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New Year Brings New Responsibilities for Some Asset Managers Who Are Exempt from Registration with the CFTC

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With the New Year comes new responsibilities for certain asset managers who are exempt from registration with the U.S. Commodity Futures Trading Commission ("CFTC") as commodity pool operators ("CPOs") or commodity trading advisors ("CTAs"). Following recent amendments to CFTC rules applicable to asset managers (discussed further here), family offices, operators of business development companies ("BDCs") and certain operators of registered investment companies ("RICs") should reevaluate their CPO registration exemptions and, with respect to family offices, CTA registration exemptions. Asset managers affected by the rule amendments may be required to take additional action. In addition, as in years past, certain CPO and CTA registration exemptions, including those claimed under CFTC Rule 4.5, 4.13(a)(3) and 4.14(a)(8), must be renewed by March 2, 2020.

New Requirements for Asset Managers

Family Offices

Effective January 9, 2020, CFTC Staff Letters 12-37 and 14-143 (the "Family Office Letters"), which provided relief to family offices from registration as a CPO and CTA respectively, were superseded by exemptions under CFTC Rules 4.13(a)(6) and 4.14(a)(11) (the "Family Office Exemptions"). Family offices that previously relied on the Family Office Letters should review the Family Office Exemptions and create and maintain an internal record documenting their intent to rely on the relevant exemption and the basis on which they qualify for the exemptions. A filing is not required to rely on the Family Office Exemption.

BDCs

The CFTC amended Rule 4.5 to codify CFTC Staff Letter 12-40, which granted relief to operators of BDCs from registration as a CPO. Amended Rule 4.5, which took effect on January 9, 2020, supersedes Letter 12-40. Operators of BDCs that previously relied on Letter 12-40 and have not claimed the exclusion under Rule 4.5 should do so as soon as possible. In addition, asset managers relying on amended Rule 4.5 should update their compliance procedures to account for the annual renewal requirement.

Registered Investment Companies

Effective January 9, 2020, the CFTC amended Rule 4.5 to specify that the registered investment adviser ("RIA") of a qualifying RIC is the entity that is required to claim the exclusion from the definition of CPO, not the fund or trust itself. If a person other than a RIC's RIA has claimed the Rule 4.5 exclusion, the RIA must file a notice of exclusion with respect to the fund with the NFA by March 1, 2021. Despite the 2021 deadline, the exclusions may be moved to the RIA this year in connection with the annual exclusion renewal or otherwise.

Renewal of CFTC Registration Exemptions

The CFTC requires any person that has claimed an exemption from CPO registration under CFTC Rule 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), and 4.13(a)(5), an exclusion from the definition of CPO under CFTC Rule 4.5, or an exemption from registration as a commodity trading advisor ("CTA") under CFTC Rule 4.14(a)(8) to annually affirm such exemption/exclusion within 60 days of the calendar year end, which is February 29, 2020 for this affirmation cycle, but because that date falls on a Saturday, the deadline is extended until the next business day, March 2, 2020.

Failure to affirm an exemption from CPO or CTA registration will result in the exemption being withdrawn automatically. For registered CPOs or CTAs, the withdrawal of the exemption will result in the entity being subject to the entirety of Part 4 of the CFTC's regulations regardless of whether the entity otherwise remains eligible for the exemption. For non-registrants, the withdrawal of the exemption may subject the person or entity to enforcement action by the CFTC.

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Please contact Deborah A. Monson or Jeremy A. Liabo or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.