

CFTC Requests Comment on NFA Petition to Restrict Exclusions from Commodity Pool Operator Definition

September 20, 2010

On September 17, the Commodity Futures Trading Commission (CFTC) published in the Federal Register a request for comments on National Futures Association's (NFA's) petition for rulemaking (the Petition), to revise the exclusions from the definition of a commodity pool operator (CPO) under CFTC Rule 4.5. Comments must be received by the CFTC on or before October 18, 2010.

The original Petition, submitted on June 29, 2010, would have required the operator of any qualifying entity under Rule 4.5 (such as a registered investment company, bank, or insurance company) seeking futures- and commodities-related performance to register with the CFTC as a CPO unless certain conditions were met. (For a full description of these requirements, please see Morgan Lewis's LawFlash of July 1, 2010.)¹ On August 18, NFA withdrew the original Petition and submitted a revised Petition, making clear that NFA intends for the restrictions to apply only to registered investment companies. (For a full description of these requirements, please see Morgan Lewis's LawFlash of August 19, 2010.)²

If the CFTC adopts NFA's proposal, a registered investment company will no longer be able to claim that it is excluded from the CPO definition under Rule 4.5, and therefore not required to comply with the registration requirements, unless the investment company limits the initial margin it posts for its speculative commodities-related trading to 5% of the liquidating value of its portfolio, and does not market participation in the investment company as a means to obtain exposure to commodity futures or options. The intent of the proposal is to effectively require registered investment companies to register the operator of any fund investing, to any material extent, in listed futures or options other than for bona fide hedging purposes.

The request for comment makes clear that the CFTC is seriously considering amending Rule 4.5. If after reviewing comments regarding the Petition the CFTC determines to go forward with revising Rule 4.5, it will have to publish a formal proposed rulemaking that includes the amendments to the language of the rule and the CFTC's reasons for proposing such amendments.

¹ See the Morgan Lewis LawFlash regarding NFA's original Petition, "NFA Petitions the CFTC to Restrict Exclusions from the Commodity Pool Operator Definition for Investment Companies" (July 1, 2010), available at http://www.morganlewis.com/pubs/IM_CommodityPoolOperatorDef_LF_01jul10.pdf.

² See the Morgan Lewis LawFlash regarding NFA's revised Petition, "NFA Revises Petition to Restrict Exclusions from Commodity Pool Operator Definition" (August 19, 2010), available at http://www.morganlewis.com/pubs/IM_NFACommodityPoolOpDef_LF_19aug10.pdf.

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