

Clients & Friends Memo

CFTC Codifies Registration and Reporting Relief for Commodity Pool Operators and Commodity Trading Advisors

January 17, 2020

The Commodity Futures Trading Commission (the “**CFTC**”) approved the publication of two releases (the “**Final Rules**”)¹ on November 25, 2019, adopting final amendments to Part 4 of the CFTC Rules² which codify and expand a number of interpretative notices and no-action letters granting relief from the registration and reporting obligations applicable to various categories of Commodity Pool Operators (“**CPOs**”)³ and Commodity Trading Advisors (“**CTAs**”)⁴. The CFTC first proposed the amendments in a release published on October 18, 2018 (the “**Proposed Rulemaking**”).⁵

I. Overview of the Amendments

- **Proposed Amendments Adopted.** The CFTC adopted the following amendments to incorporate CFTC staff guidance regarding CPO and CTA registration and reporting requirements into Part 4 of the CFTC Rules:
 - i. adoption of CPO and CTA registration exemptions under CFTC Rules 4.13(a)(6) and 4.14(a)(11) for qualifying family offices, in line with the Securities and Exchange

¹ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors: Registered Investment Companies, Business Development Companies, and Definition of Reporting Person, 84 FR 67343 (Nov. 25, 2019), available at <https://www.cftc.gov/sites/default/files/2019/12/2019-26161a.pdf> (“**Final Rules Part I**”) and Registration and Compliance Requirements for Commodity Pool Operators (CPOs) and Commodity Trading Advisors: Family Offices and Exempt CPOs, 84 FR 67355 (Nov. 25, 2019), available at <https://www.cftc.gov/sites/default/files/2019/12/2019-26162a.pdf> (“**Final Rules Part II**”).

² Unless otherwise noted, any references to Rules in this memorandum are to CFTC Rules under the Commodity Exchange Act.

³ Any person “engaged in a business that is of the nature of a commodity pool, investment trust, syndicate, or similar form of enterprise, and who, in connection therewith, solicits, accepts, or receives from others, funds, securities, or property, either directly or through capital contributions, the sale of stock or other forms of securities, or otherwise, for the purpose of trading in commodity interests. . . .” CEA Section 1a(11).

⁴ Any person who, for compensation or profit, (i) advises others as to the value of, or the advisability of trading in futures, swaps, security futures products and retail foreign currency and commodity transactions, (ii) who issues analyses or reports on futures transactions, (iii) is an SEC-registered investment adviser who recommends to clients managed futures account programs of third-party CTAs, or (iv) is registered with the CFTC as a CTA. CEA Section 1a(12).

⁵ Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors, 83 FR 52902 (Oct. 18, 2018), available at <https://www.govinfo.gov/content/pkg/FR-2018-10-18/pdf/2018-22324.pdf> (“**Proposed Rulemaking**”).

Commission (the “**SEC**”) exclusion from investment adviser registration under the Investment Advisers Act of 1940 (the “**Advisers Act**”);

- ii. adoption of amendments to the “registration lite” regime of CFTC Rule 4.7 and the *de minimis* derivatives trading exemption in CFTC Rule 4.13(a)(3), permitting general solicitation of offerings in private “**Commodity Pools**”⁶ under Rule 506(c) of Regulation D or Rule 144A under the Securities Act of 1933 (the “**Securities Act**”), as directed by the Jumpstart Our Business Startups Act of 2012 (the “**JOBS Act**”);
 - iii. adoption of an amendment to clarify that “non-United States persons,” as defined in CFTC Rule 4.7, are eligible to invest in Commodity Pools operated under CFTC Rule 4.13(a)(3);
 - iv. adoption of an exclusion from CPO registration for SEC-registered investment advisers (“**RIAs**”) to business development companies (“**BDCs**”) in CFTC Rule 4.5, subject to the same conditions as for RIAs to registered investment companies (“**RICs**”), and clarification that the appropriate entity to claim the exclusion from CPO registration is the RIC’s or BDC’s RIA; and
 - v. adoption of exemptions from reporting on Forms CPO-PQR and CTA-PR under CFTC Rule 4.27 for CFTC-registered CPOs and CTAs that exclusively operate Commodity Pools or advise accounts in accordance with an exemption from registration.
- **Proposed Amendments Not Adopted.** The CFTC decided against adopting certain proposals set forth in the Proposed Rulemaking. Specifically, the CFTC declined to:
 - i. create a new registration exemption for CPOs that solicit and/or accept funds from only non-U.S. persons for participation in non-U.S. Commodity Pools;
 - ii. codify existing relief that permits the U.S.-based CPO of a non-U.S. Commodity Pool to maintain the Commodity Pool’s original books and records in the non-U.S. location of the Commodity Pool; and
 - iii. require firms claiming an exemption from CPO registration under CFTC Rule 4.13 to certify that neither they nor their principals are subject to a statutory disqualification under the CEA.
 - **Compliance Date.** The Final Rules went into effect on January 9, 2020.⁷

⁶ CEA Section 1a(10) defines “Commodity Pool” as “[a]ny investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any— (i) commodity for future delivery, security futures product, or swap; (ii) agreement, contract, or transaction described in section 2(c)(2)(C)(i) of the CEA or section 2(c)(2)(D)(i) of the CEA; (iii) commodity option authorized under section 6c of the CEA; or (iv) leverage transaction authorized under section 23 of the CEA.”

⁷ RIAs to RICs may be required to make CPO exemption filings by March 1, 2021. *See* Section II.A.4.i. *infra*.

II. The Final Rules

A. Proposed Amendments Adopted by the CFTC

1. Codification of CPO and CTA Registration Exemptions for Qualifying Family Offices.

In order to provide relief consistent with the SEC exclusion from registration of family offices under the Advisers Act, the CFTC issued No-Action Letters 12-37⁸ and 14-143⁹ in 2012 and 2014, respectively, providing relief from registration as a CPO and CTA, respectively, for certain qualifying family offices. In effect, family offices must meet the definition of a “family office” under the Advisers Act in order to qualify for the CFTC exemptive relief.¹⁰ The Final Rules adopted the CFTC’s proposal to codify Letters 12-37 and 14-143.¹¹ As adopted, the exemption is self-executing for both CPOs and CTAs.¹² However, firms should be mindful of the following compliance considerations:

- i. In order to document compliance with the new exemptions, family offices should make an internal record of which exemption they intend to rely on (*i.e.*, CPO and/or CTA) and how they meet the applicable conditions.¹²
- ii. As family offices are not required to file an exemption notice with the National Futures Association (“NFA”), CFTC-registered firms conducting business with family offices must satisfy their NFA Bylaw 1101 obligations some other way (*e.g.*, through the use of a Bylaw 1101 Questionnaire).¹³
- iii. The CFTC confirmed that firms may rely on existing CFTC guidance regarding those family investment vehicles that fall outside the definition of a “Commodity Pool.”¹⁴

2. Jobs Act Relief under CFTC No-Action Letter 14-116.

In 2014, the CFTC issued relief for CPOs operating Commodity Pools pursuant to exemptions under CFTC Rules 4.7 (“registration lite”) and 4.13(a)(3) (the *de minimis* derivatives trading exemption) to permit the use of general

⁸ CFTC No-Action Letter 12-37, Re: Family Offices (Nov. 29, 2012), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/12-37.pdf>.

⁹ CFTC No-Action Letter 14-143, Re: No-Action Relief from Registration as Commodity Trading Advisors for Family Offices (Nov. 5, 2014), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-143.pdf>.

¹⁰ *See* Proposed Rulemaking at 52909. The SEC defines “family office” as “a company (including its directors, partners, members, managers, trustees, and employees acting within the scope of their position or employment) that: (1) [h]as no clients other than family clients. . . . ; (2) [i]s wholly owned by family clients and is exclusively controlled (directly or indirectly) by one or more family members and/or family entities; and (3) [d]oes not hold itself out to the public as an investment adviser.” 17 CFR § 275.202(a)(11)(G)-1(b).

¹¹ *See* Final Rules Part II at 67358-59.

¹² The CFTC had originally proposed requiring family offices operating as CPOs (but not as CTAs) to file a notice claiming exemption from registration. The Final Rules did not adopt this aspect of the proposal, with the CFTC acknowledging privacy concerns for family offices making public filings, and the reduced investor protection concerns applicable to family offices, whose participants are family members, not public investors. *See id.* at 67359. Commissioner Berkovitz voted against this proposal, expressing the need to identify family offices due to their potential to be a disruptive market force. *See id.* at 67369-70. However, this objection does not seem justified in light of information available about systemically important firms through the CFTC’s large trader reporting system.

solicitation¹³ in accordance with Rule 506(c) of Regulation D¹⁴ or amended Rule 144A¹⁵ as adopted by the SEC under the JOBS Act.¹⁶ The Final Rules adopted the CFTC's JOBS Act relief through amendments to CFTC Rules 4.7 and 4.13(a)(3), and dispensed with the requirement under prior CFTC guidance that firms make a separate JOBS Act filing with the CFTC.¹⁷

3. **“Non-U.S. Person” Investors in CFTC Rule 4.13(a)(3) Commodity Pools.** The CFTC codified existing guidance¹⁸ which clarifies that “non-U.S. persons,” as defined in CFTC Rule 4.7(a), are eligible to participate in Commodity Pools operated under CFTC Rule 4.13(a)(3) (the *de minimis* derivatives trading exemption). The CFTC noted that certain commenters on the Proposed Rulemaking had requested that firms be permitted to rely on the “non-U.S. person” definition in Regulation S under the Securities Act.¹⁹ However, in line with existing guidance, the CFTC maintained the requirement that to be eligible to invest in Rule 4.13(a)(3) Commodity Pools, non-U.S. investors must fall within the definition of “non-United States person” in CFTC Rule 4.7.²⁰
4. **Codification of Exclusionary Relief for BDCs under CFTC No-Action Letter 12-40.** CFTC Rule 4.5 provides an exclusion from CPO registration for certain operators of Commodity Pools that are subject to regulation by other financial regulators. Those CPOs originally included: an investment company registered with the SEC under the Investment Company Act

¹³ Though “general solicitation” is not specifically defined in the SEC Rules, 17 CFR § 230.502(c) provides that the use of advertisements published in newspapers, magazines and on public websites, communications broadcast over television and radio, and advertisements at public seminars all would be considered general solicitation.

¹⁴ In order to conduct a private placement of securities under Rule 506(b) of Regulation D, an issuer of securities is prohibited from using general solicitation. The SEC adopted Rule 506(c) of Regulation D in accordance with the JOBS Act to permit issuers to conduct a private placement of securities through use of general solicitation if (i) all purchasers of the securities are accredited investors (as defined in Rule 501 of Regulation D), and (ii) the issuer takes reasonable steps to verify that the purchasers are accredited investors. *See* Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 78 FR 44771 (July 24, 2013), *available at* <https://www.govinfo.gov/content/pkg/FR-2013-07-24/pdf/2013-16883.pdf> (the “**JOBS Act Release**”) (amending Regulation D, 17 CFR §§ 230.500-230.508, and Rule 144A, 17 CFR § 230.144A).

¹⁵ The SEC amended Rule 144A under the Securities Act to provide registration relief for resales of securities to qualified institutional buyers using general solicitation. *See id.*

¹⁶ *See* CFTC Letter No. 14-116, Re: Exemptive Relief from Provisions in Regulations 4.7(b) and 4.13(a)(3) Consistent with JOBS Act Amendments to Regulation D and Rule 144A (Sept. 9, 2014), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-116.pdf>; *see also* JOBS Act Release at 44772.

¹⁷ *See* CFTC Letter No. 14-116. CPOs that have previously filed a notice with the DSIO to claim JOBS Act relief thus will not be required to take any additional action as a result of the CFTC amendments. As adopted, CPOs will solely be required to file an exemption notice with the NFA under CFTC Rule 4.7 or 4.13(a)(3), as applicable. *See* Final Rules Part II at 67361.

¹⁸ *See* CFTC Interpretative Letter 04-13, Re: Rule 4.13(a)(3) – Request for Interpretation Permitting Exempt CPOs To Admit Non-United States Persons That Are Not Accredited Investors (Apr. 14, 2004), *available at* <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/04-13.pdf>.

¹⁹ *See* Final Rules Part II at 67362 n.70 and accompanying text.

²⁰ *See id.* at 67362. Firms conducting Regulation S offerings (sometimes referred to as “Super Regulation S Offerings”) of interests in Commodity Pools operated under CFTC Rule 4.13(a)(3) must continue to qualify investors as non-U.S. persons under both Regulation S and CFTC Rule 4.7.

of 1940 (*i.e.*, a RIC); an insurance company subject to regulation by any state; a bank, trust company or other financial depository institution subject to regulation by any state or by the U.S. government; and a trustee or fiduciary of, or an employer maintaining, a pension plan that is subject to Title I of the Employee Retirement Income Security Act.²¹ CFTC Letter 12-40 extended the Rule 4.5 exclusion to BDCs, noting the similarity between RICs and BDCs in both activities and regulatory requirements.²² The Final Rules codified the exclusionary relief for BDCs in CFTC Rule 4.5,²³ and also clarified that a RIC's or BDC's RIA is the appropriate entity to claim the exclusion from CPO registration under CFTC Rule 4.5(a)(1).²⁴ RICs and BDCs should be mindful of the following compliance considerations:

- i. If an entity other than a RIC's RIA currently has filed a notice of eligibility to claim the exclusion, then the RIC's investment adviser must file the requisite notice with the NFA by March 1, 2021 to claim the exclusion as the RIC's designated CPO under the amended rule.
- ii. RICs must determine whether changing the CPO claiming the exclusion to the RIA would constitute a material change necessitating an off-cycle amendment to the RIC's registration statements. However, the CFTC noted that requiring the RIA to claim the exemption was not intended to create any substantive change to a RIC's eligibility for exemption under Rule 4.5.²⁵
- iii. RIAs to BDCs should make the requisite Rule 4.5 filing with the NFA "as soon as practicable."²⁶

- 5. Codification of Relief from Forms CPO-PQR and CTA-PR Reporting.** The CFTC amended CFTC Rule 4.27 consistent with current CFTC exemptive relief in CFTC Staff Letters 14-115²⁷ and 15-47²⁸ to provide that: (i) CFTC-registered CPOs that operate only Commodity Pools for which they are exempt from CPO registration under CFTC Rules 4.5 or 4.13 are not "reporting persons" required to file a Form CPO-PQR; and (ii) CFTC-registered CTAs are not "reporting persons" required to file a Form CTA-PR if they (a) do not "direct" client accounts (*i.e.*, exercise discretionary trading authority over the accounts) or (b) direct only Commodity

²¹ CFTC Rule 4.5(a)(1)-(4).

²² See CFTC No-Action Letter 12-40, Re: No-Action Relief from the Commodity Pool Operator Registration Requirement for Commodity Pool Operators of Certain Pooled Investment Vehicles Organized as Business Development Companies (Dec. 4, 2012), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/12-40.pdf>.

²³ Final Rules Part I at 67346.

²⁴ See *id.* at 67345 n.19 and accompanying text.

²⁵ See *id.* at 67346-47.

²⁶ *Id.*

²⁷ CFTC Letter No. 14-115, Re: Exemptive Relief from CFTC Regulation 4.27(c) with Respect to Certain Registered Commodity Pool Operators (Sept. 18, 2014), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/14-115.pdf>.

²⁸ CFTC Letter No. 15-47, Re: Exemptive Relief from CFTC Regulation 4.27(c) with Respect to Certain Registered Commodity Trading Advisors (July 21, 2015), available at <https://www.cftc.gov/sites/default/files/idc/groups/public/@lrllettergeneral/documents/letter/15-47.pdf>.

Pools for which they are registered, or exempt from registration, as a CPO.²⁹ The CFTC additionally confirmed existing guidance that where a CPO or CTA operates or advises (i) a Commodity Pool or account for which it is required to be registered, and (ii) a Commodity Pool or account pursuant to a registration exemption, the CPO or CTA is only required to file CPO-PQR and CTA-PR reports with respect to those Commodity Pools or accounts for which it is required to be registered.³⁰

B. Proposed Amendments Not Adopted by the CFTC

- 1. Proposed Codification of CFTC Advisory 18-96 into a CPO Registration Exemption for Non-U.S. Commodity Pools.** CFTC Advisory 18-96 currently permits CFTC-registered CPOs that operate non-U.S. Commodity Pools to claim relief from the reporting, disclosure, and recordkeeping requirements of CFTC Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and from the requirement in CFTC Rule 4.23 to maintain the Commodity Pool's books and records at the CPO's main U.S. offices.³¹ The CFTC proposed to create a new registration exemption (the "**Proposed 18-96 Exemption**") for CPOs that operate a non-U.S. Commodity Pool with exclusively non-U.S. investors in accordance with the conditions of CFTC Advisory 18-96. The Proposed 18-96 Exemption would have: (i) codified the reporting, disclosure and recordkeeping relief currently available under CFTC Advisory 18-96 into a registration exemption for CPOs to non-U.S. Commodity Pools; (ii) been available to both unregistered and CFTC-registered CPOs with respect to any qualifying Commodity Pool; and (iii) exempted CPOs claiming the Proposed 18-96 Exemption from Form CPO-PQR reporting requirements, which currently apply to CFTC-registered CPOs operating under CFTC Advisory 18-96.³² However, the CFTC decided to withdraw the Proposed 18-96 Exemption in light of concerns that the exemption "could have a significant impact on the compliance burdens of CPOs operating outside of the United States."³³

²⁹ See Final Rules Part I at 67347; see also *id.* at 67354 (amending the definition of "reporting person").

³⁰ See Final Rules Part I at 67347 nn.62-63 and accompanying text.

³¹ See CFTC Advisory 18-96, Offshore Commodity Pools Relief for Certain Registered CPOs From Rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23 (Apr. 11, 1998), available at <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm>.

³² See Proposed Rulemaking at 52905-06.

³³ See Final Rules Part II at 67357. Industry commenters had two principal concerns with the Proposed 18-96 Exemption:

1. It did not permit (i) any U.S. seed money, (ii) any U.S. administrative functions, or (iii) any leeway for inadvertent U.S. investment. Industry commenters requested that the CFTC relax these conditions in line with prior CFTC guidance. See Securities Industry and Financial Management Association Asset Management Group Comment Letter p. 8 (Dec. 17, 2018), available at <https://comments.cftc.gov/PublicComments/ViewComment.aspx> (the "**SIFMA AMG Comment Letter**").
2. CFTC Rule 3.10(c)(3) provides a CPO registration exemption for non-U.S. CPOs that operate non-U.S. Commodity Pools with exclusively non-U.S. investors that trade on U.S. futures exchanges or with U.S. swap counterparties. CFTC Rule 3.10(c)(3). The CFTC's comments in the Proposed Rulemaking indicated that the CFTC interpreted Rule 3.10(c)(3) restrictively on an entity—as opposed to a pool—basis. See, e.g., Proposed Rulemaking at 52904 n.24; SIFMA AMG Comment Letter pp.10-12. Under the CFTC's entity interpretation, a non-U.S. CPO may rely on CFTC Rule 3.10(c)(3) if the only Commodity Pools it operates are non-U.S. Commodity Pools with exclusively non-U.S. investors. The non-U.S. CPO may not, in addition, operate other Commodity Pools with U.S. investors in reliance on another registration exemption, including CFTC Rule 4.13(a)(3) (the *de minimis* derivatives trading exemption).

2. **Proposed Codification of Relief from the Books and Records Location Requirement for Non-U.S. Commodity Pools under CFTC Advisory 18-96.** CFTC Advisory 18-96 currently permits a CFTC-registered CPO whose main office is within the United States to maintain books and records of its non-U.S. Commodity Pools outside of the United States if the CPO submits a claim for exemption with the CFTC and the NFA by making certain certifications.³⁴ The CFTC proposed to codify relief from the books and record location requirement in CFTC Rule 4.23 subject to compliance with the conditions of CFTC Advisory 18-96 (collectively with the Proposed 18-96 Exemption, the “**Advisory 18-96 Proposals**”).³⁵ However, the CFTC withdrew the proposed amendments to Rule 4.23 along with the withdrawal of the Proposed 18-96 Exemption.³⁶
3. **Impact of the Withdrawal of the Advisory 18-96 Proposals.** Notwithstanding the withdrawal of the Advisory 18-96 Proposals, CFTC-registered CPOs may continue to claim exemption from disclosure, reporting and recordkeeping requirements with respect to operation of non-U.S. Commodity Pools by filing a claim for exemption under CFTC Advisory 18-96 with the CFTC and the NFA. CFTC-registered CPOs located in the United States may also continue to claim relief under CFTC Advisory 18-96 to maintain the books and records of a non-U.S. Commodity Pool at the pool's non-U.S. offices.

However, the CFTC's interpretive comments on Rule 3.10(c)(3) discussed in connection with the Proposed 18-96 Exemption indicate a gap between industry and regulatory understanding of the scope of this provision. Nevertheless, the CFTC acknowledged the serious implications that a more restrictive, entity-based interpretation would have on widespread industry practice. The CFTC indicated that it “may undertake a more comprehensive review of the extraterritorial application of CFTC regulations in the CPO/CTA space in the future.”³⁷ A separate rule proposal on CFTC Rule 3.10(c)(3) is pending approval, which will provide the CFTC with an opportunity to address industry concerns on the CFTC's interpretation of the scope of this exemption.³⁸

Industry commenters argued that CFTC Rule 3.10(c)(3) was widely interpreted to apply on a pool basis, so that a non-U.S. CPO may operate both (i) non-U.S. Commodity Pools with exclusively non-U.S. investors in reliance on CFTC Rule 3.10(c)(3), and (ii) Commodity Pools with U.S. investors in reliance on other registration exemptions (e.g., CFTC Rule 4.13(a)(3)). *See* SIFMA AMG Comment Letter.

³⁴ Specifically, the CPO must certify that: (i) the CPO will maintain the original books and records of the Commodity Pool at the main office of the Commodity Pool located outside the United States; (ii) the CPO desires to maintain such books and records outside the United States in furtherance of compliance with Internal Revenue Service requirements for relief from United States federal income taxation; (iii) the CPO will maintain duplicate books and records of the Commodity Pool at a designated office in the United States; (iv) within 72 hours after the request of a representative from the CFTC, the United States Department of Justice or the NFA, the original books and records will be provided to such representative at a place located in the United States that is specified by the representative; and (v) neither the CPO nor its principals are subject to a statutory disqualification under the CEA, unless previously disclosed to the CFTC. In addition, the CPO must provide contact information for the person that will have custody of the Commodity Pool's original books and records, and the location where the books and records will be kept outside the United States. *See* CFTC Advisory 18-96.

³⁵ *See* Proposed Rulemaking at 52905-06.

³⁶ *See* Final Rules Part II at 67357.

³⁷ *See* Final Rules Part II at 67357.

³⁸ *See* Exemption from Registration for Certain Foreign Persons, 81 FR 51824 (Aug. 5, 2016), *available at* <https://www.govinfo.gov/content/pkg/FR-2016-08-05/pdf/2016-18210.pdf>.

- 4. Proposed Codification of CFTC Advisory 18-96 Statutory Disqualification Provisions into Rule 4.13 Exemptions.** Though none of the CPO registration exemptions under CFTC Rule 4.13 prohibit statutory disqualifications as a condition of relief,³⁹ one of the requirements to obtain relief under Advisory 18-96 is that neither the registered CPO nor its principals is subject to any statutory disqualification under Sections 8a(2) or 8a(3) of the CEA, unless such disqualification arises from a matter which (i) was previously disclosed in connection with a previous application, if such registration was granted, or (ii) which was disclosed more than 30 days prior to the claim of this exemption.⁴⁰ In response to customer protection concerns, the CFTC proposed to require any CPO claiming a registration exemption under CFTC Rules 4.13(a)(1) through (a)(5) to represent that neither the CPO claiming the relief nor any of its principals is subject to any statutory disqualification under Section 8a(2) or 8a(3) of the CEA, unless the disqualification was previously disclosed to the CFTC, as previously described.⁴¹ The CFTC withdrew its statutory disqualification proposal, noting that it drew comments "in great detail," thus warranting further consideration. The CFTC expects to reconsider the statutory disqualification prohibition in a future rulemaking.⁴²

III. Summary and Policy Considerations

This is a measured rule amendment that incorporates existing CFTC guidance into Part 4 of the CFTC Rules. Just as significant as what the CFTC included in the Final Rules is what the CFTC chose to omit. Specifically, the CFTC decided to (i) reconsider the application of CPO registration requirements to operators of non-U.S. Commodity Pools, and (ii) withdraw its proposal to require statutory disqualification certifications for CPOs claiming registration relief under CFTC Rule 4.13. The CFTC thus acknowledged the disruption that may result from the imposition of regulatory requirements that are divergent from the longstanding industry understanding as to the territorial scope of CPO registration requirements, and the impact of imposing statutory disqualification screening requirements on firms that fall outside the scope of CFTC registration.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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Special thanks to law clerk Nikita Cotton for her contribution to this memo.

³⁹ See CFTC Rule 4.13.

⁴⁰ See CFTC Advisory 18-96. Under CEA Sections 8a(2) and 8a(3), the CFTC may deny registration to any person who has been found to have committed a number of bad acts. See 7 USC 12(a)(2) and (a)(3).

⁴¹ See Proposed Rulemaking at 52906, 52927.

⁴² Industry commenters were concerned that this proposal would have imposed considerable compliance burdens on exempt firms, and marked a radical departure from long-standing practice, which requires statutory disqualification screening only for firms registering with the CFTC, but not those claiming an exemption from registration. See Final Rules Part II at 67357. Commissioner Berkovitz opposed withdrawing the proposal, arguing that "disqualified persons should be disqualified" regardless of whether they are registered with the CFTC or operating pursuant to a registration exemption. See *id.* at 67370.