

To Our Clients and Friends

Memorandum

February 10, 2021

Reminder: CPO and CTA Annual Affirmation Requirement

CPO and CTA Annual Affirmation Requirement

The Commodity Futures Trading Commission (“CFTC”) requires any person that claims an exemption from commodity pool operator (“CPO”) registration under CFTC Rule 4.13, except for any person claiming the exemption for family offices under Rule 4.13(a)(6), an exclusion from the CPO definition under Rule 4.5, or an exemption from commodity trading advisor (“CTA”) registration under Rule 4.14(a)(8), to annually affirm the applicable notice of exemption or exclusion within 60 days of the calendar year end. Affirmations for the current cycle are due no later than **March 1, 2021**.

Notably, exempt CPOs affirming an existing notice filing under CFTC Rules 4.13(a)(1), (2), (3) or (5) will for the first time be required to specifically represent that neither such firm, nor any of its principals, has in its background a statutory disqualification that would require disclosure under Section 8a(2) of the Commodity Exchange Act, as amended (“CEA”), if such person sought registration (unless such disqualification arises from a matter disclosed in connection with a previous application for registration, where such registration was granted).¹ Exempt CPOs making the new representation have generally been advised to (i) identify the principals of their firm,² and (ii) conduct background checks into such individuals to determine whether they have in their backgrounds any statutory disqualification enumerated in Section 8a(2) of the CEA.³

¹ See CFTC Rule 4.13(b)(1)(iii).

² Under CFTC Rule 3.1(a), the term “principal” generally includes individuals and entities who have management authority over a CPO, as well as any legal person who is a 10% or greater owner of a CPO or who is entitled to 10% or more of its profits. A “principal” usually includes general partners, managing members, chief executive officers, chief operating officers, and certain other senior officers in addition to any 10% owner.

³ See 7 U.S.C. 12a(2). Covered statutory disqualifications under Section 8a(2) of the CEA generally include: (i) suspension or revocation of a prior CFTC registration; (ii) refusal of CFTC registration within the preceding five years of an application for registration; (iii) being enjoined from acting as a CFTC or Securities and Exchange Commission registrant or from engaging in an activity that involves embezzlement; theft; extortion; fraud; fraudulent conversion; misappropriation of funds, securities, or property; forgery; counterfeiting; false pretenses; bribery; gambling; or any transaction in or advice concerning futures contracts or securities; (iv) a felony conviction for certain commodities or securities-related offenses within the preceding ten years; or (v) willfully making any materially false or misleading statement or omission in connection with any application for CFTC registration or any update thereto.

A CPO or CTA subject to the annual affirmation requirement who fails to file such annual affirmation by March 1, 2021 will have its exemption or exclusion automatically withdrawn. Thus, CPOs and CTAs are encouraged to file their annual affirmation(s) as soon as possible, and in any event before this deadline, to avoid the potential adverse impacts of automatic withdrawal of the applicable notice of exemption or exclusion.

The annual affirmation process can be completed by accessing the National Futures Association's ("NFA's") Exemption System on [its website](#). For additional detail, CPOs and CTAs may wish to refer to NFA's recent Notice to Members regarding the annual affirmation requirement, available [here](#).

* * *

Authors:

William J. Breslin

David S. Mitchell

Charles R. Thompson, II

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its contents. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or an attorney listed below:

Contacts:

London

Gregg Beechey	+44.20.7972.9172	gregg.beechey@friedfrank.com
David Christmas	+44.20.7972.9222	david.christmas@friedfrank.com
Kate Downey	+44.20.7972.6221	kate.downey@friedfrank.com
Mark Mifsud	+44.20.7972.9155	mark.mifsud@friedfrank.com
Sam Wilson	+44.20.7972.9223	sam.wilson@friedfrank.com

New York

Jonathan S. Adler	+1.212.859.8662	jonathan.adler@friedfrank.com
Lawrence N. Barshay	+1.212.859.8551	lawrence.barshay@friedfrank.com
Jeremy R. Berry	+1.212.859.8796	jeremy.berry@friedfrank.com
Gerald H. Brown, Jr.	+1.212.859.8825	gerald.brown@friedfrank.com
Jessica Forbes	+1.212.859.8558	jessica.forbes@friedfrank.com
Jonathan H. Hofer	+1.212.859.8583	jonathan.hofer@friedfrank.com
Bryan Hunkele	+1.212.859.8251	bryan.hunkele@friedfrank.com
Darren A. Littlejohn	+1.212.859.8933	darren.littlejohn@friedfrank.com
Robert M. McLaughlin	+1.212.859.8963	robert.mclaughlin@friedfrank.com
Todd J. McMullan	+1.212.859.8190	todd.mcmullan@friedfrank.com
David S. Mitchell	+1.212.859.8292	david.mitchell@friedfrank.com
Kenneth I. Rosh	+1.212.859.8535	kenneth.rosh@friedfrank.com
Lisa M. Schneider	+1.212.859.8784	lisa.schneider@friedfrank.com
Stacey Song	+1.212.859.8898	stacey.song@friedfrank.com

Washington, D.C.

Richard I. Ansbacher	+1.202.639.7065	richard.ansbacher@friedfrank.com
William J. Breslin	+1.202.639.7051	william.breslin@friedfrank.com
Matthew W. Howard	+1.202.639.7494	matthew.howard@friedfrank.com
Walid Khuri	+1.202.639.7013	walid.khuri@friedfrank.com
Bradford R. Lucas	+1.202.639.7483	brad.lucas@friedfrank.com
Andrew P. Varney	+1.202.639.7032	andrew.varney@friedfrank.com
Rebecca N. Zelenka	+1.202.639.7260	rebecca.zelenka@friedfrank.com