

AND ONE MORE THING: THE NFA ADOPTS RULES ESTABLISHING CPO NOTICE FILING REQUIREMENTS WHEN A CPO IS UNABLE TO FULFILL ITS OBLIGATIONS TO PARTICIPANTS

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INTRODUCTION

On 13 April 2021, the National Futures Association (NFA) released an Interpretive Notice entitled *Compliance Rule 2-50: CPO Notice Filing Requirements* (Interpretive Notice).¹ The Interpretive Notice details how a commodity pool operator (CPO Member) can comply with newly adopted Compliance Rule 2-50 (the Rule).² The Rule and Interpretive Notice detail the circumstances under which a CPO Member must file a notice with the NFA because a commodity pool (or exempt commodity pool) may not be able to fulfill its participant obligations.

Prompt notification must be given to the NFA no later than 5:00 pm (CT) of the next business day (the Notification Cut-Off), if the CPO Member operates a commodity pool that:

1. is unable to meet a margin call;
2. is unable to satisfy redemption requests in accordance with its subscription agreements;
3. halts redemptions based on factors not associated with pre-existing gates or lockups; or
4. receives notice from a swap counterparty that its pool is in default.

The Rule and Interpretive Notice are effective 30 June 2021.³

GUIDANCE & TAKEAWAYS

- The Rule applies not just to registered commodity pools, but also to exempt commodity pools.⁴ CPOs operating exempt commodity pools will still need to make the notice filing with the NFA.
- Even if the CPO Member is disputing the amount or appropriateness of the margin call from their trading partners, it must make a filing if the dispute will not be resolved by the Notification Cut-Off.
- If a CPO Member cannot satisfy a participant's redemption request, a CPO Member may need to make the filing prior to the expiration of any grace periods.
- Astute CPOs should review their current policies and procedures to ensure compliance with the Rule's requirements. At a minimum, many CPOs will need to amend their existing policies and procedures to ensure a filing is made by the Notification Cut-Off.

- CPOs must ensure they are operationally capable of complying with these requirements, especially during periods of potentially high market stress.

SUMMARY OF CPO NOTICE FILINGS REQUIRED BY THE RULE

A Commodity Pool is Unable to Meet a Margin Call

If the CPO Member reasonably expects to meet the margin call within the time period imposed by its designated contract markets or broker, a CPO Member is not required to make a filing. Alternatively, if the CPO Member determines that a commodity pool will be unable to meet its margin call, the CPO Member must promptly notify the NFA prior to the Notification Cut-Off. Importantly, even if the CPO Member disputes the amount or appropriateness of the margin call, the CPO must still make the notice filing.

A Commodity Pool is Unable to Satisfy Redemption Requests

The CPO Member should consider the terms of the commodity pool's subscription agreement when determining whether a filing with the NFA is required. Specifically, the CPO Member must determine whether any grace periods or provisions relate to the timing of redemption payments. If a CPO Member is able to meet a redemption request in accordance with the subscription agreement, no filing is required. However, if the CPO Member determines that a pool will not meet a redemption request within the terms of the subscription agreement, the CPO Member must make the filing prior to the Notification Cut-Off. This means that under some circumstances, the filing may need to be made prior to the end of the grace period.

A Commodity Pool Halts Redemptions

A filing is required when a pool unexpectedly halts redemptions, either temporarily or permanently, as a result of a market or other event that impacts the pool's ability to meet redemptions. A CPO Member is not required to file a notice for its pool(s) in situations where the CPO Member decides to liquidate a pool in the ordinary course of business.

A Commodity Pool is Declared in Default by a Swap Counterparty

The NFA requires a CPO Member to file a notice with the NFA prior to the Notification Cut-Off if a swap counterparty declares the commodity pool to be in default and the CPO Member does not reasonably believe the pool can cure the default within the previously agreed cure period. Even if the CPO Member is in negotiations with the swap counterparty to liquidate positions or disputes the default notice, the CPO Member must make the notice filing with the NFA.

The Interpretive Notice highlights that the Rule is designed to ensure that the CPO Member timely notifies the NFA of potential financial issues that may impact a CPO Member's ability to fulfill its obligations to pool participants or which may result in a pool's unplanned liquidation. Accordingly, the Rule is intended to streamline the process of the NFA's identification of CPO Members with pools that have been negatively impacted by adverse market conditions or other events.

CONCLUSION

CPO Members must ensure they are capable of timely notification to the NFA of potential financial issues potentially impacting the CPO Member's ability to fulfill its obligations. CPO Members are currently required to report some of these events in a quarterly Form CPO-PQR filing or in a pool annual report. However, the NFA

believes that such periodic reporting does not provide it with timely information about critical events that impact CPO Members and their pool participants. The required notifications are intended to assist the NFA in readily identifying CPO Members with pools that have been adversely impacted by market conditions or other events and may result in a pool's unplanned liquidation. K&L Gates' global futures and derivatives team will continue to monitor these developments and future CFTC and NFA developments. Please feel free to contact us if you should have any additional questions.

FOOTNOTES

¹ NFA Notice 9080 - NFA Compliance Rule 2-50: CPO Notice Filing Requirements. The Interpretive Notice is available [here](#).

² Rule 2-50. CPO Notice Filing Requirements, available [here](#).

³ The NFA will provide additional instructions regarding the form and manner of CPO notice filings prior to the effective date.

⁴ See National Futures Association: Proposed NFA Compliance Rule 2-50 and related Interpretive Notice entitled NFA Compliance Rule 2-50: CPO Notice Filing Requirements

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