

ALERTS

CFTC/NFA Update: Recent Changes to the BASIC Database for Exempt Firms

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Recently, the National Futures Association (“NFA”) has changed its “BASIC” registration database to omit display of non-member exemption filers such as “exempt” Commodity Pool Operators (“CPOs”) and Commodity Trading Advisors (“CTAs”) relying on registration relief under Part 4 of the Commodity Futures Trading Commission (“CFTC”)’s rules (including Rules 4.13, 4.14 and 4.5) and associated no-action letters. The change has been made without a published news release, but appears contemplated as permanent at this time. The process of making exemption filings, and the information publicly available about NFA member entities, has not changed.

Workaround for Customary Counterparty Diligence

Under NFA Bylaw 1101, NFA member managers are required to confirm the CFTC registration, or valid exemptive status, of counterparties that are involved in commodity interest-related activities, such as brokers, third-party subadvisors to a manager’s commodity pools or entity investors in a manager’s commodity pools, both at the consummation of a business relationship and, where the counterparty in question has a registration status that might be subject to lapse (such as having an exemption that must be reaffirmed, like that under Rule 4.13(a)(3)), annually thereafter. Where this status could be checked on the NFA’s electronic systems, the NFA’s expectation has been that NFA member managers would avail themselves of the NFA’s database – traditionally, via BASIC – as part of customary Bylaw 1101 diligence to confirm that a counterparty’s claimed CFTC status is valid. If a counterparty is a CFTC registrant (and thus NFA

member), such as a CFTC-registered Introducing Broker, Commodity Trading Advisor or Commodity Pool Operator, this status can continue to be easily double-checked on NFA BASIC. Foreign financial services providers (such as certain futures commission merchants) that rely on special “exempt foreign firm” relief granted under CFTC Part 30 also continue to be listed on BASIC.

Previously, NFA member firms could also verify whether a counterparty who claimed to be completely exempt from CFTC registration under certain commonly-used exemptions that require NFA notice filings in CFTC Rules 4.13, 4.14, 4.5 or no-action relief letter 12-38 maintained a valid exemption by referring to the NFA’s BASIC database. Exemption notice filings are required, for instance, for all exemptions under Rule 4.13 except the family office exemption in Rule 4.13(a)(6), for relief for registered investment companies under Rule 4.5, and for “fund-of-funds” no-action letter 12-38 relief, and these exemptions would commonly be relied upon by entity investors in commodity pools. Third-party subadvisors often claim Rule 4.14(a)(8) relief, which also requires an NFA notice filing. These exemptions can still be verified using the NFA’s electronic systems, but, due to the recent changes to BASIC, must be verified in a different way. NFA member managers should be able to log into the NFA Annual Questionnaire System and access a link to a spreadsheet of “Exempt CPO/CTAs” to confirm the status of non-member entities that have made registration exemption filings. This list is updated each weekday night.

Note that the NFA’s changes to BASIC do not affect the display of information about NFA member firms, and this includes NFA members who have filed exemptions under Rules 4.13, 4.14, 4.5 and no-action letter 12-38 (i.e., those exemptions will still be displayed in BASIC if the filer is an NFA member). However, as it is common for investment managers to file Rule 4.13 (and no-action letter 12-38) exemptions under the name of the General Partner of an advised “de minimis” Limited Partnership fund rather than the name of the investment manager itself, many such exemptions associated with NFA members will no longer be displayed in BASIC.

Considerations for Exempt Managers

Reciprocally, non-NFA member CPOs and CTAs that have made exemption notice filings with the NFA should anticipate that investors, and potentially other counterparties, performing their own diligence into a

manager or commodity pool's CFTC status may have follow-up questions (and potential confusion) due to now being unable to find the manager or its pools' exemptions on BASIC. It may be necessary to furnish screenshots of the exemption filer's index of exemptions, which can be accessed by logging into the NFA Exemption Filing System with the credentials of the applicable filer.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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