



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Gary Barnett  
Director

CFTC Letter No. 14-114  
Exemption  
September 8, 2014  
Division of Swap Dealer and Intermediary Oversight

**Re: Exemptive Relief to Use Additional Third-party Recordkeepers in Commission Regulations 4.7(b)(4) and 4.23(c)**

Ladies and Gentlemen:

This letter is in response to requests from multiple parties received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) for clarification regarding the scope of the books and records exemption recently made available to all commodity pool operators (“CPOs”) in the adopting release, “Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators” (“Harmonization Rule”).<sup>1</sup>

For all CPOs, the Harmonization Rule removed the previous requirement of Commission Regulation 4.23<sup>2</sup> that the books and records of the CPO and the pool be maintained at the CPO’s main business office (“Main Business Office Requirement”).<sup>3</sup> The Harmonization Rule provided that to the extent that required books and records are not kept at the main business office of the CPO, these records may be alternately kept at one or more of the following:

*“the pool’s administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool.”<sup>4</sup>*

The question before the Division is whether, through the use of the authority delegated to it through Commission Regulation 140.93, the Division would consider expanding the universe

<sup>1</sup> 78 FR 52308 (Aug. 22, 2013).

<sup>2</sup> It should be noted that an identical exemption from the “main business office” recordkeeping requirement is found in Commission Regulation 4.7(b)(4). Hereinafter, for purposes of this discussion, any reference to Commission Regulation 4.23 shall be inclusive of that term as it is included in Commission Regulation 4.7(b)(4).

<sup>3</sup> Prior Commission Regulation 4.23 provided that all CPOs must make and keep certain records at their main business office, providing “each [CPO] registered or required to be registered under the Commodity Exchange Act (“Act”) must make and keep the following books and records in an accurate, current and orderly manner at its main business office.” Commission Regulation 4.23 (2012).

<sup>4</sup> See 78 FR 52308 at 52333, 52334 (Aug. 22, 2013); see also 17 CFR 4.7; 17 CFR 4.23.

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of permitted third-party recordkeepers for purposes of compliance with amended Commission Regulation 4.23.<sup>5</sup>

An exemption from the Main Business Office Requirement was first considered in the proposing release, “Commodity Pool Operators: Relief From Compliance With Certain Disclosure, Reporting and Recordkeeping Requirements for Registered CPOs of Commodity Pools Listed for Trading on a National Securities Exchange; CPO Registration Exemption for Certain Independent Directors or Trustees of these Commodity Pools.”<sup>6</sup>

The release proposed an amendment to Part 4 of the Commission’s regulations to codify, and make broadly available, relief previously granted by the Division to individual CPOs in Commission Staff Letters (“Prior Staff Letters”). The Commission cited an extensive list of letters in which the Division granted no-action relief from Main Business Office Requirement. In the Prior Staff Letters, relief was granted for CPOs who wished to keep such records at, among other entities, the CPO’s administrator, distributor, custodian, bank, or registered broker or dealer. Although these cited entities were the most frequently requested alternate recordkeepers in the Prior Staff Letters, they were not exhaustive. Among the letters cited in the proposing release was CFTC Staff Letter 10-06, which also made available relief to a CPO who kept required records at an entity that acted as the CPO’s custodian and accounting/transfer agent, as well as at another entity that served as a subcontractor to the CPO’s custodian and accounting/transfer agent.<sup>7</sup>

In the Harmonization Rule, the Commission stated:

*The Commission understands the current practice for RICs, as well as many other CPOs, to maintain their books and records with a third party vendor, or other such record-keeper, to be part of efficient management practices regarding such records. Such practice allows the CPO to avail itself of the lower cost and increased record security of a third party vendor, as such vendors often specialize in such services. The Commission acknowledges that its requirement to keep such books and records at the main business address of a CPO is rooted in the timely and certain access of that data. However, to the extent that such data is readily accessible to a CPO, the Commission believes that the requirement that such data be maintained at the main business address of a CPO is similarly met so long as timely and complete access to that data is available.<sup>8</sup>*

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<sup>5</sup> The Division notes that in conversations with multiple parties, concern has been expressed regarding the requirement that all records required to be maintained by Commission Regulation 4.23 must be kept in accordance with Commission Regulation 1.31, regardless of whether such records are maintained by the CPO or by a third party recordkeeper. Parties have expressed their concern that certain portions of Commission Regulation 1.31 may no longer be in keeping with modern data management practices. The Division intends to perform a review of the requirements of Commission Regulation 1.31 and their applicability to the current technological environment.

<sup>6</sup> 75 FR 54794 (Sept. 9, 2010).

<sup>7</sup> See CFTC Staff Letter 10-06.

<sup>8</sup> 78 FR 52308 at 52321 (Aug. 22, 2013).

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Although by its terms, the Main Business Office Requirement exemption in the Harmonization Rule would only permit the use of the third-party recordkeepers enumerated in that list, the Division believes that such an outcome may be unnecessarily restrictive. The Division believes that this is particularly the case in light of current data management practices in use by CPOs, which increasingly employ specialized data centers and services, or unenumerated affiliates that have day-to-day control over that data to manage records, and is bolstered by the Division's previous stance with respect entities that fall outside the list. Moreover, the CPO remains responsible for producing any such records upon request by the Commission. The Division notes that Commission Regulations 4.7(b)(5)(i)(D)(3) and 4.23(c)(1)(iv)(C) require representations from a CPO using the services of a third-party recordkeeper that, upon request from the Commission, the CPO will obtain such books and records and provide them to the Commission.<sup>9</sup> Further, the CPO must represent that it remains responsible for ensuring that all books and records required to be kept are maintained in accordance with Commission regulations.<sup>10</sup> As such, regardless of who has custody these books and records, the CPO remains liable for the fulfillment of its recordkeeping obligations under the Commission's regulations, regardless of where, and with whom those records are kept. Therefore, the failure of a selected third party recordkeeper to properly keep such books and records is considered the failure of the CPO. The Division believes that these retained obligations provide an incentive for CPOs to select well qualified third-party recordkeepers, as a failure to properly keep, and provide these books and records within that 48-hour period may be cause for an enforcement action against the CPO by the Commission. Therefore, the Division believes that recordkeeping relief should be available to CPOs that use a non-enumerated entity to maintain their records, as the ultimate responsibility for these obligations remains with the CPO.

Accordingly, the Division does not believe that allowing a CPO to use a third-party recordkeeper that falls outside the set currently enumerated in the Commission's regulations is inconsistent with the purposes of the Commission's regulations. As such, pursuant to the authority delegated to it by Regulations 140.93 and 4.12(a), the Division hereby provides exemptive relief from the Main Business Office Requirement of Commission Regulations 4.7(b)(4) and 4.23 to allow a CPO to use any third-party recordkeeper provided:

1. That the CPO's timely access to such records is maintained, such that the CPO will satisfy the obligations of the applicable Commission regulations, particularly with respect to providing such records for inspection; and

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<sup>9</sup> With respect to records that are permitted to be, and are maintained at a location outside of the United States, such records may be produced consistent with Regulations 4.7(b)(5)(i)(D)(3) and 4.23(c)(1)(iv)(C).

<sup>10</sup> See, Commission Regulations 4.7(b)(5)(i)(D)(2) and 4.23(c)(1)(iv)(B).

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2. The CPO timely and completely files the statements required pursuant to Commission Regulations 4.7(b)(5) or 4.23(c), as applicable.<sup>11</sup>

Consistent with its regulatory obligations and the statements above, the CPO remains responsible for ensuring that all books and records required to be kept are maintained in accordance with Commission regulations, and producing them upon request, within the time specified by the regulations. These obligations remain with the CPO regardless of the condition of, or failures by, the third-party recordkeeper.

The relief issued by this letter does not excuse any registrant from compliance with any other applicable requirements contained in the Commodity Exchange Act or in the Commission's regulations issued thereunder.

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

Very truly yours,

Gary Barnett  
Director, Division of Swap Dealer  
And Intermediary Oversight

cc: Regina Thoelle, National Futures Association

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<sup>11</sup> These statements require that the CPO identify the recordkeeper, the recordkeeper's contact information, which records shall be so kept, and representations regarding the continued and proper keeping of those records.