
HENDERSON & LYMAN

FINANCIAL SERVICES PRACTICE GROUP CLIENT UPDATE

October 14, 2010

NFA Seeks to Amend CFTC Regulation 4.5

On August 18, 2010, NFA petitioned the CFTC to amend the Regulation 4.5 exclusion for certain otherwise regulated persons from the definition of “commodity pool operator” (CPO). This Client Update will summarize key aspects of NFA’s petition.

CFTC Regulation 4.5 was intended to allow registered investment companies (“RICs”), i.e. mutual funds, to trade futures and options using a portion of their assets without requiring the RIC to become registered as a commodity pool operator or comply with CFTC disclosure obligations. In the past year, certain RICs have marketed and promoted what amounts to traditional commodity pools under this exclusion. NFA has taken the position that this should not be permitted.

Reg. 4.5 requires any person desiring to claim the exclusion to file a notice of eligibility with NFA, which must simply identify the qualifying entity to be operated pursuant to the exclusion. NFA’s petition requests the CFTC to amend its rule to limit the scope of the exclusion for registered investment companies (RICs). Specifically, NFA has requested that any RIC include in its notice of eligibility a representation that the RIC’s qualifying entity:

- (1) Will use commodity futures or commodity options contracts solely for bona fide hedging purposes;
- (2) Will not have initial margin and premiums required to establish any commodity futures or commodity options not used for bona fide hedging purposes exceeding five percent of the liquidation value of the qualifying entity’s portfolio; and
- (3) Will not be marketed to the public as a commodity pool or as a vehicle for investment in commodity futures or commodity options.

Essentially, NFA’s petition requests that the CFTC restore the rule’s operating restrictions that applied to RICs prior to 2003, when the CFTC amended the rule to its current form. All comments to the CFTC regarding NFA’s proposed rule change must be received by the CFTC by October 18, 2010.

Henderson & Lyman welcomes the opportunity to assist you and your firm on a wide variety of legal matters that affect the financial services industry. To view and print the above update and other updates, please visit our website at www.henderson-lyman.com/site/epage/102730_771.htm. To discuss these or any other legal matters, please contact your Henderson & Lyman attorney, or contact the firm's office manager, Debbie Guth at (312) 986-6963.

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