swaps (but not including SEC-regulated securities-based swaps). Responding to its new jurisdictional authority concerning swaps, the CFTC has amended the standardized risk disclosure statements required to be used by CPOs under CFTC Rule 4.24(g) and CTAs under CFTC Rule 4.34(g) to include certain risks associated with the use of swaps (inclusive of both cleared and uncleared swaps). These new risk disclosure statements are required for all new CPO and CTA disclosure documents that are required to be filed with the National Futures Association and all updates filed after the effective date of the Final Rules, 60 days from the date the Final Rules are published in the Federal Register.

### **Proposed Relief for Registered Investment Companies**

In connection with the amendment to Rule 4.5, the CFTC issued the Proposed Rules, which propose to amend various rules in an attempt to “harmonize” compliance obligations for RICs required to register as CPOs with their disclosure and reporting obligations under the Investment Company Act of 1940. The Proposed Rules are meant to address concerns that investment advisers to RICs that also are required to register as CPOs would be subject to duplicative, inconsistent and possibly conflicting disclosure, reporting and recordkeeping requirements.

The CFTC is proposing to address most of these concerns by amending CFTC Rule 4.12(c) so that the CPO of any pool whose units of participation will be offered and sold pursuant to an effective registration statement under the Securities Act of 1933 (including both RICs and other commodity pools) may claim relief from the disclosure document delivery and acknowledgement requirements under CFTC Rule 4.21, certain periodic financial reporting obligations under CFTC Rule 4.22 and the requirement that records be maintained at the CPO’s main office under CFTC Rule 4.23. CPOs relying on proposed CFTC Rule 4.12(c) would also be permitted to deviate slightly from certain disclosure obligations required by

## CFTC Rule 4.24.

Finally, the CFTC is also proposing to amend CFTC Rules 4.26 and 4.36 for all CPOs and CTAs that are required to deliver disclosure documents pursuant to CFTC Rules 4.21 or 4.31 to require that disclosure documents be updated every twelve months rather than every nine months.

The proposed amendments are similar to the relief the CFTC adopted in May 2011 with respect to exchange-traded funds and are needed because the distribution and subscription mechanics for RICs make it difficult to comply with the CFTC's delivery and acknowledgement requirements.

The CFTC is seeking comment on a number of questions related to the proposed harmonization process, certain of which have little or nothing to do with RICs. If you wish to submit a comment letter to the CFTC on any of the Proposed Rules, please contact a Sidley lawyer. Comments must be received on or before 60 days after the Proposed Rules' publication in the Federal Register.

---

<sup>1</sup>The most recent letter (CFTC letter 10-25) issued affirming the CFTC's interpretation that a "family office" is not a pool under § 4.10(d) is available at the CFTC's website at: <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/10-25.pdf>. See, CFTC Interpretative Letter 00-100 [2000-2002 Transfer Binder] Comm. Fut. L. Rep. (CCH) 28,420 (Nov. 1, 2000); CFTC Interpretative Letter No. 96-24, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) 26,653 (March 4, 1996); CFTC Interpretative Letter No. 97-29, [1996-1998 Transfer Binder] Comm. Fut. L. Rep. (CCH) 27,039 (March 21, 1997); CFTC Interpretative Letter No. 95-35, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) 26,376 (Nov. 23, 1994).

<sup>2</sup>Family offices that have received interpretive relief stating that each family pooled vehicle is "not a pool" and exempt from registration should confirm that they are still compliant with the facts upon which the letters were issued. Given the expansion of CFTC regulation over non-securities based derivatives, some of these letters may be too limited for the current environment.

<sup>3</sup>See Sidley Client Update, "SEC and CFTC Adopt Form PF Confidential Information Reporting Requirements" (November 22, 2011), available at <http://www.sidley.com/sidleyupdates/Detail.aspx?news=5005>.

---


## The Investment Funds Practice of Sidley Austin LLP

Sidley has a premier, global practice in structuring and advising investment funds and advisers. We advise clients in the formation and operation of all types of alternative investment vehicles, including hedge funds, fund-of-funds, commodity pools, venture capital and private equity funds, private real estate funds and other public and private pooled investment vehicles. We also represent clients with respect to more traditional investment funds, such as closed-end and open-end registered investment companies (i.e., mutual funds) and exchange-traded funds (ETFs). Our advice covers the broad scope of legal and compliance issues that are faced by funds and their boards, as well as investment advisers to funds and other investment products and accounts, under the laws and regulations of the various jurisdictions in which they may operate. In particular, we advise our clients regarding complex federal and state laws and regulations governing securities, commodities, funds and advisers, including the Dodd-Frank Act, the Investment Company Act of 1940, the Investment Advisers Act of 1940, the Securities Act of 1933, the Securities Exchange Act of 1934, the Commodity Exchange Act, the USA PATRIOT Act and comparable laws in non-U.S. jurisdictions. Our practice group consists of approximately 120 lawyers in New York, Chicago, London, Hong Kong, Singapore, Shanghai, Tokyo, Los Angeles and San Francisco.

To receive copies of Sidley updates via email, [please click here](#).

*This Sidley update has been prepared by Sidley Austin LLP for informational purposes only and does not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Readers should not act upon this without seeking advice from professional advisers.*

*Attorney Advertising - For purposes of compliance with New York State Bar rules, our headquarters are Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, 212.839.5300 and One South Dearborn, Chicago, IL 60603, 312.853.7000. Prior results do not guarantee a similar outcome.*

 [View Update in PDF Format](#)

