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## CFTC Announces Self-Executing No-Action Relief for Delegating CPOs

Client Alert

October 20, 2014

On October 15, 2014, the Commodity Futures Trading Commission (CFTC) issued a [no-action relief letter](#) granting self-executing registration no-action relief to qualifying commodity pool operators (CPOs) that delegate their CPO functions to other registered CPOs. This new letter further simplifies the streamlined CPO delegation process announced by the CFTC in May by removing the need for a delegating CPO (Delegating CPO) to submit a written relief request to the CFTC. In addition, the new letter clarifies in helpful ways certain of the criteria that a Delegating CPO must satisfy in order to claim no-action relief under the streamlined process.

### Background

A CPO of a commodity pool is required to register with the CFTC, unless it is excluded or exempted from registration. In certain cases, a CPO may choose to delegate its CPO functions to another person that is registered as a CPO (Designated CPO) and become exempt from registration. On May 12, 2014, the CFTC announced a streamlined approach for CPO delegation that clarifies the conditions under which a Delegating CPO may delegate its CPO functions to a Designated CPO and avoid registration. To rely on the streamlined approach in the May letter, however, a Delegating CPO must submit a written request to the CFTC.

### New Self-Executing No-Action Relief

Due to the volume of requests received under the streamlined process, the CFTC is further simplifying the streamlined process by allowing Delegating CPOs to claim no-action relief without filing a written request, provided that certain criteria are met. These criteria are substantially the same as those under the existing streamlined approach, subject to additional clarifications with respect to criterion (1) below:

1. a. The Delegating CPO must have delegated to the Designated CPO all of its investment management authority with respect to the commodity pool pursuant to a legally binding document<sup>[1]</sup>; 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 Commodity Exchange Act (CEA) or CFTC regulations;
- b. The Delegating CPO does not participate in the solicitation of participants for the commodity pool; provided,

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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 an AP pursuant to the CEA or CFTC regulations; 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 commodity 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 Regulation 166.3. For purposes of this criterion, 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 statutory disqualification from registration under CEA Sections 8a(2) and 8a(3).
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 CFTC regulations.
5. The books and records of the Delegating CPO with respect to the commodity pool are maintained by the Designated CPO.
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 CFTC regulations 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<sup>[2]</sup>, then such Delegating CPO and the Designated CPO have executed a legally binding document whereby each undertakes to be jointly and

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severally liable for any violation of the CEA or CFTC regulations 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.

The CFTC has indicated in the new letter that pending requests previously submitted under the existing streamlined process will not be reviewed. A Delegating CPO should evaluate internally whether it meets the criteria for claiming self-executing no-action relief under this new streamlined process. For CPOs that do not qualify for self-executing no-action relief under the new streamlined process, the CFTC has reaffirmed that it will continue to review no-action relief requests on a case-by-case basis.

If you have any questions regarding CPO delegation and the new self-executing relief process, please feel free to contact your usual contact at Proskauer or any of the Proskauer attorneys listed in this alert.

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[1] The legally binding document could include, without limitation, a separate delegation agreement, a constituent document of the commodity pool or an investment management agreement between the Delegating CPO and the Designated CPO.

[2] The letter defines "Unaffiliated Board Member" as a natural person who is a voting member of the board of directors 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) above 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 is, or within the past 3 years was, employed in an executive capacity by, or was a principal or employee of, a material service provider or investment counterparty to, the Designated CPO or any of its affiliates.