SPEECHES & TESTIMONY

Statement of Commissioner Dan M. Berkovitz

Amendments to Registration and Compliance Requirements for CPOs and CTAs: Registered Investment Companies, Business Development Companies, and Regulation 4.27

November 25, 2019

I am voting in favor of today's rule adopting three amendments to Regulations 4.5 and 4.27, addressing certain exemptions for commodity pool operators (CPOs) and filing requirements for CPOs and commodity trading advisors (CTAs). These three amendments are in largely identical form to those proposed last fall, which I voted for because they codify no-action and exemptive letters and simplify our registration framework, without compromising customer protection or the integrity of our derivatives markets.

The first amendment is to Regulation 4.5(a)(1), which currently excludes an investment company (RIC) registered under the Investment Company Act of 1940 (1940 Act) from the definition of a CPO. Today's amendment confirms the Commission's understanding that an investment adviser registered under the Investment Advisers Act of 1940 is the entity that operates the RIC and therefore is the appropriate person to claim the CPO exclusion for the RIC. I note that this revision neither broadens the category of persons currently claiming the RIC exclusion, nor changes the current requirements that qualifying entities claiming the exclusion must file annual notices with the CFTC and make disclosures to pool participants.

Today's final rule also amends Regulation 4.5(b)(1) to include business development companies (BDCs), defined in the 1940 Act, as persons excluded from the CPO definition.[1] BDCs are a type of closed-end investment company, but are exempt from registering as a RIC under the securities laws. A BDC therefore is not a "qualified entity" under 4.5(a)(1). On this basis, in 2012 CFTC staff provided no action relief to BDCs that meet the conditions of Regulation 4.5(c), which include significant caps on the BDC's use of derivatives and require notice to the CFTC and disclosures to investors.[2] To date, 65 entities have claimed this relief. By codifying the exclusion through this amendment, we also harmonize our regulations relating to BDCs with those of the Securities and Exchange Commission (SEC).

Finally, today's rule amends the definition of "Reporting Person" in Regulation 4.27 to exempt certain classes of CPOs and CTAs, consistent with exemptive relief currently provided at the request of the National Futures Association (NFA).[3] Under these amendments, certain CPOs and CTAs are not required to file Forms CPO-PQR and CTA-PR, respectively, where such filing would provide limited additional information about the reporting person beyond what is already available to the Commission. Notice and filing requirements are critical to performing effective market oversight, but where the information received by the Commission is largely duplicative, these requirements do not materially advance the interests of the Commission or its registrants and are therefore unnecessary.

It is good government to periodically asses our regulations and make improvements where appropriate. In this context, improving the clarity and transparency of our rules and harmonizing them with those of the SEC are worthy objectives, but without more, do not justify a change.[4] The primary objective in evaluating and considering amendments to our regulations is whether and how they will improve the Commission's ability to protect customers and police our markets.

Here, the NFA—the front-line self-regulatory organization responsible for member registration—has noted that these amendments will bring transparency to the CPO registration framework by incorporating CPO and CTA no-action and exemptive relief into the Commission's regulations. I agree with the NFA that today's proposed amendments will benefit both the Commission and its registrants, and in my view, they will not impact our mission to safeguard the markets and its participants. I therefore support these narrow revisions to Regulations 4.5 and 4.27 and thank the staff of the Division of Swap Dealer and Intermediary Oversight for their work on this rule.

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[1] CFTC Letter No. 12-40 (Dec. 4, 2012), available at https://www.cftc.gov/csl/12-40/download ("BDC No-Action Letter").

[2] BDC No-Action Letter at 3.

[3] CFTC Letter No. 14-115 (Sept. 8, 2014), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/14-115.pdf; CFTC Letter No. 15-47 (July 21, 2015), available at https://www.cftc.gov/idc/groups/public/@lrlettergeneral/documents/letter/15-47.pdf.

[4] *See, e.g.*, *Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 177-78 (D.C. Cir. 2010) ("The SEC cannot justify the adoption of a particular rule based solely on the assertion that the existence of a rule provides greater clarity to an area that remained unclear in the absence of any rule.")