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What the CFTC Rule Revisions Mean for Registered Investment Companies and Their Investment Advisers—An Update

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In its May 2012 issue, *The Investment Lawyer* published an article regarding revisions to the Commodity Futures Trading Commission (CFTC) Regulation 4.5 and the impact of these revisions on registered investment companies (RICs) and their investment advisers[1] (the Original Article). This article provides a summary of recent developments with respect to regulation by the CFTC and the National Futures Association (NFA) of investment advisers to RICs that must register as commodity pool operators (CPOs) as a result of the revisions to Regulation 4.5, and should be read in conjunction with the Original Article.[2]

Until recently, advisers to RICs expected to be regulated principally by the Securities and Exchange Commission (the SEC), even if they traded commodity interests, due to their ability to rely on the exclusion from the definition of CPO contained in Regulation 4.5[3] under the Commodity Exchange Act[4] (the CEA). Last year, however, the CFTC amended its regulations to narrow this exclusion by reinstituting limits on the trading of commodity interests and imposing marketing restrictions.[5] Those advisers to RICs that could not meet the new standards were required to register as CPOs as of December 31, 2012.[6] Notably, however, advisers to RICs are not required to comply with the CFTC's recordkeeping, reporting, and disclosure requirements until the CFTC harmonizes its rules with those of the SEC.[7] The final

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harmonization release is expected to be issued by the CFTC shortly.

I. Developments

A. Lawsuit Challenging Amendments to CFTC Regulation 4.5

In April 2012, the Investment Company Institute (the ICI) and the US Chamber of Commerce (the Chamber) filed a lawsuit challenging the CFTC Regulation 4.5 amendments, arguing that the revised regulation imposes unnecessary, overlapping, and burdensome regulations on RICs, their advisers and ultimately, RIC shareholders.[8] On December 12, 2012, the United States District Court for the District of Columbia upheld the CFTC's amendments, agreeing with the CFTC's argument that the amendments were consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) because of the role derivatives played in the financial crisis, and concluded that the CFTC provided an adequate basis in the Amending Release for its decision to narrow the Regulation 4.5 exclusion for operators of RICs.[9] The ICI and the Chamber appealed the decision to the US Court of Appeals for the District of Columbia Circuit, which agreed to consider the appeal on an expedited basis (oral argument took place on May 6, 2013, and a decision is expected in the third quarter of 2013).[10] Significantly, the effectiveness of the CFTC Regulation 4.5 amendments has not been stayed during litigation.[11] Accordingly, many advisers to RICs that are already regulated by the SEC registered as CPOs effective as of January 1, 2013, and many more may continue to do so.

B. Treasury Determination Finalized

The definitions of CPO and commodity pool in the CEA, as amended by the Dodd-Frank Act, now include swaps as commodity interests.[12] Therefore, operators of collective investment vehicles that have previously traded swaps, but no other commodity interests, and thus were not considered to be operating commodity pools, now must register as CPOs or claim exemption or exclusion therefrom. For this purpose, "commodity interests" include any futures contract, including a security futures contract, an option on a futures contract, a swap (other than a security-based swap), a leverage transaction, and any retail foreign exchange transaction.[13] On July 10, 2012, the SEC and the CFTC jointly adopted several final rules and provided interpretive guidance with respect to the definitions of the terms "swap," "security-based swap," "security-based swap agreement," and "mixed swap."[14] These regulations became effective on October 12, 2012, and were applied to the definition of a CPO for purposes of determining whether the operator of a RIC must register as such as of December 31, 2012.[15]

With respect to this new inclusion of swaps as commodity interests, the Original Article discussed the proposed determination issued by the Department of the Treasury that would exempt foreign exchange swaps and foreign exchange forwards from the definition of "swaps" for this purpose.[16] On November 20, 2012, the Treasury finalized this determination, such that certain foreign exchange forwards and foreign exchange swaps are no longer considered "swaps" for purposes of determining whether the operator of a RIC must register with the CFTC.[17] In order for an exchange of foreign currencies in the forward market to be considered a foreign exchange forward or foreign exchange swap, however, there must be an actual exchange of two different currencies.[18] In other words, if the contract is cash settled in a single currency, it is not a foreign exchange forward or foreign exchange swap. Thus, non-deliverable forwards (NDFs) are still treated as commodity interests for this purpose because they do not meet the requirement that there be an actual exchange of two different currencies.

On February 26, 2013, the ICI, ICI Global, the American Bankers Association, and the ABA Securities Association (the NDF Parties) petitioned the CFTC to exempt NDFs from certain aspects of swap regulation under the CEA, so that they are regulated in the same manner as foreign exchange forwards and foreign exchange swaps (which, as discussed above, are now generally excluded from the definition of "swap").[19] The NDF Parties assert in their petition that NDFs

are economically and functionally the same as foreign exchange forwards and should be included in the Treasury's exemption of foreign exchange forwards and foreign exchange swaps.[20] The CFTC has not yet responded to this petition.

In furtherance of this position regarding NDFs, the NDF Parties submitted a letter to the Chairwoman of the Senate Committee on Agriculture, Nutrition and Forestry, recommending that Congress amend the CEA to accomplish the exemption of NDFs from certain aspects of swap regulation under the CEA if the CFTC does not grant their petition.[21] The NDF Parties maintain in their letter that Congress did not intend for NDFs to be excluded from the CEA definition of foreign exchange forward, that there is no valid public policy reason for treating NDFs differently than other foreign exchange forwards, and that the inability to include NDFs in the Treasury exemption for foreign exchange forwards causes a number of problems for the industry.[22] It remains to be seen whether Congress will amend the CEA as proposed by the NDF Parties if the CFTC does not respond favorably to the NDF Parties' petition.

C. Uncleared Swaps

The Original Article, in describing the two *de minimis* trading limit tests under amended Regulation 4.5 (Amended Regulation 4.5) noted that, for purposes of the net notional test, the operator of a RIC may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade and swaps cleared on the same derivatives clearing organization.[23] In January 2013, the ICI, the Investment Adviser Association (the IAA), the Managed Funds Association (MFA), and the Asset Management Group of the Securities Industry and Financial Markets Association (AMG) requested that the CFTC's DSIO grant relief to permit operators of RICs and private funds to net certain uncleared swaps held by a fund when applying the net notional test in Amended Regulation 4.5 or amended CFTC Regulation 4.13(a)(3), as applicable.[24] Specifically, the letter requests that the DSIO grant relief that would permit the operator of a fund to net uncleared swaps for purposes of the net notional test provided that (1) the termination dates of the offsetting swaps are the same and (2) the reference asset or rate for the offsetting swaps is the same.[25] The letter also requests that the relief make clear that, if the notional amounts of the offsetting swaps are not the same, the amount netted should be equal to the smaller of the two notional amounts.[26] The letter states that, without the requested relief, both the long exposure and the short exposure on offsetting swaps would have to be counted for purposes of the net notional test, which would overstate a fund's actual exposure to the underlying commodity interests.[27] The CFTC has not yet responded to this request letter.

II. Funds of Funds

A. Rescinded Appendix A

As the Original Article noted, a Fund of Funds (FoF) can be a commodity pool even if the FoF itself does not trade commodity interests directly.[28] Appendix A to Part 4 of the CFTC's Regulations had provided guidance on the application of CFTC Regulation 4.13(a)(3) to private FoFs,[29] but was rescinded by the Amending Release.[30] The CFTC Staff has indicated to one of the authors that the guidance contained in Appendix A is being reviewed and that revised guidance is expected to be provided in the first half of 2013.[31] In the FAQ, the DSIO has indicated that FoFs (including RICs) may continue to rely on rescinded Appendix A to establish compliance with the trading limitations in Amended Regulation 4.5 until revised guidance is provided.[32]

B. Registration Relief for FoF Operators

Because advisers to existing RICs that could not meet the new trading limits and marketing restrictions imposed by Amended Regulation 4.5 were required to register as CPOs as of January 1, 2013, most advisers who were required to register have by now registered. However, operators of FoFs are one exception.

In November 2012, the DSIO indicated that it will not recommend that the CFTC take

enforcement action against CPOs of FoFs for failure to register as such until six months from the date the DSIO issues revised guidance on the application of the calculation of the *de minimis* thresholds in Amended Regulation 4.5 and CFTC Regulation 4.13(a)(3) if the CPOs comply with certain requirements.[33] These requirements are that: (i) the CPO file a claim with the DSIO to take advantage of the relief prior to December 31, 2012, and (ii) (1) the CPO currently structures its operations in whole or in part as a CPO of one or more FoFs; (2) the amount of commodity interest positions to which the FoF is directly exposed does not exceed the levels specified in CFTC Regulation 4.5 or 4.13(a)(3)(ii)(A) or (B); (3) the CPO "does not know and could not have reasonably known" that the FoF's indirect exposure to commodity interests derived from contributions to investee funds exceeds the levels specified in CFTC Regulations 4.5 or 4.13(a)(3)(ii)(A) or (B), either calculated directly, or through the use of prior Appendix A; and (4) the commodity pool for which the CPO seeks relief is either (x) an investment company registered as such under the 1940 Act, or (y) compliant with the provisions of CFTC Regulation 4.13(a)(3)(i), (iii), and (iv).[34] For this purpose, a FoF is a fund that invests in just one investee fund.[35]

Although the DSIO's no-action letter in this area indicates that such notice must have been filed by December 31, 2012, the DSIO Staff has confirmed to one of the authors that a FoF operator can file this notice after December 31, 2012 for newly formed funds and, if the operator only became aware of the need to file subsequent to December 31, 2012, for pre-existing funds.

C. ICI/IAA Letter to the CFTC

On February 26, 2013, the ICI and the IAA submitted a letter to the DSIO (FoF Comment Letter) regarding the forthcoming FoF guidance, and in particular the difficulties involved in applying the *de minimis* thresholds to managers of FoFs.[36] This difficulty has been compounded by the fact that interests in certain securitization vehicles, real estate investment trusts (REITs), and business development companies (BDCs) are now treated as interests in commodity pools.[37] However, the CFTC has provided relief from CPO registration for operators of mortgage REITs, certain "plain vanilla" securitization vehicles, and BDCs that meet specified conditions.[38] Although the CFTC has only explicitly extended such relief to the operator of a fund that invests in a securitization vehicle,[39] the same logic should hopefully apply to an investment in a mortgage REIT or BDC whose operator is not required to register as a CPO.

The FoF Comment Letter recommends that the DSIO's guidance regarding how the *de minimis* thresholds of Amended Regulation 4.5 and amended CFTC Regulation 4.13(a)(3) will be applied to FoFs: (i) be crafted broadly to cover a range of FoFs; (ii) permit a specified level of investment, without a look-through, in (a) underlying funds managed by registered CPOs and commodity trading advisors (CTAs) that are acting in a registered capacity with respect to the underlying funds and (b) non-traditional pools (REITs, BDCs, and securitization vehicles); (iii) clarify the treatment of direct trading by the FoF manager; (iv) clarify the treatment of a Sub-Advised Sleeve;[40] (v) include a "reasonable belief" standard for FoF managers that must look through certain underlying funds; (vi) permit periodic testing for compliance with *de minimis* limitations by the FoF manager; (vii) provide a transition period for a FoF manager that currently can rely on Amended Regulation 4.5 or CFTC Regulation 4.13(a)(3) and then subsequently determines that it needs to register as a CPO; (viii) provide relief for FoFs that invest in underlying funds that do not issue interests/shares that are periodically redeemable; and (ix) provide relief for FoFs that cannot easily change their investments once formed. The new FoF guidance has not yet been issued.

III. Reporting to the CFTC and the NFA

A. Form CPO-PQR and NFA Form PQR

The SEC and the CFTC have adopted joint regulations, the purpose of which, among other things, is to assist the Financial Stability Oversight Council in its assessment of systemic

risk in the US financial system.[41] The SEC rule requires investment advisers registered with the SEC that advise one or more private funds and have at least $150 million in private fund assets under management to file Form PF with the SEC.[42] The related CFTC rule (Regulation 4.27) requires registered CPOs to file information about non-exempt pools with the CFTC on Form CPO-PQR.[43] However, the CFTC has stated that "the Final Rule [4.5] release suspends compliance with Rule 4.27 for registered investment companies, pending a final harmonization rule. … [I]nvestment companies required to register with the [CFTC] pursuant to the amendments to Rule 4.5 need not comply with Rule 4.27 until after the harmonization rule becomes effective."[44] Similarly, the NFA Staff has confirmed to the ICI that registered CPOs of RICs would not have to file NFA Form PQR pursuant to NFA Compliance Rule 2-46 until the compliance date for the CFTC's harmonization efforts.[45]

In addition, following harmonization, a CPO that reports a RIC on Form PF need not complete Schedules B and C of Form CPO-PQR with respect to that RIC.[46] Such CPO will, however, still need to file Schedule A of Form CPO-PQR and will be required to file NFA Form PQR quarterly as required under NFA Compliance Rule 2-46, including the schedule of investments (which is essentially question 6 of Schedule B of Form CPO-PQR).[47]

B. Delayed Reporting Guidance from the CFTC and the NFA Regarding Controlled Foreign Corporations (CFCs) Prior to Harmonization

Although, as noted in the prior section, CPOs of RICs do not have to report their RICs on Form CPO-PQR or NFA Form PQR prior to harmonization, reporting on CFCs is not deferred. Consequently, on April 10, 2013, the ICI and AMG submitted letters to the CFTC and the NFA, requesting that they address the application, prior to harmonization, of Form CPO-PQR and NFA Compliance Rule 2-46[48] to CPOs of RICs that trade in commodity interests through wholly owned subsidiaries known as CFCs.[49] In the letters, the ICI and the AMG noted that, in most cases, RICs that trade through CFCs consolidate the financial statements of the CFC into the RIC's financial statements for financial reporting purposes.[50] For such RICs, filing Form CPO-PQR and NFA Form PQR only with respect to the CFC prior to the compliance date of the CFTC's final harmonization rulemaking would require the CPO to engage in a manual process to isolate the CFC's data, which may increase the likelihood of error.[51]

The NFA issued a letter to the ICI on April 30, 2013, confirming that the CPO of a RIC that consolidates its CFC with the RIC for financial reporting purposes may defer reporting obligations under NFA Compliance Rule 2-46 for the CFC until the first applicable reporting period ending after the compliance date of the CFTC's final harmonization rulemaking.[52] The CFTC has not yet responded to this request.

IV. Other NFA Requirements

A. Delayed Compliance with Certain NFA Rules for CPOs of RICs

When the adviser to a RIC registers as a CPO, the adviser must also become a member of the NFA. A firm that is a member of the NFA is generally subject to all of the NFA's compliance rules and other requirements at that time. However, the NFA Staff has confirmed to the ICI that certain registered CPOs of RICs do not have to comply with NFA Compliance Rules 2-10 (books and records), 2-13 (certain disclosure document requirements regarding break-even analyses, "up front fees," and organizational and offering expenses), 2-29 (promotional materials other than anti-fraud), 2-34 (CTA performance reporting and disclosures for sub-advisers to RICs), 2-35 (contents and delivery of disclosure documents), and 2-46 (NFA quarterly reporting) until the compliance date for the CFTC's harmonization efforts.[53]

B. Proficiency Examination Requirements and Waiver

Generally, an Associated Person (AP) must satisfy proficiency requirements by taking and passing the National Commodity Futures Examination (Series 3), unless he or she has taken and passed the exam within the previous

two years or, since having passed the exam, there has not been a period of two consecutive years in which he or she has not been registered as an AP or as a floor broker.[54] Applicants may satisfy the proficiency requirements by taking an exam other than the Series 3 if they meet the appropriate qualifications.[55] However, the NFA's Vice President of Registration and Membership is authorized to grant waivers from the Series 3 examination requirement to individuals associated with CPOs if they meet certain requirements.[56]

In addition, if the only commodity interests a firm trades are swaps, then the APs of that firm are now eligible for an automatic examination waiver.[57] To the extent that a firm engages in other commodity interest trading activities in addition to swaps, and if trading swaps is what triggers the firm's CPO registration obligation (that is, but for trading in swaps, the firm would satisfy the trading limits under Amended Regulation 4.5), the firm can apply for an examination waiver for particular APs only involved in marketing pools where swaps are what cause registration to be required.[58] Per conversations with NFA Staff, these swap examination waivers are initially temporary and may only be available until the NFA develops an examination for swaps and, if a proficiency examination for swaps is developed at some future date, persons relying on the waiver in connection with January 1, 2013 registrations may be grandfathered.

C. Marketing Rules

On December 28, 2012, the ICI confirmed its understanding in a letter to the NFA Staff that, pending further review, the NFA would deem compliance by a fund's principal underwriter or by another broker-dealer with FINRA's review, approval, filing, recordkeeping, and supervision requirements with respect to fund promotional materials to satisfy a RIC CPO's or CTA's obligation to comply with NFA Compliance Rules 2-9, 2-29 and related interpretive notices.[59] The ICI Staff is continuing to provide additional information to the NFA Staff in hopes that this view will become the NFA Staff's final position on the subject.

D. NFA Bylaw 1101

One of the hallmarks of NFA regulation is NFA Bylaw 1101. NFA Bylaw 1101 states that no NFA member may carry an account, accept an order or handle a commodity interest transaction for or on behalf of any nonmember or suspended member of the NFA that is required to be registered with the CFTC and is not so registered.[60] What this generally means in practice is that a registered CPO must conduct due diligence to determine that all of the investors in its funds, the counterparties with which its funds enter into commodity interest transactions, its sub-advisers and its solicitors[61] are appropriately registered or exempt. This requirement applies to current investors, counterparties, sub-advisers and solicitors, as well as to new ones.[62]

The NFA has, however, determined that, until further notice, a CPO member of the NFA that operates a RIC will be considered in compliance with Bylaw 1101 if the CPO's due diligence covers any futures commission merchant through which the RIC transacts any commodity interest transactions and any sub-adviser that provides investment management services to the RIC.[63] Thus, the CPO of a RIC will not be required to conduct Bylaw 1101 due diligence on the RIC's investors.[64] The NFA has indicated that it intends to issue further guidance in this area.[65]

V. Conclusion

Until recently, advisers to RICs were regulated principally by the SEC, even if they traded commodity interests for their RIC clients, due to the advisers' ability to rely on the exclusion in CFTC Regulation 4.5. Now, however, an adviser to a RIC must either limit the RIC's use of commodity interests and comply with the marketing restrictions under Amended Regulation 4.5 or submit to dual regulation by the CFTC and the SEC. The CFTC revisions to Regulation 4.5, and the rescission of Regulation 4.13(a)(4), which had provided an exemption from CPO registration for operators of private funds, has resulted in an increase of over 500 registered CPOs. Depending upon the shape of the final revisions to Appendix A affecting the operators of

FoFs, there could be a similar upsurge in the number of CPOs required to register under the CEA. Fortunately, at present, registered CPOs that are advisers to RICs essentially do not have to comply with any of the CFTC's or the NFA's disclosure, reporting, or record-keeping requirements until the CFTC adopts its harmonization relief. However, this means that the burdens of dual regulation cannot be completely determined until the CFTC issues its harmonization rulemaking, which is expected in the near future.

Notes

1. Michael Phillip, Sean Graber, Laura Flores and John O'Brien, "What the CFTC Rule Revisions Mean for Registered Investment Companies and Their Investment Advisers," *The Investment Lawyer*, Vol.19, No.5 (May 2012).

2. This article is up-to-date as of May 31, 2013.

3. 17 C.F.R. § 4.5.

4. 7 U.S.C. § 1, *et seq*.

5. *Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations,* 77 Fed. Reg. 11,252 (Feb. 24, 2012); correction notice published at 77 Fed. Reg. 17,328 (Mar. 26, 2012) (Amending Release).

6. *Id*., at 11,259; *see also* CFTC, Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations (Aug. 14, 2012, as amended) (FAQ), available at *http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf* (answer to question 1 under the heading "Compliance Dates").

7. Amending Release, *supra* n.5, at 11,252. Registered CPOs are required to comply with certain disclosure, reporting, and recordkeeping requirements under the CFTC's rules. Investment advisers to RICs are subject to regulation by the SEC under the Investment Advisers Act of 1940, and the RICs they manage are subject to regulation under the Investment Company Act of 1940 (the 1940 Act). Investment advisers to RICs are concerned that they could be subject to different, and sometimes conflicting, requirements imposed by the SEC, the CFTC, the NFA and the Financial Industry Regulatory Authority, Inc. (FINRA). In order to address this concern, the CFTC has proposed a separate rule-making to "harmonize" the compliance obligations that will apply to operators of RICs subject to the two regimes (*see Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators*, 77 Fed. Reg. 11,345, 11346 (Feb. 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. The authors understand that the CFTC Staff is considering harmonization efforts in other areas as well.

8. Investment Co. Institute v. CFTC, No. 12-cv-612, 2012 WL 6185735 (D.D.C. Dec. 12, 2012); *see also* "ICI and U.S. Chamber of Commerce File Lawsuit Challenging CFTC Rule," Investment Company Institute, Apr. 17, 2012, available at *http://www.ici.org/cftc_challenge/brief/12_news_cftc_complaint* (last visited May 9, 2013).

9. Investment Co. Institute v. CFTC, *supra* n.8.

10. Order, Investment Co. Institute v. CFTC, No. 12-5413 (D.C. Cir. Feb. 28, 2013).

11. Investment Co. Institute v. CFTC, *supra* n.8, at *2.

12. 17 C.F.R. § 1.3(cc) (definition of "CPO"); Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Title VII § 721(a)(5); *see also* Commodity Pool Operator (CPO) Definition, National Futures Association, available at *http://www.nfa.futures.org/nfa-registration/cpo/index.HTML* (last visited May 9, 2013).

13. 17 C.F.R. § 1.3(yy) (definition of "Commodity Interest").

14. Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement;" Mixed Swaps; Security-Based Swap Agreement Recordkeeping; Final Rule, 77 Fed. Reg. 48,208 (Aug. 13, 2012).

15. *See* the FAQ, *supra* n.6 (answer to question 4 under the heading "Compliance Dates").

16. Original Article (*citing* Notice of Proposed Determination on Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 76 Fed. Reg. 25,774 (May 5, 2011)).

17. Determination of Foreign Exchange Swaps and Foreign Exchange Forwards under the Commodity Exchange Act, 77 Fed. Reg. 69,694 (Nov. 20, 2012).

18. Section 1a(24) of the CEA, as amended by the Dodd-Frank Act, defines a foreign exchange forward as "a transaction that solely involves the exchange of [two] different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange." Dodd-Frank Act, Title VII § 721(a)(24); *see also id.*, at Title VII § 721(a)(25) (definition of "Foreign Exchange Swap").

19. Letter to Melissa Jurgens, Secretary of the CFTC, from NDF Parties (Feb. 26, 2013).

20. *Id*.

21. Letter to Chairwoman Debbie Stabenow from NDF Parties (May 1, 2013).

22. *Id*.

23. Original Article, endnote 16; *see* 17 C.F.R. § 4.5(c)(2)(iii)(B)(*2*) and the FAQ, *supra* n.6 (answer to question 3 under the heading "Trading Limits").

24. Letter to the Division of Swap Dealer and Intermediary Oversight (the DSIO) from the ICI, the IAA, MFA and AMG (Jan. 25, 2013).

25. *Id.*

26. *Id.*

27. *Id.*

28. Original Article.

29. 17 C.F.R. § 4.13(a)(3) contains an exemption available to the operator of a private fund. This exemption has *de minimis* trading limitations substantially similar to those in Amended Regulation 4.5, except that there is no blanket permission to engage in unlimited *bona fide* hedging transactions. *See* 17 C.F.R. § 4.13(a)(3).

30. *See* CFTC, Swap Dealer and Intermediary Oversight, CFTC No-Action Letter 12-38, Comm. Fut. L. Rep. (CCH) ¶ 32,453 (Nov. 29, 2012).

31. Various trade associations have had discussions with, and have made written submissions to, the DSIO Staff regarding the scope of the FoF guidance. *See* Section II(C).

32. *See* the FAQ, *supra* n.6 (answer to question 1 under the heading "Funds-of-funds").

33. CFTC No-Action Letter 12-38, *supra* n.30.

34. *Id.*

35. *Id.*

36. ICI and IAA Letter to CFTC (Feb. 26, 2013), available at *http://www.ici.org/pdf/27052.pdf*.

37. *Id.*

38. *See, e.g.*, CFTC, Swap Dealer and Intermediary Oversight, CFTC No-Action Letter No. 12-44, Comm. Fut. L. Rep. (CCH) ¶ 32,459 (Dec. 7, 2012) (addressing mortgage REITs); CFTC, Swap Dealer and Intermediary Oversight, CFTC Interpretive Letter No. 12-14, Comm. Fut. L. Rep. (CCH) ¶ 32,405 (Oct. 11, 2012) (addressing certain securitization vehicles); CFTC, Swap Dealer and Intermediary Oversight, CFTC Interpretive and No-Action Letter No. 12-45, Comm. Fut. L. Rep. (CCH) ¶ 32,460 (Dec. 7, 2012) (addressing certain securitization vehicles); CFTC, Swap Dealer and Intermediary Oversight, CFTC No-Action Letter No. 12-67, Comm. Fut. L. Rep. (CCH) ¶ 32,502 (Dec. 21, 2012) (addressing the status of the operator of a fund that invests in a securitization vehicle); CFTC, Swap Dealer and Intermediary Oversight, CFTC No-Action Letter No. 12-40, Comm. Fut. L. Rep. (CCH) ¶ 32,455 (Dec. 4, 2012) (addressing BDCs); and CFTC, Swap Dealer and Intermediary Oversight, CFTC No-Action Letter 13-07, Comm. Fut. L. Rep. (CCH) ¶ 32,578 (Mar. 29, 2013) (providing time-limited no-action relief for certain securitization vehicles). Note that the relief granted under each of CFTC No-Action Letters Nos. 12-40 and 12-44 is not self-executing; rather, notice filings are required to perfect the use of the relief.

39. *Id.*

40. When a fund engages sub-advisers to directly manage one or more portions of the fund's assets, this is a "Sub-Advised Sleeve" as used in the FoF Comment Letter.

41. *Reporting by Investment Advisers to Private Funds and Certain Commodity Pool Operators and Commodity Trading Advisors on Form PF*, 76 Fed. Reg. 71,128, 71,128 (Nov. 16, 2011).

42. *Id.*, at 71,132.

43. Amending Release, *supra* n.5, at 11,269.

44. Investment Company Institute, et al. v. CFTC, Case No. 1:12-cv-00612 (D.D.C. Apr. 17, 2012) (Defendant CFTC's Reply to Plaintiff's Supplemental Response (Oct. 25, 2012) at 3).

45. *See* ICI letter to NFA Staff (Dec. 28, 2012), available at *http://www.ici.org/pdf/12_ici_nfa_rics_advisers.pdf*.

46. *See* Instruction 18 of the General Instructions to NFA Form PF and Instruction 2 of the Reporting Instructions to CFTC Form CPO-PQR.

47. NFA, Effective Date of Amendments to NFA Compliance Rule 2-46: CPO and CTA Quarterly Reporting Requirements, Notice to Members I-13-12 (April 24, 2013), available at *http://www.nfa.futures.org/news/newsNotice.asp?ArticleID=4218* (last visited May 13, 2013).

48. NFA Compliance Rule 2-46 provides that (a) except as provided in paragraph (b), each CPO Member must file NFA Form PQR on a quarterly basis with the NFA for each pool that it operates and for which it has any reporting requirement under CFTC Regulation 4.27 within 60 days after the end of the first three quarters and a year-end report within 90 days of the calendar year end; (b) each CPO Member that is required to file CFTC Form CPO-PQR on a quarterly basis pursuant to CFTC Regulation 4.27 will satisfy its NFA Form PQR filing requirements by filing CFTC Form PQR in accordance with CFTC Regulation 4.27; and (c) each CTA Member with a reporting requirement under CFTC Regulation 4.27 must file NFA Form PR on a quarterly basis with the NFA within 45 days after the end of the first three quarters and a year-end report within 45 days of the calendar year end. NFA Compliance Rule 2-46. Furthermore, although NFA Compliance Rule 2-46 also imposes a quarterly filing requirement on CTAs, the NFA has not finalized the date of the first required filing. NFA Notice to Members I-13-12, *supra* n.47. The NFA will advise CTA Members of the date of the first quarterly report, and provide filing information and instructions, well in advance of that date. *Id.* No report will be due for the quarters ended March 31 or June 30, 2013. *Id.*

49. ICI and AMG letter to the CFTC (April 10, 2013), available at *http://www.ici.org/pdf/27170.pdf and ICI and AMG letter to the NFA* (April 10, 2013).

50. *Id.*

51. *Id.*

52. NFA letter to Karrie McMillan, General Counsel of ICI (April 30, 2013).

53. *See* ICI letter to NFA Staff (Dec. 28, 2012), available at *http://www.ici.org/pdf/12_ici_nfa_rics_advisers.pdf*.

54. NFA, NFA Manual, Registration Rule 401(a), available at *http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=8* (last visited May 9, 2013).

55. *See* NFA, NFA Manual, Registration Rule 401, available at *http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=8* (last visited May 9, 2013).

56. *See NFA Interpretive Notice 9018: Registration Rule 402: CPOs of Pools Trading Primarily in Securities* (Board of Directors: August 1, 1992; revised December 10, 2007) (which provides for waiver of the Series 3 examination requirement when (1) the CPO or the commodity pool is subject to regulation by a federal or state regulator such as the SEC, federal bank regulators or state insurance agencies, or the pool is privately offered pursuant to an exemption from the registration requirements of the Securities Act of 1933, and (2) the CPO limits its activities for which registration is required to a commodity pool where (a) the pool engages principally in securities transactions, (b) the pool commits only a small percentage of its assets as initial margin and premiums for futures and options on futures and (c) the pool uses futures and options on futures only for hedging or risk management purposes). The Interpretive Notice refers to this authority being exercised by the Director of Compliance, the officer previously granted this waiver authority under Registration Rule 402. The NFA has filed a rule change with the CFTC to conform the Interpretive Notice applicable to waiver of the Series 3 examination in the case of an AP of a CTA; presumably, the similar Interpretive Notice applicable to waivers for APs of CPOs will also be conformed to Registration Rule 402. NFA Letter to Christopher Kirkpatrick, Deputy Secretary of the CFTC (March 1, 2013), available at *http://www.nfa.futures.org/news/PDF/CFTC/CR2-7_RR201_203_501_InterpNotc022113.pdf*.

57. NFA, NFA Manual, Registration Rule 401(e), available at *http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=8* (last visited May 9, 2013).

58. *Id.*

59. ICI Letter to the NFA (Dec. 28, 2012), available at *http://www.ici.org/pdf/12_ici_nfa_rics_advisers.pdf*; *see also* NFA Interpretive Notice 9037 – NFA Compliance Rule 2-9: Supervisory Procedures for E-Mail and the Use of Websites (Board of Directors: August 19, 1999).

60. NFA, NFA Manual, Bylaw 1101, available at *http://www.nfa.futures.org/nfamanual/NFAManualTOC.aspx?Section=3* (last visited May 9, 2013).

61. If a solicitor is a broker-dealer and it solicits persons to invest in commodity pools, CFTC registration and NFA membership should not be required. *See* 17 C.F.R. § 3.12(h)(1)(ii).

62. *See* NFA, Guidance on Obligations Under NFA Bylaw 1101 for Commodity Pool Operator Members Advising Pools that are Registered Investment Companies, Notice I-12-34 (Dec. 19, 2012), available at *http://www.nfa.futures.org/newsNotice.asp?ArticleID=4170* (last visited May 9, 2013).

63. *Id.*

64. *Id.*

65. *Id.*

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