FS Regulatory Brief

CFTC Adopts New Rules Requiring Advisers to Investment Companies and Private Funds to Register

Also Adopts New Reporting Requirements and Proposes New "Harmonization" Rules

On February 9, 2012, the Commodity Futures Trading Commission (CFTC) adopted amendments to its rules to require private fund managers and SEC-registered investment companies that hold more than 5% of their portfolio holdings in commodity interests (futures, commodity options and swaps) to become registered with the CFTC, unless they meet new criteria for exemption.[1]

Registration, in turn, will have a significant impact on these advisers as it will impose new CFTC-driven obligations, including new disclosures to customers and new regulatory reporting requirements.

The CFTC also proposed "harmonization" rules intended to ease the burden of complying with both the Securities and Exchange Commission (SEC) and CFTC requirements.[2] The CFTC is asking for public comment on these rules.

The CFTC also adopted new reporting requirements for commodity pool operators (CPOs) on Form CPO-PQR.

This FS Regulatory Brief describes the CFTC's new registration rules, proposed harmonization rules, and new information reporting requirements.

In Sum

The final rules, which become effective April 24, 2012:

- Rescind relief from the CPO registration requirement upon which many advisers to private funds relied;
- Reinstate a trading threshold and marketing restriction for mutual funds and other SEC-registered investment companies – thus requiring CFTC registration for many mutual fund advisers;
- Establish new annual, and in some cases quarterly, reporting requirements for CPOs and commodity trading advisers (CTAs) on new Forms CPO-PRQ and CTA-PR; and
- Require that CPOs and CTAs provide specific risk disclosures in connection with swap transactions.

---

[1] 77 Fed. Reg. 11252 (Feb. 24, 2012) ("Final Rule Release"), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-3390.pdf

[2] 77 Fed. Reg. 11345 (Feb. 24, 2012), *available at* http://www.gpo.gov/fdsys/pkg/FR-2012-02-24/pdf/2012-3388.pdf

pwc

Private funds: Exemption from registration as a CPO

Prior to this new rule, CFTC rules had provided an exemption from registration utilized by many advisers to private funds. Specifically, the "de minimis exemption" (CFTC Rule 4.13(a)(3)) allowed advisers to private funds to claim exemption if they:

1. operate pools exempt from registration under the Securities Act of 1933 – *i.e.* private funds;
2. offer the pools only to sophisticated investors – referred to in CFTC rules as "qualified eligible persons" (QEPs),[3] accredited investors, or knowledgeable employees; and
3. the aggregate initial margin and/or premium attributable to commodity interests in each pool does not exceed five percent of the liquidation value of a pool's portfolio.

In addition, a separate CFTC rule, commonly referred to as the "hedge fund exemption," (Rule 4.13(a)(4)), provided another exemption from registration for private funds offered only to institutional QEPs and natural persons who meet both definitional and portfolio QEP requirements, regardless of the amount of commodity interests held by the pool.

The CFTC had originally proposed to abolish both exemptions from registration – requiring a large number of advisers to private funds to become registered with the CFTC as CPOs. In its final rules, however, the CFTC decided to rescind the hedge fund exemption, but to retain the de minimis exemption. It observed that "there are no limits on the amount of commodity interest trading in which pools operating under [the hedge fund exemption] can engage."[4] Because a previously-exempt commodity pool could be invested solely in commodity interests, the CFTC decided to withdraw the exemption and require CPO registration "to ensure adequate customer protection and market oversight."[5]

Thus, advisers to private funds that meet the de minimis exemption, described above, will continue to be exempt from registration with the CFTC.

Numerous commenters had recommended that the CFTC adopt an exemption from registration for family offices – an exemption that has been granted in the past on a "no-action" basis by CFTC staff. The Commission declined to do so, noting that it lacked information regarding the activities of CPOs claiming relief, but suggested it may consider such an exemption in the future, once it is able to better assess the universe of firms that may be appropriate to include within such an exemption.

Effective and compliance dates

All firms that are required to register (*i.e.* those firms that are currently relying on the hedge fund exemption) must do so by December 31, 2012.

Entities formed after the effective date of the rule (April 24, 2012) must register upon formation. The rule does not provide for "grandfathering" of pools currently operating under the hedge fund exemption.

[3] *See* CFTC Rule 4.7 for the definition of "qualified eligible person."

[4] Final Rule Release, 77 Fed. Reg. at 11,265.

[5] *Id.*

New requirements for SEC-registered investment companies

Historically, SEC-registered investment companies were not required to register with the CFTC, irrespective of the amount of their portfolio holdings in commodity interests. Until the CFTC adopted these new rules, the CFTC maintained an exclusion from the definition of a CPO for investment companies that were registered with the SEC under the Investment Company Act (Rule 4.5).

In adopting the new rules, the CFTC stated that it had observed SEC-registered investment companies offering interests in “de facto commodity pools” (funds consisting primarily or solely of commodity interests) while not being registered with the CFTC as a CPO.[6] In the CFTC’s view, firms that offer “services substantially identical to those of a registered CPO” should be subject to the same regulatory obligations as fully-registered CPOs.

Accordingly, the CFTC narrowed the exclusion that had previously been available to SEC-registered investment companies trading commodity interests, and established new criteria. These new criteria are described below.

In the adopting release, the CFTC stated that registration provides two significant benefits:

First, registration allows the CFTC to ensure that all entities operating collective investment vehicles participating in the derivatives markets meet minimum standards of fitness and competency; and

Second, registration provides the CFTC and members of the public with a clear means of addressing wrongful conduct by individuals and entities participating in the derivatives markets.[7]

New criteria for exclusion

First, an SEC-registered investment company must represent that it will use commodity futures or commodity option contracts, or swaps solely for bona fide hedging purposes within the meaning of CFTC rules. Other criteria for exclusion are described below.

New criteria for exclusion: Trading threshold

In order to take advantage of the exclusion under the new rule – and avoid registration as a CPO – SEC-registered investment companies will have to establish either that:

- The pool’s aggregate initial margin and premiums required to establish derivatives positions (commodity futures, commodity options contracts, or swaps, exclusive of trading for bona fide hedging purposes) does not exceed five percent of the liquidation value of the entity’s portfolio, or
- The aggregate net notional value of derivatives positions (exclusive of trading for bona fide hedging purposes) does not exceed 100 percent of the liquidation value of the pool’s portfolio after taking into

[6] The CEA, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) defines commodity pool as "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any . . . commodity for future delivery, security futures product, or swap."

[7] *See* Final Rule Release, 77 Fed. Reg. at 11,254.

account unrealized profits and losses on any such positions.

SEC-registered investment companies may exclude from their calculations an option that is in-the-money at the time of purchase, the in-the-money amount as defined in CFTC Rule 190.01(x).

The CFTC noted in the adopting release that trading in commodity interests exceeding five percent of the liquidation value of a portfolio evidences a significant exposure to the derivatives markets requiring CFTC oversight.

The CFTC, however, acknowledging that the initial margin for some commodity interest products – i.e. swaps – may not permit compliance with the five percent threshold, also adopted the alternative "notional value" test to provide flexibility to registered investment companies.

The final rules provide that SEC-registered investment companies may net futures contracts with the same underlying commodity across designated contract markets and foreign boards of trade, and swaps cleared on the same designated clearing organization, where appropriate.

In calculating derivatives positions, the final rules require SEC-registered investment companies to include:

- Risk management transactions; and
- Swaps. In response to commenters' concern that the CFTC would require inclusion of swaps within the threshold test prior to adopting a definition of the term "swap," the CFTC is delaying the compliance date for the inclusion of swaps within the thresholds – to 60 days after it adopts a definition of the term.

New criteria for exclusion: Marketing restrictions

In order to qualify for the exclusion from the definition of CPO, SEC-registered investment companies may not market the fund to the public as a vehicle for trading in the commodity futures, commodity options, or swaps markets.

By way of guidance, the CFTC lists a number of non-exclusive factors it states are indicative of "marketing" a registered investment company as a vehicle for investing in commodity interests:

- The name of the fund;
- Whether the fund's primary investment objective is tied to a commodity index;
- Whether the fund makes use of a controlled foreign corporation for its derivatives trading;
- Whether the fund's marketing materials, including its prospectus or disclosure document, refer to the benefits of the use of derivatives in a portfolio or make comparisons to a derivatives index;
- Whether, during the course of its normal trading activities, the fund or entity on its behalf has a net short speculative exposure to any commodity through a direct or indirect investment in other derivatives;
- Whether the futures/options/swaps transactions engaged in by the fund or on behalf of the fund will directly or indirectly be its primary source of potential gains and losses; and
- Whether the fund is explicitly offering a managed futures strategy.

The CFTC stated that it will give more weight to the final factor in the list when determining whether a registered investment company is operating as a "de facto commodity pool." However, the CFTC notes that a registered investment company that offers a strategy with several indicia of a managed futures strategy, yet avoids explicitly describing the strategy as such in its offering materials, may still be found to have violated the marketing restriction.

The CFTC also noted that whether the name of the fund includes the terms "futures" or "derivatives" or otherwise indicates a possible focus on futures or derivatives will not be considered a dispositive factor, but rather one of many.

Who registers?

The CFTC's registration scheme requires registration of the CPO. The CFTC provided guidance that a registered investment company's adviser is the entity required to register as the CPO (rather than the fund itself).

Use of controlled foreign corporations

The CFTC stated that it understands that SEC-registered investment companies use controlled foreign corporations (CFCs) as a mechanism to invest up to 25 percent of their portfolio in derivatives, and that the use of a CFC in this way could indicate that the registered investment company is engaging in derivatives trading above the threshold requiring registration as a CPO.

While the CFTC does not oppose the use of CFCs by registered investment companies, it contends that CFCs that fall within the statutory definition of "commodity pool" should be subject to regulation. Moreover, the CFTC holds that each separate legally-cognizable entity must be assessed on its own characteristics, and that a CFC should not be entitled to exclusion simply because its parent company is a registered investment company that may be entitled to exclusion from CPO registration. Therefore, CFCs that are used for trading in commodity interest by registered investment companies will be required to have their CPOs register, unless they can claim an exemption or exclusion.

With the elimination of the hedge fund exemption, discussed above, controlled foreign corporations whose sole participant is a registered investment company may, themselves, be required to register as CPOs.

Effective and compliance dates

Firms that are unable to meet the new exclusion as described above, must register with the CFTC by the later of: (1) December 31, 2012, or (2) 60 days after the effective date of the CFTC's final rules defining the term "swap."

The CFTC specifically declined to "grandfather" entities that fall outside the exclusion.

Entities required to register will be required to comply with the CFTC's recordkeeping, reporting and disclosure requirements within 60 days following the effectiveness of a final rule implementing the CFTC's proposed harmonization effort, discussed below.

Annual notice requirements

Even if exempt from registration, the final rules require advisers to submit an annual notice to the CFTC.

Advisers relying on the exemption from registration as a CPO or the exclusion from the definition of CPO must provide annual notice reaffirming their eligibility for the exemption or exclusion:

- Advisers relying on a registration exemption under Rule 4.13(a)(3) must file the notice within 60 days of calendar year end.
- Advisers relying on the exclusion under Rule 4.5 must file the notice within 30 days of calendar year end.

Proposed harmonization of compliance obligations for SEC-registered investment companies and CFTC-registered sponsors

Many commenters had expressed concern that sponsors of SEC-registered investment companies required to register as CPOs would be subject to duplicative, inconsistent, and possibly conflicting disclosure and reporting requirements by the SEC and the CFTC. In response, the CFTC proposed changes to its regulations intended to "harmonize" the compliance and regulatory obligations applicable to investment companies.

The CFTC is proposing that the following exemptive provisions be available to advisers to SEC-registered investment companies who are also required to register as CPOs.

Relief from delivery of disclosure documents and periodic reports

Part 4 of the CFTC's regulations impose certain risk disclosure, reporting and recordkeeping obligations on registered CPOs:

Disclosure requirements. Rule 4.21 requires that each CPO registered or required to be registered with the CFTC deliver a Disclosure Document prepared in accordance with Rules 4.24 and 4.25, which set forth the specific information required to be disclosed, including the past performance of the offered pool to each prospective participant in a pool that it operates or intends to operate.

Reporting requirements. Rule 4.22 requires that each CPO periodically distribute to pool participants an Account Statement presented in the form of a Statement of Income (Loss) and a Statement of Changes in Net Asset Value for the prescribed period. The Account Statement must be distributed monthly for pools with net assets of more than $500,000 and otherwise at least quarterly.

Recordkeeping requirements. Rule 4.23 requires that each registered CPO must make and keep the books and records specified in CFTC regulations "at its main business office."

The proposed rules would permit SEC-registered investment companies to comply with the Disclosure Document and account statement delivery requirements by making such documents available on their websites and by maintaining their records with specified third parties, on the condition that certain information and representations be filed with the CFTC along with the SEC-registered investment company's notice claiming relief.[8]

Content and timing of disclosure documents

According to the CFTC, many of the disclosures required by the CFTC's regulations are consistent with SEC-required disclosures. Where the CFTC requirements differ slightly, the CFTC states that CFTC-required disclosures can be presented along with SEC-required information in a registered investment company's prospectus.

The CFTC identified certain conflicts in the CFTC and SEC disclosure requirements, and is proposing the following relief to harmonize those requirements:

Performance disclosures. CFTC regulations require that if a pool has traded commodity interests for three years or more, during which at least 75 percent of its contributions have been made by persons unaffiliated with the CPO, CTAs or their principals, the only required performance to be disclosed is

[8] The proposed rules also would permit CPOs of publicly offered pools to claim relief from the disclosure, reporting and recordkeeping requirements.

that of the offered pool. If a pool has not operated for at least three years, the CPO must present the performance of certain other pools and accounts.

The CFTC is proposing that SEC-registered investment companies may present information regarding the performance of certain other pools and accounts in its Statement of Additional Information included on Part B of its Form N-1A.

The CFTC notes that SEC requirements may conflict with CFTC requirements with respect to reporting past performance, and that it's had preliminary discussions with the SEC regarding this issue. The SEC staff has indicated it would consider requests for no-action relief regarding the performance presentations, if necessary and appropriate.

In addition, the CFTC's proposed rules would permit an SEC-registered company's prospectus to contain a cautionary statement that combines the language required by both CFTC rules and SEC rules under the under the Securities Act of 1933 (Securities Act).

Information required in the forepart of CFTC disclosure document. CFTC rules require disclosure of a "break-even point,"[9] in the Disclosure Document --the trading profit that a pool must realize in the first year of a participant's investment to equal all fees and expenses (showing the point at which the h investor will recoup his initial investment). To comply with this requirement, the CFTC proposes to consider the information required in the forepart of its Disclosure Document (such as the pool's name and address, and the CPO's name, address and form of organization) as the section immediately following all disclosures required by SEC Form N1-A to be included in the summary prospectus (otherwise, for registered investment companies using SEC Form N-2, in the forepart of the prospectus).

The CFTC proposes to treat any other information required to be presented in the forepart of the Disclosure Document by CFTC rules but that is not included in the summary section of the prospectus for open-ended registered investment companies in the same way.

Disclosure of fees and expenses. The CFTC proposes that any expenses that are not included in the fee table required by Item 3 of SEC Form N-1A or Item 3 of SEC Form N-2 would be disclosed in the prospectus, along with a tabular presentation of the calculation of the pool's break-even point consistent with CFTC requirements.

Timing. The CFTC's and SEC's timing requirements for Disclosure Document updates are inconsistent. CFTC regulations require that a Disclosure Document may be used for nine months from the date of the document before a new Disclosure Document must be prepared and filed, while the securities laws essentially require an annual prospectus update.[10]

[9] The CEA defines the "break-even point" as the trading profit that a pool must realize in the first year of a participant's investment to equal all fees and expenses such that such participant will recoup its initial investment, as calculated pursuant to rules promulgated by a registered futures association pursuant to Section 17(j) of the CEA. The break-even point must be expressed in terms of dollars and as a percentage of the minimum unit of initial investment.

[10] Section 10(a)(3) of the Securities Act provides that "when a prospects is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than 16 months prior to such use." Because financial statements are prepared annually as of the end of the investment company's fiscal year, and information from the financial statement is included in the prospectus, the operation of Section 10(a)(3) results in an annual updating cycle.

To address this inconsistency, the CFTC proposes to require that CPOs and CTAs file updates of all Disclosure Documents twelve months from the date of the document.

In addition, the CFTC stated that when filing amendments to disclosure documents with the National Futures Association (NFA), CPOs of pools that provide for daily liquidity may post the disclosure document with the highlighted changes on their websites for pool participants at the same time the CPO files with the NFA, with the final document posted upon completion of the NFA review process.

Account statement reports – Timing and certification

Timing. The CFTC's regulations require CPOs to provide periodic reports, generally monthly, to participants in the pools they operate. SEC regulations require that investment companies provide semi-annual reports to shareholders. Both the SEC and the CFTC require that annual financial statements be provided to commodity pool participants and investment company shareholders.

Notably, the CFTC has determined not to propose relief regarding the content or timing of the monthly account statement. In the CFTC's view, the information required to prepare the monthly account statement should be readily available to the operator of an investment vehicle, in accordance with recordkeeping requirements under the CEA and applicable securities laws.

The proposed rules do provide, however, that SEC-registered investment companies will be able to satisfy the requirement to deliver account statements to participants by making such statements readily available on their websites within 30 calendar days after the last day of the applicable reporting period and continuing for a period of not less than 30 calendar days.

Certification. The SEC and CFTC have different requirements with respect to certification in periodic and annual reports. CFTC regulations require that the oath or affirmation be included with periodic and annual reports provided to pool participants and with the annual report filed with the NFA. In contrast, the SEC's certification required on Form N-CSR is made available through EDGAR, but does not have to be provided to shareholders.

The CFTC proposes to accept the SEC's certification as meeting CFTC requirements, as long as such certification is part of the Form N-CSR filed with the SEC.

The CFTC is seeking comments on its proposed harmonization rules

Comments on the proposal are due by April 24, 2012. The CFTC has requested comment, in particular, on whether any additional provisions need to be harmonized. For example, the CFTC noted that it is considering adopting a family office exemption from CPO registration akin to the exemption adopted by the SEC. In addition, the CFTC asked whether it should consider harmonizing its account statement reporting requirement with the SEC's semiannual reporting requirement, or harmonize its past performance reporting requirements with SEC requirements.

New disclosure and reporting requirements

Hand-in-hand with the new rules requiring that many firms register with the CFTC, the CFTC also adopted expansive new reporting and disclosure requirements.

The new rules require that CPOs and CTAs add new language to their standard risk disclosure documents to include "swaps" as a permitted activity for CPOs and CTAs (amended rules 4.24 and 4.34).

The new rules also require that CPOs and CTAs report certain information to the CFTC on new Forms CPO-PQR and CTA-PR (new Rule 4.27). The CFTC states that it is collecting the data in Form CPO-PQR in order to assess the risk posed by investment vehicles to the derivatives markets and to the broader financial system.

These new reporting requirements are complicated and significant – and will require that CPOs and CTAs provide the CFTC with a range of information.

The new reporting requirements apply to both dually and non-dually registered CPOs and CTAs, and are intended to supplement SEC reporting requirements for dual registrants that must also file Form PF (Private Fund).

In adopting the rules, the CFTC noted that the sources of risk delineated in the Dodd-Frank Act with respect to private funds are also presented by commodity pools.

In the CFTC's view, the agency needs similar information to address these risks by requiring the registration of previously- exempt CPOs and by requiring these firms to report information comparable to that required in Form PF, which was jointly adopted by the CFTC and SEC.

The CFTC is taking a "tiered" approach to reporting. CPOs to larger pools will submit more information, more frequently, than CPOs to smaller pools:

- ***Small CPOs***. CPOs with less than $150 million in pool assets under management will be required to complete Schedule A on an annual basis.
- ***Mid-sized CPOs***. CPOs with at least $150 million in aggregated pool assets under management as of the close of business on any day during the calendar year, will be required to complete Schedules A and B on an annual basis.
- ***Large CPOS***. CPOs with $1.5 billion in pool assets under management as of the close of business on any day during the any of the individual calendar quarters will be required to complete Schedules A, B, and C on a quarterly basis.
- ***Co-CPOs***. The CPO with the greater assets under management overall will be required to report for the co-operated pool. Further, if a pool is operated by co-CPOs and one of the CPOs is also an SEC-registered investment adviser, the non-investment adviser CPO will still be obligated to file the applicable sections of Form CPO-PQR regardless of whether the investment adviser CPO filed a Form PF.

Substituted compliance on Form PF

CPOs that are dually-registered with the SEC and that file Form PF must still file Schedule A with the CFTC, and CTAs must still file Form CTA-PR. Dual registrants may file Form PF with the SEC in lieu of completing Schedules B and/or C of Form CPO-PQR.

Schedule B substitution. Any mid-sized CPO or Large CPO that is (1) registered with the SEC as an investment adviser and (2) operated only pools that satisfy the definition of a private fund[11] may file Sections 1.b and 1.c of Form PF for each pool that it operated during the reporting period.

Further, any mid-sized CPO or Large CPO (1) is registered with the SEC as an investment adviser and (2) operated any pools that do not satisfy the definition of private fund during their respective reporting periods, and does not elect to file Form PF, they will be required to complete and file a Schedule B for each such pool. Schedule B will need to be completed, in addition to the mid-sized CPO's or Large CPO's Form PF filing requirements.

Schedule C substitution. Any Large CPO that (1) is registered with the SEC as an investment adviser and (2) operated only pools that satisfy the definition of a private fund during the reporting period will be deemed to have satisfied its Schedule C filing requirements by filing the applicable Sections 1 and 2 of Form PF for the reporting period in question.

In addition, any Large CPO that (1) is registered with the SEC as an investment adviser and (2) operated any pools that do not satisfy the definition of private fund during the reporting period, and does not elect to file Form PF, will be required to complete Parts 1 and 2 of Schedule C.

Large CPOS must complete Part 1 with respect to all pools they operated during the reporting period that did not satisfy the definition of private fund, and Part 2 will need to be completed with respect to all Large Pools they operated during the reporting period that did not satisfy the definition of a private fund. These Schedule C filings must be completed in addition to the Large CPO's Form PF filing requirements.

Determining assets under management

The SEC and CFTC use different methods for determining assets under management. The CFTC requires the use of aggregated gross pool assets under management. In contrast, the SEC defines "regulatory assets under management" as the gross value of the securities portfolio as reported on the SEC's Form ADV.

Additionally, the CFTC's Form CPO-PQR uses net assets under management as the method for determining whether a commodity pool is a large commodity pool for filing purposes, whereas the SEC's Form PF uses net regulatory assets.

In the CFTC's view, gross assets under management and net asset value are more appropriate means for determining filing obligations for CPOs and large commodity pools because entities registered with the CFTC are familiar with the use of net asset value for other purposes, including determining the frequency of reporting to participants. The CFTC also stated that the use of net asset value is consistent with the longstanding utilization of net asset value in US GAAP and in CFTC regulations.

Treatment of funds of funds

Funds of funds are covered by these rules and the CFTC provided specific guidance for them. The CFTC stated that its guidance regarding funds of funds are consistent with those instructions adopted as part of Form PF.

The CFTC concluded that a fund investing in an unaffiliated commodity pool is itself a commodity pool for purposes of the CEA and CFTC regulations. Acknowledging that a fund of funds may not have access to the type of information necessary to respond to all of the data elements in Schedules B and C,

[11] "Private Fund" has the same meaning as "private fund" as defined in Form PF. Form PF defines "private fund" as any issuer that would be an investment company as defined in section 3 of the Investment Company Act of 1940 but for section 3(c)(1) or 3(c)(7) of that Act.

the CFTC stated that it would be required to provide basic information about the investment in the investee funds.

The final rules require disclosure of the name of investee funds and size of the fund of funds' investment in the investee funds (on Schedule A). The CFTC permits the CPO of a fund of funds to exclude any assets invested in the equity of commodity pools or private funds for purposes of determining the CPO's reporting obligations. The CPO must, however, treat the assets consistently when completing the Form. The new instruction will permit a CPO to disregard investments in commodity pools or private funds, but would not allow a CPO to disregard the liabilities of the fund, even if incurred due to the investment in the underlying fund.

Further, if any of the CPO's commodity pools invests substantially all of its assets in the equity of other commodity pools or private funds and, aside from those investments, holds only cash, cash equivalents, and instruments intended to hedge currency risk, the CPO may complete only Schedules A and B with respect to that fund (and otherwise disregard such assets for reporting purposes).

If a CPO advises a pool that invests in entities that are not pools and thus are exempt, these investments should be included for all purposes in completing Form CPO-PQR. The CPO is not, however, required to "look through" a pool's investments in any other entity unless the Form specifically requests information regarding that entity or the other entity's primary purpose is to hold assets or incur leverage as part of the pool's investment activities.

Aggregation

To determine whether a CPO meets the reporting thresholds for Schedules B and/or C of Form CPQ-PR, the CPO must: (1) aggregate all the parallel pool structures,[12] parallel managed accounts[13] and master-feeder arrangements,[14] and (2) treat any pool or parallel managed account operated by any of its affiliated entities[15] as though it was operated by the CPO.

To determine whether a pool qualifies as a "Large Pool"[16] for Schedule C, a CPO must: (1) aggregate all pools that are part of the same parallel fund structure or master-feeder arrangement; (2) aggregate any parallel managed accounts with the largest pool to which that parallel managed account relates; and (3) treat any pool or parallel managed account operated by any affiliated entities as though it were operated by the CPO.

For parts of the Form that request information about individual pools, CPOs are required to report aggregate

---

[12] A "parallel pool structure" is defined as any structure in which one of more pools pursues substantially the same investment objective and strategy, and invests side by side in substantially the same assets as another pool.

[13] The Form defines a "parallel managed account" as any managed account or other pool of assets that the CPO operates and that pursues substantially the same investment objective and strategy, and invests side by side in substantially the same assets as the identified pool.

[14] A "master-feeder arrangement" is defined as an arrangement in which one or more funds (feeder funds) invest all or substantially all of their assets in a single fund (master fund). A fund also would be a feeder fund investing in a master fund for purposes of this definition if it issued multiple classes or series of shares or interests and each class (or series) invests substantially all of its assets in shares (or other interests in) a single underlying master fund.

[15] An "affiliated entity" means any entity that is an affiliate of another entity. An entity is an affiliate of another entity if the entity directly or indirectly controls, is controlled by or is under common controls with the other entity.

[16] "Large Pool" is defined as any pool that has a net asset value individually, or in combination with any parallel pool structure, of at least $500 million as of the close of business on any day during the reporting period.

information for parallel managed accounts and master feeder arrangements as if each were an individual pool, but not parallel pools. Assets held in parallel managed accounts should be treated as assets of the pool with which they are aggregated.

Further, where two or more parallel pool structures or master-feeder arrangements are aggregated, the CPO must treat the aggregated funds as if they are all one pool. Investments that a feeder fund makes in a master fund should be disregarded, but other investments of the feeder fund should be treated as though they were investments of the aggregated fund.

Information required

The following table describes information required to be reported on Form CPO-PQR for each type of filing adviser.

Schedule	Who must complete?	What information is required?
A	All CPOs	Part 1 – Information about the CPO: • General identifying information, including NFA Id #, CPO's chief compliance officer, total number of equity holders and number of pools operated by the CPO • Total and net assets under management Part 2 – Information about each pool: • Pool name, identification of co-CPOs and whether the pool is a private fund • Indication of whether the pool is a master or feeder fund in a master-feeder arrangement • Value of pool's investments in equity of other pools or private funds • Identification of pool's third party administrators, brokers, trading managers, custodians, auditors and marketers • Disclosure of changes concerning the pool's assets under management, including additions, withdrawals and redemptions from the pool; • Total and net assets under management at the beginning of the reporting period and at the reporting date • Monthly rates of returns • Information regarding subscriptions and redemptions

Schedule	Who must complete?	What information is required?
B	Mid-sized CPOs and large CPOs	<u>For each pool</u>: • Information regarding each pool’s investment strategies • Borrowings and types of creditors, including all secured and unsecured borrowings • Information concerning counterparty credit exposure, • Information regarding the pool’s use of trading and clearing mechanisms • Aggregate value of derivative positions • Schedule of investments, including dollar value, in: (1) cash; (2) equities; (3) alternative investments; (4) fixed income; (5) derivatives; (6) options; and (7) funds

Schedule	Who must complete?	What information is required?
C	Large CPOs	Part 1 – Aggregated investments of all pools that are not private funds: • Geographical breakdown of all pools, including value of investments held by hedge funds in six countries (Brazil, China, India, Japan, Russia and the United States) • Turnover rate by volume for the aggregate portfolio of all pools Part 2 – Large pools that are not private funds: • Identifying information concerning the large pool, including identification of Co-CPO(s), total unencumbered cash and open positions held at the close of each month during the reporting period • Disclose of percentage of the large pool's portfolio (excluding cash and cash equivalents) that may be liquidated with certain time periods. • Information concerning the large pool's counterparty credit exposure • Risk metric information, including information concerning the value at risk (VaR) calculation, and other metrics used during the reporting period • Information concerning secured and unsecured borrowings, including the types of creditors and collateral posted to secure the borrowings; for each type of borrowing, disclosure of the percentage value borrowed from each type of creditor • Derivative positions and collateral posted to secure those positions • Financing liquidity, including aggregate dollar amount of cash financing drawn by or available to the large pool and percentage of cash financing that is contractually committed to the large pool by its creditors for specified periods of time • Participant information, including disclosure of what portions (by percentage) of the large pool's NAV (1) is subject to a side pocket arrangements; (2) may be subject to a suspension of participant withdrawal or redemption by the Large CPO or governing body; (3) may be subject material restrictions of participant withdrawal or redemption by the Large CPO or governing body; and (4) is subject to daily margin requirements • Value of fixed income assets including: listed equity, unlisted equity, listed equity derivatives, derivative exposures to unlisted equities, corporate bonds, sovereign and municipal bonds, loans, repos, ABS/structured products, credit derivatives, commodities, physical real estate and cash and cash equivalents

Confidentiality of information provided

Similar to the SEC's treatment of information provided on Form PF, most of the information provided on Form CPO-PR will not be publicly available. Information provided on Schedules B and C will be designated as non-public.

Certain information regarding a pool's marketers, statement of changes concerning assets under management, monthly rates of return and subscriptions and redemptions provided on Schedule A will also be non-public.[17]

Certain limited information, such as general information concerning the CPO and pool, and identification of the pool's third party administrator, brokers, trading managers, custodians and auditors <u>will</u> be publicly available.

The CFTC stated in the release that it will protect proprietary information according to the Freedom of Information Act and CFTC rules concerning CFTC records and information.

Section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public "data and information that would separately disclose the business transactions or market position of any person and trade secrets or names of customers." The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.

Frequency of filing

CPOs will be required to file quarterly or annual updates to Form CPO-PQR as applicable, according to the following schedule:

Entity	Schedules required	Frequency of filing
Small and mid-sized CPOs	A	Annually, within 90 days of the end of the calendar year
Mid-sized CPOs	A, B	Annually, within 90 days of the end of the calendar year
Large CPOs	A, B, C	Quarterly, within 60 days of quarter-end

Oath and affirmation

In submitting Form CPO-PQR, CPOs must include an oath or affirmation that, to the best of the knowledge and belief of the individual making the oath or affirmation, the information contained in the document is accurate and complete.

Form CTA-PR

The CFTC also adopted Form CTA-PR. In a change from its proposal, the Form has been revised to eliminate Schedule B. A CTA will need to complete Schedule A, which requires the CTA to disclose general identifying information, total assets and pool assets directed by the CTA, names of the pools and the name of the reporting CPO for each pool.

Information concerning the names of the pools advised by the CRA and name of the reporting CPO for each pool will not be publicly available.

CTAs will be required to file the form on an annual basis within 45 days of the end of the fiscal year.

[17] Specifically, the following parts of Form CPO-PQR are designated as nonpublic: Schedule A: Question 2, subparts (b) and (d); Question 3, subparts (g) and (h); Question 9; Question 10, subparts (b), (c), (d), (e), and (g); Question 11; Question 12; and Schedules B and C.

Effective and compliance dates

The effective date of the new Forms CPO-PQR and CTA-PR is July 2, 2012. There will be a two-stage phase-in period for compliance with Form CPO-PQR filing requirements.

- ***Large CPOs***. Large CPOs must comply by September 15, 2012. Therefore, a Large CPO with $5 billion in commodity pool assets under management as of June 30, 2012, must file its first Form CPO-PQR within 60 days following September 30, 2012. Reporting CPOs must file all schedules of Form CPO-PQR.
- ***All other CPOs and all CTAs***. All other registered CPOs and all CTAs must come into compliance by December 14, 2012. As a result, most advisers must file their first Form CPO-PQR or CTA-PR based on information as of December 31, 2012.

Additional information

If you would like additional information about the topic discussed in this FS Regulatory Brief, please contact:

William Penner	703 918 4259	william.penner@us.pwc.com
Meghan Carey	703 610 7581	meghan.carey@us.pwc.com
Lori Richards	703 610 7513	lori.richards@us.pwc.com
Margaret Paulsen	703 918 3027	margaret.paulsen@us.pwc.com

www.pwcregulatory.com