



U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and
Intermediary Oversight

Eileen T. Flaherty
Director

CFTC Letter No. 17-04
Exemption
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Division of Swap Dealer and Intermediary Oversight

Re: Exemptive Relief from the Requirement in Commission Regulation 4.22(c)(7) to Obtain Participant Waivers to Provide Unaudited Financial Statements when Liquidating a Series of a Registered Investment Company

Ladies and Gentlemen:

This letter is in response to inquiries received from several parties by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) requesting clarification of how Regulation 4.22(c) relates to certain financial reporting obligations of a commodity pool operator (“CPO”) of a commodity pool that also is registered with the Securities and Exchange Commission (“SEC”) as a registered investment company (“RIC”).¹ Specifically, the Division has received inquiries as to whether the CPO of a RIC that is comprised of more than one series (a “series fund”) is required to distribute a final Annual Report to the participants of the series, and to file a copy of the final Annual Report with the National Futures Association (“NFA”), if such series is liquidated, and the CPO otherwise continues operation of one or more of the remaining series. In response to such inquiries, the Division hereby restates the current applicable filing requirements for CPOs of RICs and provides exemptive relief as detailed below.

Background

With respect to the liquidation of a commodity pool, including these series funds at issue, Commission Regulation 4.22(c) requires a CPO to provide to each participant in the pool, and to file with NFA, an Annual Report within 90 calendar days after the end of the pool’s fiscal year, or the permanent cessation of trading, whichever is earlier.² Commission Regulation 4.22(c)(6)

¹ Commission regulations referred to herein are found at 17 CFR Ch.I (2016).

² Commission Regulations 4.22(c)(1) – (5) and 4.22(d) provides that the Annual Report must be audited and must contain statements showing the commodity pool’s net asset value as of the end of the commodity pool’s two preceding fiscal years; the net asset value per outstanding participation unit in the commodity pool as of the end of each of the commodity pool’s two preceding fiscal years; a statement of financial condition as of the close of the commodity pool’s last two fiscal years; statements of operation for the two preceding fiscal years; changes in net

further provides that a series fund that is structured with a limitation on liability among the different series may provide participants with an Annual Report for each individual series that a participant maintains an ownership interest in lieu of a single, consolidated Annual Report for the full commodity pool.

In August 2013, the Commission amended its regulations to harmonize certain of its compliance obligations for RIC CPOs with SEC rules (the “Harmonization Rule”).³ The Harmonization Rule adopted new regulatory text in Commission Regulation 4.12(c)(3), which provides exemptive relief to the RIC CPO with respect to certain enumerated compliance obligations under part 4 of the Commission’s regulations. Notably absent from this list of exemptions is Commission Regulation 4.22(c). As such, RIC CPOs are still subject to the Annual Report requirement contained in Commission Regulation 4.22(c).

The Harmonization Rule also recognized that SEC rules require the RIC CPO to produce financial statements that, while not identical in form to the Annual Report required by Commission Regulation 4.22(c), are similar in substance. As such, pursuant to the regime adopted in the Harmonization Rule, such SEC required filings, when additionally provided to NFA, satisfy the CPO’s final Annual Report requirements contained in Commission Regulation 4.22(c).⁴

However, Division staff also understands that under certain circumstances, such as the liquidation of a series of a RIC, a filing specific to that liquidation is not required pursuant to SEC rules. Under such circumstances, where the CPO of a RIC is not required to make a filing, it would be inappropriate to view the obligation under Regulation 4.22(c) as satisfied. Therefore, with respect to a liquidation where the SEC does not require an annual financial statement to be filed, as in the instance of the liquidation of a series of a series fund, a RIC CPO cannot rely upon substituted compliance with respect to Annual Report requirements set forth in Commission Regulation 4.22(c), as no SEC required filing is submitted to NFA.

assets for the two preceding fiscal years; and appropriate footnote disclosures and other information necessary to make the above statements not misleading.

Commission Regulation 4.22(c)(7) permits a CPO of commodity pool that has ceased operation prior to, or as of the end of, the pool’s fiscal year end to file an abbreviated financial statement in lieu of the full financial statements required by Regulations 4.22(c)(1) – (5). The CPO also is permitted under Regulation 4.22(c)(7)(iii) to prepare an unaudited abbreviated Annual Report provided the CPO has obtained written waivers from all of the participants in the commodity pool.

³ See Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators, 78 FR 52308 (Aug. 22, 2013) (the “Harmonization Rule”).

⁴ The Commission specifically addressed compliance with the financial statement requirements under Commission Regulation 4.22(c), stating: “Additionally, CPOs of RICs will still be subject to § 4.22(c)..., requiring the CPO of a RIC to submit to NFA a copy of the annual financial statements the RIC provides to the SEC.” In the instance of the liquidation of the entire corporate entity that constitutes the RIC, or the concurrent liquidation of all of the series of the RIC, the Division understands that the RIC operator will file the Form 8-F with the SEC. In such instances, the CFTC will also accept the Form 8-F, when additionally provided to NFA, as substituted compliance with the RIC’s Commission Regulation 4.22(c) liquidation report requirement.

Exemptive Relief from Regulation 4.22(c)(7) Participant Waivers

As noted above, Commission Regulation 4.22(c)(7) authorizes a CPO to provide an abbreviated Annual Report to participants of a liquidating fund, including a series of a series fund, in lieu of the full Annual Report otherwise required by Commission Regulation 4.22(c)(1) – (5). Commission Regulations 4.22(c)(7) and (d) further provide that the abbreviated Annual Report is not required to be audited provided that the CPO obtains from each participant of the commodity pool a written waiver of its right to receive an audited Annual Report.

Industry participants have noted the difficulty for a CPO to obtain written waivers from each participant of a series fund as the CPO generally cannot determine the identity of each of the commodity pool's participants who purchase their ownership interests through financial intermediaries.

As noted above, the regime adopted in the Harmonization Rule was based on a recognition of existing SEC requirements for these RIC CPOs. Because of these existing SEC requirements, including, among things, the daily publication of the Pool's net asset value on a RIC's Web site or other means available to participants, which provides additional visibility into the performance of the pool to participants, coupled with the significant difficulty for the CPO in obtaining the required waivers, the Division believes that the CPO of a liquidating series of a RIC should be permitted to use Commission Regulation 4.22(c)(7) notwithstanding the fact that it would be unable to obtain the participant waivers required by Commission Regulation 4.22(c)(7)(iii). Accordingly, pursuant to the authority delegated to it by Regulations 140.93 and 4.12(a) the Division grants the CPO of a liquidating series of a RIC relief from the participant waiver provision of Commission Regulation 4.22(c)(7)(iii), such that the CPO may nonetheless prepare, and provide to participants and NFA, unaudited Statements of Operations and Changes in Net Assets in accordance with Commission Regulation 4.22(c)(7). The Division further notes that a CPO of a liquidating series RIC remains subject to the timing requirements of Commission Regulation 4.22(c), such that it must provide the unaudited Statements of Operations and Changes in Net Assets, either through electronic or physical delivery, and either directly to all participants in the fund or through the relevant financial intermediaries (such as a broker, bank, trust or retirement plan) that sells the pool's shares and to NFA within 90 calendar days of the permanent cessation of trading.⁵

The exemptive relief contained in this letter does not excuse any person relying on it from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. Any different, changed or omitted material facts or

⁵ The statement above that such unaudited Statements of Operations and Changes in Net Assets must be provided within 90 days of the permanent cessation of trading of the pool does not otherwise limit the CPO's ability to apply to NFA for relief pursuant to Commission Regulations 4.22(c)(7)(ii)(C) and 4.22(f)(1)(i). 17 CFR 4.22(c)(7)(ii)(C) and 17 CFR 4.22(f)(1)(i).

circumstances may render this letter void. The Division retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of this letter in its discretion.

Should you have any questions, please do not hesitate to contact Amanda Olear, Associate Director at 202-418-5283 or Michael Ehrstein, Special Counsel, at 202-418-5957.

Very truly yours,

Eileen T. Flaherty
Director, Division of Swap Dealer
And Intermediary Oversight

cc: Regina Thoele, National Futures Association