

BETTER LATE THAN NEVER? THE CFTC AND THE NFA PUBLISH FAQs ON CPO AND CTA REPORTING FORMS

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Investment Management Alert

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On November 5, 2015, the Commodity Futures Trading Commission (“CFTC”) Division of Swap Dealer and Intermediary Oversight (“DSIO”) issued responses to frequently asked questions (“CFTC FAQs”) regarding CFTC Forms CPO-PQR and CTA-PR. On November 10, the National Futures Association (“NFA”) issued responses to frequently asked questions (“NFA FAQs”) regarding NFA Forms PQR and PR. So, now that we’ve been completing these forms for over three years, in the case of CFTC Forms CPO-PQR and CTA-PR,^[1] and over two years, in the case of NFA Forms PQR and PR,^[2] what have we been doing wrong?

The following Alert highlights items where the responses in the CFTC FAQs deviate from the answers sought by industry associations when they jointly submitted frequently asked questions and proposed answers to the CFTC and NFA (“Industry FAQs”)^[3] and/or our understanding of how firms in the industry have been responding to specific questions on the forms, largely with respect to CFTC Form CPO-PQR.

While the NFA FAQs gave little substantive guidance regarding how to determine and/or calculate responses to the questions in CFTC Forms CPO-PQR and CTA-PR and NFA Forms PQR and PR, they provide a wealth of information regarding how to solve operational and technical issues regarding the filings. The NFA FAQs respond to numerous “How do I?” questions -- on everything from error messages to XML uploads to why certain responses cannot be entered (e.g., all amounts and values should be entered in U.S. dollars!). They are a helpful tool to keep on hand when completing the forms online.

Finally, we have confirmed with the DSIO staff that the guidance provided by the CFTC FAQs and the NFA FAQs does not come into effect until the fourth quarter 2015 filing (for large CPOs) or annual 2015 filing (for small and mid-sized CPOs).

CFTC FORM CPO-PQR

Most of the CFTC FAQs on Form CPO-PQR were not earth-shattering. A few items, however, took us by surprise, including the following:

- Generally, all CPOs that operate at least one pool during a Reporting Period^[4] must complete and file a Form CPO-PQR for that Reporting Period.^[5] However, if two or more CPOs operate a pool during a Reporting Period (“Co-CPOs”), only the Co-CPO with the highest total AUM, aggregated across all pools operated by the Co-CPOs, is required to fully complete Form CPO-PQR for the pool. The other Co-CPO is only required to complete Part 1 of Schedule A of Form CPO-PQR. However, if the larger Co-CPO is also an investment adviser registered with the Securities and Exchange Commission (“SEC”) that

presumably relies on substituted compliance with Form CPO-PQR by filing Form PF, the smaller Co-CPO must file all of the relevant sections of Form CPO-PQR, notwithstanding that the information with respect to such pool is being reported on Form PF by the larger Co-CPO. It is our understanding that many firms that act as Co-CPOs were under the impression that if the larger Co-CPO reports on the pools on either Form PF or Form CPO-PQR, then the smaller Co-CPO was only required to complete Part 1 of Schedule A of Form CPO-PQR. Apparently, this is not the case. (Response to Question 2 of the CFTC FAQs.)

- The CFTC FAQs state that, unlike Form PF (and Example 2 of Instruction 5 of Form CPO-PQR, as discussed further below) and contrary to the Industry FAQs, there is no concept of “dependent parallel managed accounts”^[6] for purposes of Form CPO-PQR. Whereas on Form PF, where an adviser is only required to aggregate dependent parallel managed accounts for purposes of determining whether the adviser meets any reporting threshold and the adviser is not required to report information regarding parallel managed accounts, the CFTC FAQs indicate that a CPO is required to aggregate all parallel managed accounts for purposes of determining filing thresholds and for reporting purposes. The result of this inconsistency between Forms PF and CPO-PQR is that a fund may not be a large hedge fund for purposes of Form PF, but may be a large pool for purposes of Form CPO-PQR, requiring the CPO to complete Schedule C of Form CPO-PQR with respect to that pool. (Responses to Questions 6 and 7 of the CFTC FAQs.)
- Further to the point above, the CFTC FAQs requires Parallel Managed Accounts to be aggregated with the Pool with the largest AUM to which the Parallel Managed Account relates. This response is inconsistent with Instruction 5 of Form CPO-PQR, which discusses “electing” to aggregate parallel fund structures for reporting purposes. Example 2 of that instruction even goes so far as to state that you would disregard the “dependent parallel managed account.” To make matters more confusing, in contrast to Instruction 5, Instruction 3 of Form CPO-PQR states: “. . . *Assets held in Parallel Managed Accounts should be treated as assets of the Pools with which they are aggregated.*” (emphasis added) Example 2 in Instruction 5 is identical to the example in Form PF, where “dependent parallel managed accounts” are to be treated differently from “‘non-dependent’ parallel managed accounts,” so it may be that the CFTC miscopied the text from Form PF, creating some substantive confusion. (Response to Question 7 of the CFTC FAQs.)
- The CFTC indicates that all CPOs are required to use U.S. generally accepted accounting principles in completing Form CPO-PQR. This is in contrast to the proposed response in the Industry FAQs. (Response to Question 9 of the CFTC FAQs.) Further, this is in contrast to CFTC Regulation 4.22, which permits a CPO to have financial statements of offshore funds prepared in accordance with International Financial Reporting Standards.
- In the response to Question 17 of the CFTC FAQs, the CFTC FAQs confirm that a pool parallel to a non-exempt pool, but operated pursuant to CFTC Regulation 4.13(a)(3), should not be included in determining the reporting threshold or for purposes of reporting on the non-exempt pool in Schedules B or C. (Response to question 17 of the CFTC FAQs.)
- The CFTC FAQs confirmed that, where there is no cross liability between the series of a multi-series pool (e.g., limited liability partnership, a Cayman Islands segregated portfolio company or equivalent structure), the CPO may report each series as a separate pool on Form CPO-PQR, even though the CPO

maintains only one disclosure document for all of the series. (Response to Question 20 of the CFTC FAQs.)

- Contrary to the proposed answer on the Industry FAQs, the CFTC FAQs state that, if multiple classes of a pool are each engaged in differing trading strategies and a participant in the pool cannot participate in each of the classes, the performance and risk information should be reported for each of the participant classes. But, if all participants invest in the various strategies, the CPO may report on the performance of the pool as a whole. It is our understanding that, where multiple strategies (or variations on a strategy) are being offered on a class basis (instead of using ring-fenced series or segregated portfolios, some firms in the industry have been reporting on a “representative” class. While some of this response is unclear (e.g., why a participant would not be able to participate in each of the classes even if each class pursued a different strategy), it seems that the DSIO wants the CPO to report on each class independently. (Response to Question 23 of CFTC FAQs.)
- The CFTC FAQs confirm that the term “Pool Marketers” in Question 9 of Schedule A of Form CPO-PQR refers to any entities that are soliciting on behalf of the pool (except the CPO itself), including underwriters. This is problematic for CPOs to registered investment companies (“RICs”), who may not know all of the distributors for the RIC. (Response to Questions 27 and 28 of the CFTC FAQs.)
- The CFTC FAQs confirmed that a CPO should include monthly rates of return irrespective of when the pool calculates its rates of return for other purposes. This is inconsistent with the Industry FAQs and the practice of some firms in the industry (e.g., private equity fund managers) that may not have monthly performance returns and consequently have been entering the same rates for months one and two of each quarter, with the actual calculated rate entered for month three of each quarter. Additionally, the rates of return should be entered for the last seven years or the life of the pool if less than seven years. If a pool has been in existence for more than seven years but has only calculated rates of return on a quarterly basis until now, it is unclear whether the CPO must have the past intra-quarter rates calculated. (Responses to Questions 29 and 30 of the CFTC FAQs.)
- The CFTC suggested that, in addition to completing Question 7 of Schedule B, where a CPO can enter any miscellaneous information regarding assumptions made in responding to questions in Schedule B, a CPO should keep internal notes and explanations about its assumptions to provide, upon request, during an examination. This is particularly important if the CPO determines that information in prior filings is incorrect based on guidance published by the CFTC and/or the NFA after the filing was due.

CFTC FORM CTA-PQR

There was little startling guidance in the CFTC FAQs regarding Form CTA-PR. Of note, the CFTC FAQs confirm that any CTA registered or required to be registered under the Commodity Exchange Act and the CFTC's regulations is required to file Form CTA-PR annually, unless the registered CTA does not direct commodity interest accounts.^[7] (Response to Question 1 in CFTC FAQs.)

Additionally, the CFTC confirmed that a CTA can exclude trading programs for which the CTA is not required to be registered. (Response to Question 5 in CFTC FAQs.)

Finally, the CFTC confirmed that a CTA must report on assets of pools it directs, even if such pools are offshore and operated by an offshore CPO that is not registered. Such pools should be treated as managed accounts when reporting on Form CTA-PR.

CONCLUSION

While the CFTC FAQs have clarified certain questions, they have raised a few others. We are continuing to work with industry organizations to try to resolve some of the outstanding questions and issues raised by the FAQs. If you have further questions regarding the CFTC FAQs, the NFA FAQs or any of the Forms PQR or PR, please feel free to call either of the authors at the numbers listed below or your K&L Gates lawyer.

The CFTC FAQs can be found [here](#).

The NFA FAQs on NFA Form PQR can be found [here](#).

And the NFA FAQs on NFA Form PR can be found [here](#).

Notes:

[1] In February 2012, the CFTC adopted quarterly and annual reporting requirements for commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) pursuant to CFTC Regulation 4.27.

[2] In 2013, the NFA amended NFA Compliance Rule 2.46 to require CPOs and CTAs to file quarterly reports with the NFA.

[3] The Investment Adviser Association (the “IAA”) and the Investment Company Institute (the “ICI”) originally submitted proposed questions and answers in June 2013, “Questions for CFTC Staff regarding CFTC Form CPO-PQR and Form CTA-PR and for NFA Staff regarding NFA Form PQR and NFA Form PR.” In December 2014, the proposed questions and answers were jointly resubmitted by the IAA, the ICI and the Alternative Investment Management Association (“AIMA”).

[4] A “Reporting Period” is variable depending on the amount of the CPO’s Assets Under Management (“AUM”). The term “Reporting Period” means any of the individual calendar quarters for Large CPOs and the calendar year for Small and Mid-Sized CPOs. A “Large CPO” is any CPO that had at least \$1.5 billion in aggregated pool AUM as of the close of business on any day during the Reporting Period. A “Mid-Sized CPO” is any CPO that had at least \$150 million in aggregated pool AUM as of the close of business on any day during the Reporting Period. And a “Small CPO” is any CPO that did not have at least \$150 million in aggregated pool AUM as of the close of business on any day during the Reporting Period. These amounts are calculated on a gross basis.

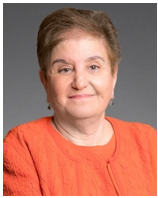
[5] A registered CPO that did not operate a pool or only operated pools for which the CPO was not required to be registered (e.g., pools for which the CPO relied on CFTC Regulation 4.13(a)(3)) during the Reporting Period is not required to complete and file a Form CPO-PQR. See CFTC Staff Letter 14-115 (September 8, 2014).

[6] Form PF defines a “dependent parallel managed account” as, with respect to any private fund, any related parallel managed account (as defined in this footnote) other than a parallel managed account that individually (or together with other parallel managed accounts that pursue substantially the same investment objective and strategy and invest side by side in substantially the same positions) has a gross asset value greater than the gross asset value of such private fund (or, if such private fund is a parallel fund, the gross asset value of the parallel fund structure of which it is a part).

Form PF defines a “parallel managed account” as, with respect to any private fund, any managed account or other pool of assets that [the adviser] advises and that pursues substantially the same investment objective and strategy and invests side by side in substantially the same positions as the identified private fund.

[\[7\]](#) See CFTC Staff Letter 15-47 (July 21, 2015).

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