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PREPARING TO BE A COMMODITY POOL OPERATOR: NFA COMPLIANCE OBLIGATIONS

The CFTC has adopted sweeping regulatory changes that will compel more operators of private and registered funds to register as commodity pool operators and become members of the National Futures Association. As members, CPOs must make sure that their investors and counterparties in commodity interest transactions are appropriately registered or exempt. There are also advertising rules, ethics training requirements, supervisory procedures, and annual and quarterly reporting obligations.

By Cary J. Meer and Kathy K. Ingber *

Last year, the Commodity Futures Trading Commission adopted sweeping changes to its regulations exempting and excluding operators of private and registered funds from regulation as commodity pool operators (“CPOs”). The CFTC rescinded the exemption from CPO registration under Regulation 4.13(a)(4) for operators of private funds that limit investors to highly sophisticated investors.¹ The CFTC also amended Regulation 4.5 to significantly narrow the exclusion for operators of registered funds.² As a result, fund operators have had to consider whether they must register as CPOs or if they

can rely on the exemption in Regulation 4.13(a)(3) for private funds or the amended exclusion in Regulation 4.5 for registered funds. In light of these regulatory changes, operators of private and registered funds that are no longer exempt or excluded from regulation as CPOs must have registered with the CFTC and become members of the National Futures Association (“NFA”) by January 1, 2013.³

¹ *Commodity Pool Operators and Commodity Trading Advisors, Compliance Obligations*, 77 Fed. Reg. 11252 (February 24, 2012); correction notice published at 77 Fed. Reg. 17328 (March 26, 2012) (“Amendment Release”).

² *Id.*

³ In CFTC Letter No. 12-68 (December 21, 2012), the CFTC’s Division of Swap Dealer and Intermediary Oversight stated that it would not recommend enforcement action against CPOs, commodity trading advisors (“CTAs”), and the principals and associated persons (“APs”) of CPOs and CTAs who are required to register as a result of the amendment to Regulation 4.5 or the rescission of Regulation 4.13(a)(4), for engaging in activities as

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Regulation 4.13(a)(3) and amended Regulation 4.5 both allow funds to trade commodity interests only to a *de minimis* extent. Operators of registered funds can, however, exclude *bona fide* hedging commodity interest transactions from these *de minimis* calculations. Operators of private funds cannot. For operators of funds of funds, it is difficult to determine compliance with the *de minimis* trading restrictions because this assessment requires that they determine the extent of commodity interest trading by the underlying funds in which they invest, and whether or not the underlying funds will themselves be able to rely on Regulation 4.13(a)(3) or amended Regulation 4.5 going forward. The CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") has issued no-action relief postponing the compliance date for operators of certain fund of funds to register as CPOs until the later of June 30, 2013, or six months from the date that the Division issues revised guidance on the application of the registration thresholds in the context of Regulations 4.13(a)(3) and 4.5.⁴

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such prior to registration being granted or denied by the NFA, provided that such persons: (1) complete and file with the NFA on or before December 31, 2012 a registration application, including Forms 7-R and 8-R and any required fingerprint card for each of its principals and APs; and (2) on and after January 1, 2013, such persons comply with applicable CFTC regulations.

⁴ CFTC Letter 12-38 (November 29, 2012). In order to claim this relief, the operator of a fund of funds must meet and remain in compliance with the following conditions: (a) the CPO currently structures its operations in whole or in part as a CPO of one or more "Funds of Funds"; (b) the amount of commodity interest positions to which the investor fund is directly exposed does not exceed the levels specified in Regulation 4.5 or 4.13(a)(3)(ii)(A) or (B); (c) the CPO does not know and could not have reasonably known that the investor fund's indirect exposure to commodity interests derived from contributions to investee funds exceeds the levels specified in Regulations 4.5 or 4.13(a)(3)(ii)(A) or (B), either calculated directly, or through the use of rescinded Appendix A; and (d) the commodity pool for which the CPO seeks relief is either: (i) an investment company registered as such under the Investment Company Act of 1940;

Private fund operators are required to comply with CFTC and NFA rule requirements upon registration. However, recognizing that dual regulation by the CFTC, NFA, and the SEC would be untenable for operators of registered funds, the CFTC has postponed compliance by registered fund operators with certain CFTC disclosure, recordkeeping, and reporting requirements until 60 days after the effectiveness of the CFTC's proposed harmonization effort.⁵ As CFTC and NFA operational rules impose similar obligations on CPOs, certain NFA rule requirements will apply to CPOs of registered funds upon registration while others will be deferred until harmonization.⁶ The NFA staff has,

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or (ii) compliant with the provisions of Regulation 4.13(a)(3) (i), (iii) and (iv). The letter does not define the term "Fund of Funds." However, it does describe an operator of a fund of funds as the operator of "a vehicle that holds an interest ('Investor Fund' or 'Fund of Funds') in a separately managed vehicle ('Investee Fund')." The relief is not self-executing. An eligible CPO must file a claim with the DSIO to perfect the relief.

⁵ Amendment Release, 77 Fed. Reg. at 11252. In a separate rulemaking, the CFTC proposed to "harmonize" the compliance obligations that will apply to registered fund operators subject to two regulatory regimes. See *Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11345, 11346 (February 24, 2012) ("Harmonization Release"). In the Harmonization Release, the CFTC stated that it intends to adopt exemptive provisions to provide harmonization in the following areas, at a minimum: (1) delivery of disclosure documents and periodic reports; (2) content and timing of disclosure documents; and (3) timing and certification of periodic reports. We understand from conversations with the CFTC staff that the staff is considering harmonization efforts in other areas.

⁶ Letter to Daniel A. Driscoll, Executive Vice President and Chief Operating Officer, and Thomas W. Sexton, III, Senior Vice President, General Counsel and Secretary, NFA from Karrie McMillan, General Counsel, Investment Company Institute (December 28, 2012) ("ICI Letter"). The ICI Letter confirms that, for CPOs and CTAs required to register with the NFA as a result of the amendments to Regulation 4.5, compliance with NFA Compliance Rule 2-10 (books and records), Compliance

however, clarified to one of the authors that, if an adviser is relying on an exclusion or exemption from CPO registration with respect to a fund, compliance with NFA rules is not required with respect to that fund.

Much has been written of the CFTC's requirements that apply to registered CPOs. Accordingly, this article discusses some of the more significant of the NFA's regulatory requirements that apply to firms that must register as CPOs and become NFA members. We address general operational requirements, including compliance with NFA Bylaw 1101 and NFA advertising rules, ethics training requirements, and supervisory procedures, as well as annual compliance requirements, including the self-examination questionnaire, the annual questionnaire, registration updates, and quarterly NFA reporting requirements.

GENERAL OPERATIONAL REQUIREMENTS

NFA Bylaw 1101

NFA Bylaw 1101 prohibits NFA members from carrying an account, accepting an order, or handling a transaction in commodity futures contracts for or on behalf of any non-member of the NFA, or suspended member, that is required to register with the CFTC as a futures commission merchant ("FCM"), introducing broker ("IB"), CPO, CTA, or leverage transaction merchant,⁷ and that is acting in respect to the account, order, or transaction for a customer, a commodity pool, or participant therein, a client of a CTA, or any other person, unless:

- the non-member is a member of another futures association registered with the CFTC under Section 17 of the Commodity Exchange Act ("CEA"), or is otherwise exempted from the Bylaw 1101 prohibition by NFA Board resolution;

- the non-member is registered with the CFTC as an FCM or IB under Section 4f(a)(2) of the CEA and the account, order, or transaction involves only security futures products; or
- the suspended member has been exempted from the Bylaw 1101 prohibition by the NFA Appeals Committee.

What this means in practice is that every registered CPO must make sure that all of the investors in its funds for which it is acting in a registered capacity, any sub-advisers to those funds, the counterparties with which those funds enter into commodity interest transactions, and its solicitors for those funds are appropriately registered or exempt.⁸ This requirement applies to current investors, sub-advisers, counterparties, and solicitors, as well as to new ones.

In Interpretive Notice 9007, the NFA sets out "certain minimal steps" for members to comply with Bylaw 1101.⁹ They include:

- reviewing the list of CFTC registrants with which a firm does business to determine whether they are NFA members. A member can determine whether a particular firm is a CFTC registrant by checking the BASIC system on the NFA's website, sending a request to the NFA through the "contact" feature on the website, or calling the NFA's Information Center toll free at (800) 621-3570;
- reviewing customer lists. If a customer's name indicates that it may be engaged in the futures business, a member should inquire as to its registration and membership status;
- verifying that a customer operating a commodity pool that claims to be exempt from CPO registration has made any required filings with the CFTC and the NFA; and
- ensuring that a member's branch offices either are not separately incorporated entities, or if they are,

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Rule 2-13 (disclosure of fees and expenses in disclosure documents), certain portions of Compliance Rule 2-29 (public and promotional material), Compliance Rule 2-34 (CTA performance reporting and disclosure), Compliance Rule 2-35 (content and delivery of disclosure documents), and Compliance Rule 2-46 (reporting under the CFTC's Part 4 regulations) will be postponed until harmonization.

⁷ We assume that, as retail foreign exchange dealer, swap dealer, and major swap participant are new CFTC registration categories, they will soon be added to the list of registration categories in Bylaw 1101.

⁸ As noted above, Bylaw 1101 compliance is not required for Regulation 4.5 and 4.13(a)(3) compliant funds, even if the operator is registered as a CPO with respect to other funds.

⁹ NFA Interpretive Notice 9007, *Compliance with NFA Bylaw 1101* (Staff, March 1987; revised July 1, 2000). Interpretive Notice 9007 states that "these suggested steps do not purport to be a dispositive list of internal procedures required to prevent violation of NFA Bylaw 1101."

that they are registered in the appropriate capacity with the CFTC.

In light of the rescission of the Regulation 4.13(a)(4) exemption and the narrowing of the Regulation 4.5 exclusion for operators of registered funds, private and registered funds operators that become NFA members will need to take steps to ensure that they are in compliance with NFA Bylaw 1101 on the date they become registered CPOs.

A private fund CPO typically addresses compliance with Bylaw 1101 by fund investors through representations in the fund's subscription agreement. Many private fund operators recently have been sending supplemental Bylaw 1101 questionnaires to existing investors and amending their subscription agreements to include Bylaw 1101 questions for new investors.

Bylaw 1101 compliance with respect to registered fund investors is a very significant undertaking, particularly because shares of registered funds often are held in omnibus accounts and other accounts held through financial intermediaries. The NFA staff is developing guidance for registered fund operators with respect to their due diligence obligations under Bylaw 1101.¹⁰ The NFA has advised that, until the guidance is issued, a registered CPO has no Bylaw 1101 obligation with respect to investors in a registered fund. Rather, the CPO of a registered fund will be considered to be in compliance with Bylaw 1101, provided that the CPO ensures that any FCM through which the fund "transacts any commodity interest transactions and any sub-adviser that provides investment management services to the [fund] is properly registered in the appropriate capacity and a [m]ember of NFA, or in the case of the sub-adviser, exempt from CTA registration."¹¹

Existing NFA members also will need to ensure that they continue to comply with NFA Bylaw 1101 with respect to funds for which they are now acting in a registered capacity. Operators of private funds and registered funds also will need to ascertain registration status of sub-advisers, operators of underlying funds in a fund of funds structure, counterparties for futures contracts, commodity options and swap transactions, and solicitors (placement and other referral agents) to ascertain Bylaw 1101 compliance.

Under the amended CFTC regulations, any person that claims an exclusion or exemption from CPO or

CTA registration under Regulations 4.5, 4.13(a)(3) and 4.14(a)(8) is required to affirm the notice of exemption on an annual basis within 60 days of each calendar year end. The NFA has issued guidance advising that members taking "reasonable steps to determine the registration and [m]embership status of previously exempt persons will not be in violation of NFA Bylaw 1101 if, between January 1 and March 31, 2013, they transact customer business with a previously exempt person that fails to either become registered and a [m]ember of NFA, file a notice affirming its exemption from CPO registration, or provide a written representation as to why the person is not required to register or file the notice affirming the exemption."¹² The NFA also has advised that NFA members are expected to "promptly" contact a person with which the member transacts business that has not filed a notice reaffirming its exemption, a notice of another exemption, or registered with NFA, to determine whether the person intends to file an affirmation. If a member learns that the person does not intend to file the affirmation or does not so file by March 1, 2013, the member is required to obtain a written representation as to why the person is not required to register or file a notice of exemption. If the member determines that the written representation is inadequate, the member is required to cease transacting business with the person or risk violating NFA Bylaw 1101.

Advertising

NFA Compliance Rule 2-29 and various interpretive notices govern communications by NFA members with the public and promotional materials.¹³ NFA

¹² NFA Notice to Members I-12-35 (Dec. 19, 2012).

¹³ The NFA has issued a series of interpretive notices related to Compliance Rule 2-29. A detailed discussion of all of these notices is beyond the scope of this article. These notices, which may be found on the NFA's website, are as follows: 9003 – *NFA Compliance Rule 2-29: Communications with the Public and Promotional Material* (Board of Directors, Nov. 19, 1985); 9009 – *NFA Compliance Rule 2-29: Review of Promotional Material Prior to Its First Use* (Staff, May 1, 1989); 9025 – *Compliance Rule 2-29: Use of Promotional Material Containing Hypothetical Performance Results* (Board of Directors, Feb. 1, 1996); 9033 – *NFA Compliance Rule 2-29: Deceptive Advertising* (Board of Directors, June 4, 1996); 9034 – *NFA Compliance Rule 2-29: Deceptive Advertising* (Board of Directors, Sept. 2, 1998); 9038 – *Compliance Rule 2-29: High Pressure Sales Tactics* (Staff, June 19, 1996); 9039 – *NFA Compliance Rules 2-29 and 2-9: NFA's Review and Approval of Certain Radio and Television Advertisements* (Board of Directors, Mar. 28, 2000); and 9055 – *NFA Bylaw*

¹⁰ NFA Notice to Members I-12-34 (Dec. 19, 2012).

¹¹ *Id.*

Compliance Rule 2-29 prohibits fraudulent advertising by CPOs and their principals, and places restrictions on the use of testimonials, and simulated or hypothetical trading results. It sets forth: (i) general rules regarding communications with the public; (ii) specific prohibitions and requirements regarding the content of promotional material; (iii) restrictions and guidelines, including disclaimers, with respect to the use of hypothetical performance; (iv) supervisory procedures and recordkeeping requirements; and (v) review and approval requirements for radio and television advertisements. The related interpretive notices provide additional guidance on the purpose and application of some of these prohibitions and guidelines.

For this purpose, “promotional material” includes: (i) any text of a standardized oral presentation, or any communication for publication in any newspaper, magazine, or similar medium, or for broadcast over television, radio, or other electronic medium, which is disseminated or directed to the public concerning a futures account, agreement or transaction; (ii) any standardized form of report, letter, circular, memorandum, or publication which is disseminated or directed to the public; and (iii) any other written material disseminated or directed to the public for the purpose of soliciting a futures account, agreement, or transaction. Under the rule, a futures account, agreement, or transaction also includes commodity pool participations.

CPOs may not make fraudulent or deceptive communications with the public, employ a high-pressure sales approach, or make a statement to the effect that futures trading is appropriate for all persons.¹⁴ NFA guidelines generally prohibit the use of promotional material that: (1) is likely to deceive the public; (2) contains any material misstatement of fact; (3) mentions the possibility of profit unless accompanied by an equally prominent statement regarding the risk of loss; (4) includes a reference to past trading profits without mentioning that past results are not necessarily indicative of future results; (5) includes numerical or statistical information unless it can be demonstrated to the NFA to be representative of the actual performance

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1101, Compliance Rules 2-9 and 2-29: Guidelines Relating to the Registration of Third-Party Trading System Developers and the Responsibility of NFA Members for Promotional Material that Promotes Third-Party Trading System Developers and their Trading Systems (Board of Directors, Aug. 19, 2004, effective Jan. 10, 2005).

¹⁴ NFA Compliance Rule 2-29(a).

for the same time period of all reasonably comparable accounts and, in the case of rate of return figures, such figures are calculated in a manner consistent with CFTC and NFA rules; or (6) includes a testimonial that is not representative of all reasonably comparable accounts, does not prominently state that the testimonial is not indicative of future performance or success, and does not prominently state that it is a paid testimonial (if it is).¹⁵

CPO marketing materials that include hypothetical results also must contain the disclaimers set forth in the rule. NFA Compliance Rule 2-29(c) restrictions and requirements on the use of hypothetical trading results do not, however, apply to promotional material directed exclusively to persons who meet the standards of a “Qualified Eligible Person” (or QEP) as defined in Regulation 4.7(a).

In addition, any radio and television advertising, or other audio or video advertisement distributed through media accessible by the public that makes a “specific trading recommendation or refers to or describes the extent of any profit obtained in the past or that can be achieved in the future,” must be submitted to the NFA’s Promotional Material Review Team for its review at least 10 days prior to its first use, or a shorter period if allowed by the NFA.¹⁶

NFA Compliance Rule 2-29 requires members to adopt and enforce written procedures for the supervision of a member’s employees relating to compliance with the rule. In addition, prior to its first use, all promotional material must be “reviewed and approved, in writing, by an officer, general partner, sole proprietor, branch office manager, or other supervisory employee, other than the individual who prepared such material” unless prepared by the only individual qualified to do the review and approval.¹⁷ The NFA Staff also will voluntarily review promotional material if submitted for review. In addition, CPOs are required to keep copies of all

¹⁵ NFA Compliance Rule 2-29(b).

¹⁶ NFA Compliance Rule 2-29(h). We note that these types of advertisements may be used by registered funds, but are not, as of the date of this article, relevant for managers of private funds given the current restrictions on general solicitation and general advertising contained in Rule 506 of Regulation D under the Securities Act of 1933. These restrictions may change upon the adoption of final rules by the SEC pursuant to the JOBS Act.

¹⁷ NFA Compliance Rule 2-29(e). If the promotional material specifically refers to security futures products, then the individual reviewing and approving the promotional material must be a designated security futures principal.

promotional materials along with a record of the approval and supporting data for any performance information presented. These materials must be maintained for a period of five years, the first two years in a readily accessible place.¹⁸

The ICI has confirmed with the NFA that, because “the CFTC’s harmonization efforts are expected to cover presentation of performance and other issues relating to the marketing of funds, as well as related recordkeeping requirements, compliance with applicable SEC requirements¹⁹ will be deemed to constitute compliance” with the NFA Compliance Rule 2-29, relating to: (1) the calculation of rate of return figures; (2) disclaimers accompanying hypothetical results; (3) the identification of statements of opinion; (4) the review of certain radio and television advertisements; (5) promotional material relating to security futures products; and (6) procedures for the approval and supervision of promotional material.²⁰ However, compliance with the more general anti-fraud provisions of Compliance Rule 2-29 is not deferred. The ICI Letter also confirms that, pending further NFA review, the NFA will deem compliance by a fund’s principal underwriter or another broker-dealer with Financial Industry Regulatory Authority review, approval, filing, recordkeeping, and supervision requirements with respect to fund promotional materials to satisfy a fund CPO’s or CTA’s obligations under NFA Compliance Rules 2-9 and 2-29 and related interpretive notices.

Ethics Training

Ethics training is a supervisory obligation for CPOs under NFA Compliance Rule 2-9. NFA members are required to have written ethics training procedures and evidence that the firm is adhering to those procedures. Nevertheless, CPOs have the flexibility to determine the frequency, duration, and provider of their ethics training programs.

In Interpretive Notice 9051, the NFA advised members regarding how to meet their ethics training requirements.²¹ According to the NFA, ethics training

procedures should address, at a minimum: (1) the topics that will be included in the ethics training program; (2) by whom the training will be provided; (3) the format of the training, *e.g.*, classroom instructions, software, etc.; (4) the frequency with which an NFA member expects its employees to obtain ethics training; and (5) how the firm will document that it has followed its written procedures.

Interpretive Notice 9051 suggests the topics that may be covered in a CPO’s ethics training program. It advises that a firm choose topics that are relevant and timely for all participants of the training, taking into account the extent of the CPO’s NFA/CFTC-related business. Examples of topics include, but are not limited to, the following:

- an explanation of the applicable laws, regulations, and rules of self-regulatory organizations;
- the firm’s obligation to observe just and equitable principles of trade;
- how to act honestly and fairly, and with due skill, care, and diligence in the best interest of clients and the integrity of the markets;
- how to establish effective supervisory systems and internal controls;
- obtaining and assessing the financial situation and investment experience of customers;
- disclosure of material information to customers; and
- avoidance, proper disclosure, and handling of conflicts of interest.

A CPO may use an outside training provider with relevant industry experience or qualified in-house personnel to provide the training. Ethics training may be provided through a variety of media, including the Internet, audiotapes, computer software, and videotapes, as well as in-person courses. Less formal methods of training are also permitted, including distribution of periodicals, legal cases, and advisories. Although the frequency of ethics training may be determined by a CPO on a case-by-case basis, a best practice would be for a CPO to offer ethics training on an annual basis. Regardless of the format, it is important for a CPO to maintain documentation verifying that it has complied with ethics training requirements for its supervised persons.

¹⁸ NFA Compliance Rule 2-29(f); CFTC Regulation 1.31(a).

¹⁹ Such as Item 26 of Investment Company Act Form N-1A (regarding calculation of performance data). ICI Letter, *supra*, note 6.

²⁰ ICI Letter, *supra*, note 6.

²¹ NFA Interpretive Notice 9051, *NFA Compliance Rule 2-9: Ethics Training Requirements* (Board of Directors, July 1, 2003).

Supervisory Procedures

NFA Compliance Rule 2-9 requires each member firm to “diligently supervise its employees and agents in the conduct of their commodity futures activities for or on behalf of the Member.” In Interpretive Notice 9019, the NFA recognized that in light of the “differences in the size of and complexity of the operations of NFA Members, there must be some degree of flexibility in determining what constitutes ‘diligent supervision’ for each firm.”²² To implement its supervisory responsibilities, the NFA requires that a CPO develop and follow written supervisory procedures for its employees that are appropriate for its operations. In Interpretive Notice 9019, the NFA advised that these procedures cover, at a minimum: (1) hiring policies; (2) registration; (3) customer information; (4) account activity; (5) discretionary accounts; (6) promotional material; (7) customer complaints; and (8) ongoing training for firm personnel.

A CPO also must oversee any branch offices that it maintains. A branch office is “any location, other than the main business address at which . . . [a] CPO . . . employs persons engaged in activities requiring registration” as an associated person.²³ An office is a branch office even if there is only one person at the location. In Interpretive Notice 9019, the NFA advised member firms to perform onsite inspections of branch offices at least annually. In the Interpretive Notice, the NFA indicated that written procedures for onsite branch office examinations would include steps to review, among other things: (1) customer order procedures; (2) discretionary accounts; (3) sales practices; (4) customer complaints; (5) handling of customer funds; and (6) proprietary trading. After the completion of an onsite visit, a written report should be prepared and the findings should be discussed with branch office managers and supervisory personnel. Follow-up procedures also should be performed to ensure that any identified deficiencies are rectified.

ANNUAL REGULATORY REQUIREMENTS

Self-Examination Questionnaire

To satisfy their supervisory responsibilities under NFA Compliance Rule 2-9, CPOs must review their

operations on an annual basis using NFA’s self-examination questionnaire.²⁴ The questionnaire focuses on a CPO’s regulatory responsibilities and requires members to review the adequacy of their internal procedures. It is intended to assist member firms in identifying potential problem areas and alert them to procedures that need to be revised or strengthened. The questionnaire is divided into five sections. The first must be completed by all firms. Each of the remaining four sections includes a supplemental questionnaire for the four registration categories (*i.e.*, CPO, CTA, FCM or IB). Notably, a firm that is registered with the SEC as an investment adviser under the Investment Advisers Act of 1940 may not rely on its annual compliance review pursuant to Advisers Act Rule 206(4)-7 to satisfy this requirement. Rather, the questionnaire must be completed by each NFA member. It can be downloaded from the NFA’s website *at* www.nfa.futures.org.

The self-assessment questionnaires must be reviewed by the appropriate supervisory personnel in a CPO’s home or branch office, if applicable. The supervisory personnel must sign and date a written attestation that they have reviewed the firm’s operations in light of the matters covered in the questionnaire. A separate attestation must be made for each branch office. If the branch office reviews its own operations, the main office must receive a copy of the attestation. These attestations need not be filed with the NFA, but should be retained by the CPO. As with all required records, signed attestations should be maintained for a period of five years from the date of review, with the questionnaire being readily accessible during the first two years.

Annual Questionnaires

Each year, a CPO must complete and submit to the NFA an annual questionnaire. The questionnaire provides NFA with information about a firm and allows the NFA to better understand the composition of its membership as a whole. Additionally, the information that each firm provides through the questionnaire allows the NFA to tailor its regulatory programs to better serve its membership. Among other information, the annual questionnaire must include a firm’s business continuity plan contacts. Member firms are encouraged to update the data in their questionnaires on a regular basis, but must, at a minimum, complete the annual questionnaire on the anniversary of their NFA membership date. Concurrently with the annual questionnaire, a member

²² NFA Interpretive Notice 9019, *NFA Compliance Rule 2-9: Supervision of Branch Offices and Guaranteed IBS* (Board of Directors, October 6, 1992; revised July 24, 2000).

²³ NFA Interpretive Notice 9002, *Registration Requirements; Branch Offices* (Staff, September 6, 1985; revised July 1, 2000; December 9, 2005; and September 30, 2010).

²⁴ NFA Interpretive Notice 9020, *NFA Compliance Rules 2-9, 2-36 and 2-39: Self-Audit Questionnaires* (Board of Directors, October 6, 1992; revised July 24, 2000 and April 8, 2011).

firm is required to pay to the NFA its annual dues of \$750.

Registration Update

NFA Registration Rule 210 requires that a CPO file a Form 3-R to correct any inaccuracies in its registration application as they occur. Form 3-R is filed with the NFA via the Online Registration System. If the firm adds a new individual principal or associated person, a Form 8-R and a fingerprint card must be filed with the NFA, together with the appropriate fee, unless the person has a current Form 8-R on file with the NFA. If a CPO terminates an individual principal or an associated person, the firm must file a notice of termination on Form 8-T through the online system within 30 days of the termination.²⁵ The NFA imposes a fee of \$100 for each Form 8-T that is not timely filed. In addition, a CPO must complete an annual registration update and pay an annual registration records maintenance fee of \$100 for each registration category (\$100 if registering only as a CPO), in accordance with NFA registration rules.

QUARTERLY REPORTING REQUIREMENTS

Pursuant to NFA Compliance Rule 2-46, the NFA requires quarterly reporting by CPOs of the following information: (1) the identity of the pool's administrator, carrying broker(s), trading manager(s), and custodian(s); (2) a statement of changes in net asset value for the quarterly reporting period; (3) monthly performance for the three months comprising the quarterly reporting period; and (4) a schedule of investments identifying any investment that exceeds 10% of the pool's net asset value at the end of the quarterly reporting period. Such reporting is required 45 days after the end of each quarterly reporting period. However, the NFA staff has informally advised one of the authors that the NFA will

permit filings to be made on NFA Form CPO-PQR (or its related schedules) within 60 days of the end of each quarterly reporting period.

In the fall of 2012, the NFA implemented amendments to Compliance Rule 2-46 that, if approved by the CFTC, would revise these reporting requirements.²⁶ To the extent that large CPOs will be filing information quarterly in accordance with Regulation 4.27, the NFA will accept that filing in lieu of the filing under its Compliance Rule 2-46.²⁷ However, if a CPO only has an annual reporting requirement under Regulation 4.27 (*e.g.*, because it is a small or mid-sized CPO), it still will be required to make quarterly filings with the NFA. With respect to small and mid-sized CPOs, such quarterly filing will consist of Schedule A of Form CPO-PQR and a schedule of investments, and will be filed with the NFA on a quarterly basis within 60 days of the quarterly period ending in March, June, and September of each year. Small and mid-sized CPOs also will be required to file a year-end report within 90 days of the calendar year end. For small CPOs, the year-end report will consist of Schedule A and a schedule of investments. For mid-sized CPOs, the year-end report also will include Schedule B of Form CPO-PQR. Under the amendment, the schedule of investments will require information on any investment that exceeds 5% of the pool's net asset value at the end of the reporting period, rather than the current 10% requirement.

CONCLUSION

The foregoing highlights a number of NFA operational and annual rule requirements. Newly registered CPOs will be required to comply with these provisions unless compliance is deferred, with respect to registered funds, pending the harmonization of SEC and CFTC regulatory requirements. ■

²⁵ NFA Registration Rules 203(a)(10) and 214.

²⁶ Letter to David A. Stawick, Office of the Secretariat, CFTC from Thomas W. Sexton, Senior Vice President and General Counsel, NFA (June 5, 2012). We have been advised by the NFA staff that the proposed amendments, which are expected to be approved by the CFTC in the near future, are likely to apply to quarterly filings as of March 31, 2013.

²⁷ Regulation 4.27 requires, among other things, that registered CPOs file with the CFTC information about non-exempt pools on Form CPO-PQR.