

CFTC PERMITS CTAS TO USE THIRD-PARTY RECORDKEEPERS; NOTICE FILING REQUIRED

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Investment Management, Hedge Funds and Alternative Investments Alert

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INTRODUCTION

On April 20, 2017, the staff of the Division of Swap Dealer and Intermediary Oversight ("DSIO") of the Commodity Futures Trading Commission ("CFTC") issued a letter that permits registered commodity trading advisors ("CTAs") to use third-party recordkeepers for storage of required records, provided that the CTAs file a notice to claim this relief. [1] Previously, registered CTAs have been required to keep records at their main business office. The CFTC's recent action has put registered CTAs in a posture similar to that of registered commodity pool operators ("CPOs") regarding recordkeeping, but there are some differences in the content of the required notices and where such notices must be filed applicable to these separate registrant categories, as described below.

CLAIMING RELIEF

Under Staff Letter 17-24, currently registered CTAs that have already retained third-party recordkeepers have until **June 30, 2017**, to file a notice to claim relief. If a currently registered CTA maintains its records at its main business office now, but decides, subsequent to June 30, 2017, to use a third-party recordkeeper, it must file the notice when it decides to do so. CTAs that register after June 30, 2017, must file the notice when they register if they decide to use a third-party recordkeeper at the outset or at the time they decide to use a third-party recordkeeper if that decision is not made until some point after commencing operations as a registered CTA.

The notice must be filed via email to DSIO's email address (dsionoaction@cftc.gov) with the subject line "CTA Third-Party Recordkeeping Relief" and include the following information:

1. The name, main business address, and main business telephone number of the person(s) who will be keeping required books and records;
2. The name and telephone number of a contact person at the alternate recordkeeper; and
3. The books and records that such third-party recordkeeper will be keeping by reference to the respective paragraph of CFTC Regulation 4.33 or 4.7(c)(2). [2]

In addition to providing this information, the notice must also be signed by the CTA and include representations that: [3]

4. It will promptly amend the notice if the contact information or location of any of the required books and records changes by identifying in such amendment the new location and any other information that has changed;
5. It remains responsible for ensuring that all books and records required to be maintained are kept in accordance with CFTC Regulation 1.31; [4]
6. Within 48 hours after a request by a representative of the CFTC (72 hours if the records are kept outside the United States, its territories, or possessions), it will obtain the original books and records from the location at which they are maintained and provide them for inspection at the CTA's main business office; and
7. It will disclose in its Disclosure Document, if any, the location of its books and records.

It is noteworthy that CTAs will **not** be required to obtain and file any representations from the third-party recordkeepers, which is still required for CPOs. [5] Please note also that the CFTC requires the notice filing to be made via email to DSIO, not through National Futures Association's electronic filing system.

ACTION REQUIRED

Registered CTAs that keep records at a third-party recordkeeper must file the required notice to dsionoaction@cftc.gov by June 30, 2017. We do not believe that this deadline will be extended, as extending this relief to currently registered CTAs that have already engaged third-party recordkeepers at all took the efforts of one of the authors of this Alert. These CTAs also must amend their registration application, Form 7-R, to update the location of books and records. Even if no Disclosure Document is required, as is the normal circumstance for a CTA operating in accordance with CFTC Regulation 4.7(c), existing documents provided to clients may indicate where books and records are located and should be reviewed and updated as necessary. In addition, although representations from the third-party recordkeeper are not required to be included in the notice filing, the representations that the CTA itself must provide need to be kept in mind when negotiating a recordkeeping arrangement with a third party so that the CTA can fulfill its obligations under the CFTC's regulations.

Notes:

[1] CFTC Staff Letter 17-24 is accessible by clicking [here](#).

[2] CFTC Regulation 4.33 sets forth the general recordkeeping requirements for registered CTAs and includes items related to the CTA's clients and subscribers as well as separate items applicable to the CTA itself. Registered CTAs that operate in accordance with CFTC Regulation 4.7 because they limit clients to those meeting the criteria of "qualified eligible persons" ("QEPs") are exempt from the specific requirements of CFTC Regulation 4.33, but must maintain all books and records prepared in connection with their activities as a CTA, including, without limitation, records relating to the qualifications of its clients as QEPs and substantiating any performance representations.

[3] CFTC Regulations 4.33 and 4.7(c) do not specifically address who signs documents for CTAs, because they are not required to provide reports to clients, as CPOs are. The notice should be signed by a representative duly authorized to bind the CTA. See CFTC Regulation 4.27(e)(1)(ii).

[4] The CFTC has separately proposed to amend CFTC Regulation 1.31 in response to a petition for rulemaking filed by various trade associations and which K&L Gates LLP assisted in drafting. 82 Fed. Reg. 6356 (January 19, 2017).

[5] We also note, however, that other registrants under the Commodity Exchange Act ("CEA"), such as futures commission merchants, introducing brokers, and swap dealers, may use third-party recordkeepers without conditions or filing any notice. CTAs that are exempt from registration under the CEA have not been subject to the requirement to maintain records at their main business office. See, e.g., CFTC Regulation 4.14(a)(8)(iv)(A).

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