

SPEECHES & TESTIMONY

Statement of Concurrence by CFTC Commissioner Rostin Behnam

Amendments to Registration and Compliance Requirements for Commodity Pool Operators and Commodity Trading Advisors

November 25, 2019

I support the two final rules amending Part 4 of the Commission's regulations addressing various registration and compliance requirements for commodity pool operators (CPOs) and commodity trading advisors (CTAs). I support these amendments because they represent the latest step in the Commission's ever evolving understanding of the needs of this dynamic segment of the derivatives market, along with the needs of consumers and the national public interest we are charged with protecting. The amendments adopted today reflect many years of staff experience and familiarity with the affected market participants. They incorporate commonly-relied upon no-action and exemptive relief into the Commission's regulations, reducing regulatory burdens while promoting legal certainty. However, these rules are not perfect. In particular, the Commission's decision to omit a notice filing requirement for claiming a CPO or CTA exemption for Family Offices gives me pause and raises concerns that we will not have direct visibility into the identity of entities claiming these exemptions. I am hopeful that the Commission will monitor whether this lack of visibility impacts our oversight and protection of market participants, and take action, if appropriate.

CPOs and CTAs were two of the three classes of commodity professionals recognized and required to register with the newly established Commodity Futures Trading Commission under the Commodity Futures Trading Commission Act of 1974,^[1] the third being associated persons of futures commission merchants.^[2] Prior to that time, CPOs were largely unregulated save for being subject to certain exchange rules requiring recordkeeping and higher margin,^[3] and, beginning in 1968, to the anti-fraud provisions of the Commodity Exchange Act when amendments made the anti-fraud prescription applicable to "any person."^[4] Although the first rules governing the operations of CPOs and CTAs were not adopted as Part 4 until 1979, CFTC staff began granting exemptive relief and issuing interpretive letters almost immediately after the statutory registration provisions became effective in 1975.^[5]

Over forty years later, the CPO and CTA registration categories are the most mixed in terms of organizational structure, investment focus, participation, and solicitation. Along the way, Part 4 has at times challenged us in its complexities; but such complexity has always been driven by the deep, multifaceted, and varied entities that fall within the Commission's statutory authority, and at times, the authority of the Securities and Exchange Commission (SEC) and others. It has always been our practice to rely on first principles when engaging with market participants in evaluating whether, through granting exemptions, defining exclusions, or permitting compliance via alternative means, we can harmonize the regulatory treatment of dually CFTC-SEC regulated entities and individuals such as in the case of Family Offices, business development companies (BDCs), and under the JOBS Act, without compromising customer protections or undermining anti-fraud authority.

I believe today's amendments to Part 4 demonstrate the Commission's commitment toward achieving that balance, utilizing its extensive surveillance and oversight resources, including that of the NFA and through its relationship with the SEC. The investor protection standards implemented via CFTC and SEC regulations as applied to Family Offices will operate in unison, which in turn will relieve such entities of the burdens of considering multiple standards in determining their registration and compliance obligations with respect to securities and commodity interest transactions. The Commission is facilitating full implementation of the JOBS Act through finalizing amendments to Commission regulations 4.7 and 4.13 that provide claiming CPOs the option to use general solicitation in their qualifying offerings. In incorporating by reference corresponding SEC regulations applicable to the same issuers, the Commission is providing the greatest clarity as to scope and legal certainty possible. The same is true for the revision to the exclusionary language in Commission regulation 4.5 which unequivocally relieves operators of BDCs subject to oversight of the SEC from the CPO definition.

The Commission's decision to not move forward at this time on proposals to exempt from registration qualifying CPOs operating commodity pools outside of the U.S. consistent with Commission Staff Advisory 18-96^[6] and to add a prohibition against statutory disqualifications for certain exempt CPOs reflects a thoughtful consideration of the comments received and the practicalities of both proposals as they relate to ongoing concerns about cross-border issues and the Commission's regulatory goals. While a pause in the deliberative process as to these issues is entirely appropriate, I urge the Commission staff to keep up the momentum, continue discussions with industry participants and the National Futures Association (NFA), and proceed with the understanding that good faith efforts and the desire to comply should align interests on all sides. As the relief provided in Staff Advisory 18-96 remains available, it is especially important that the Commission move forward expeditiously on finalizing rules implementing a suitable and effective prohibition on statutorily disqualified persons claiming CPO exemptions for qualifying pools so as to ensure that all persons claiming a CPO exemption in Commission regulation 4.13 are treated similarly and customer protections are upheld.

The amendments to Part 4 being finalized today, as a whole, exemplify how the rulemaking process ought to work. The revised rules may add intricacy to the ever evolving ruleset, but simplicity does not always mean brevity. Today's rules reflect many years of active engagement and consideration of the evolving regulatory structure, market structure, and investment culture. Market participants have been heard and Commission interests and those of the NFA and the SEC have been accounted for. I commend the staff of DSIO for working with me and my staff and demonstrating that we can reduce registration and compliance burdens, obviating the need for hundreds if not thousands of individual requests for and grants of relief, and free up market participants and Commission resources to pursue other critical functions, while preserving the core purposes of CPO and CTA registration. I will continue to engage with the Chairman and DSIO staff as we monitor the impact of the Part 4 amendments on our regulatory interests and the critical markets and market participants we oversee and protect.

^[1] Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat., 1389 (1974).

^[2] Jeffrey B. Rosen, *Regulation of Commodity Pool Operators under the Commodity Exchange Act*, 40 WASH. & LEE L. REV. 937, 940 (1983).

^[3] *Id.* at 941.

[4] *Id.*

[5] *Id.* at 961.

[6] Advisory No. 18-96, Offshore Commodity Pools Relief for Certain Registered CPOs from rules 4.21, 4.22 and 4.23(a)(10) and (a)(11) and From the Location of Books and Records Requirement of Rule 4.23 (Apr. 11, 1996), <https://www.cftc.gov/sites/default/files/tm/advisory18-96.htm>.