



## U.S. COMMODITY FUTURES TRADING COMMISSION

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Division of Swap Dealer and  
Intermediary Oversight

Eileen T. Flaherty  
Director

April 20, 2017

**Re: Exemptive Relief to Use Third-party Recordkeepers in Commission Regulations 4.33 and 4.7(c)(2)**

Ladies and Gentlemen:

This letter is in response to requests from multiple parties received by the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“Commission”) requesting that commodity trading advisors (“CTAs”) be permitted to use third-party recordkeepers similar to commodity pool operators (“CPOs”) in the adopting release, “Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators” (“Harmonization Rule”)<sup>1</sup>, and subsequently expanded by Division letter relief in CFTC staff letter 14-114.<sup>2</sup>

Commission Regulations 4.33 and 4.7(c)(2) require all CTAs to make, keep, and produce upon request by the Commission, certain records regarding their clients and subscribers, as well as the CTA itself.<sup>3</sup> Further, Commission Regulations 4.33 and 4.7(c)(2) require the CTA to keep such records at its main business office (“Main Business Office Requirement”).<sup>4</sup>

CPOs have similar recordkeeping obligations.<sup>5</sup> However, the Harmonization Rule, and subsequent Division letter relief, removed the Main Business Office Requirement of Commission Regulation 4.23<sup>6</sup> that the books and records of the CPO and the pool be maintained at the CPO’s main business office.<sup>7</sup>

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<sup>1</sup> 78 FR 52308 (Aug. 22, 2013).

<sup>2</sup> CFTC Staff Letter 14-114.

<sup>3</sup> Commission Regulations 4.33 and 4.7(c)(2). 17 CFR 4.33, 17 CFR 4.2(c)(2).

<sup>4</sup> Id.

<sup>5</sup> See, Commission Regulations 4.23 and 4.7(b)(4). 17 CFR 4.23, 17 CFR 4.7(b)(4).

<sup>6</sup> Commission Regulation 4.23 has a Main Business Office Requirement analog found in Commission Regulation 4.7(b)(4). Hereinafter, for purposes of this discussion, any reference to Commission Regulation 4.23 shall be inclusive of that term as it is included in Commission Regulation 4.7(b)(4), as applicable.

<sup>7</sup> Prior Commission Regulation 4.23 provided that all CPOs must make and keep certain records at their main business office, providing “each [CPO] registered or required to be registered under the Commodity Exchange Act (“Act”) must make and keep the following books and records in an accurate, current and orderly manner at its main business office.” Commission Regulation 4.23 (2012).

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In providing relief from the Main Business Office Requirement for CPOs, the Division believed that such requirement may be unnecessarily restrictive, particularly in light of current data management practices, which increasingly employ specialized data centers and services, or affiliates that have day-to-day control over that data to manage records.

Moreover, as was noted by the Division, the CPO remains responsible for producing any such records upon request of the Commission. The Division noted that Commission Regulations 4.7(b)(5)(i)(D)(3) and 4.23(c)(1)(iv)(C) require representations from a CPO using the services of a third-party recordkeeper that, upon request from the Commission, the CPO will obtain such books and records and provide them to the Commission.<sup>8</sup> Further, the CPO must represent that it remains responsible for ensuring that all books and records required to be kept are maintained in accordance with Commission regulations.<sup>9</sup> As such, regardless of who has custody of these books and records, the CPO remains liable for the fulfillment of its recordkeeping obligations under the Commission’s regulations. Therefore, the failure of a selected third-party recordkeeper to properly keep such books and records is considered the failure of the CPO. The Division believes that these retained obligations provide an incentive for CPOs to select well qualified third-party recordkeepers, as a failure to properly keep, and provide these books and records within that 48-hour period, may be cause for an enforcement action against the CPO by the Commission.

The Division believes that the same availability of efficient data management practices that gave rise to the relief from the Main Business Office Requirement for CPOs also applies to CTAs.<sup>10</sup> The Division further believes that consistent with the relief provided to CPOs in this area, CTAs should also be required to comply with the same notification requirements as CPOs. This results in consistent treatment for CPOs and CTAs with respect to their record maintenance and production requirements.

Accordingly, the Division does not believe that allowing a CTA to use a third-party recordkeeper, subject to the procedures and representations set forth below, is inconsistent with the purposes of the Commission’s regulations. As such, pursuant to the authority delegated to it by Regulations 140.93 and 4.12(a), the Division hereby provides exemptive relief from the Main Business Office Requirement of Commission Regulations 4.33 and 4.7(c)(2) to allow a CTA to use any third-party recordkeeper, subject to a proper filing as detailed below.

***Procedure to Claim Relief***

To obtain the exemptive relief provided in this letter, the CTA must file a notice of claim, as follows:

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<sup>8</sup> With respect to records that are permitted to be, and are maintained at a location outside of the United States, such records may be produced consistent with Regulations 4.7(b)(5)(i)(D)(3) and 4.23(c)(1)(iv)(C).

<sup>9</sup> See, Commission Regulations 4.7(b)(5)(i)(D)(2) and 4.23(c)(1)(iv)(B).

<sup>10</sup> The Division underscores the fact that the requirements to keep and produce such books and records are the obligation of the CTA per Commission Regulations 4.33 and 4.7(c)(2). As such, the failure of a third-party recordkeeper to keep or produce such books and records in accordance with Commission regulations is the failure of the CTA.

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At the time it registers with the Commission, delegates its recordkeeping obligations, or June 30, 2017, whichever is later, the CTA shall file a notice with the Division via email, using the email address [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov), with the subject line "CTA Third-Party Recordkeeping Relief" that:

(i) Identifies the name, main business address, and main business telephone number of the person(s) who will be keeping required books and records in lieu of the CTA;

(ii) Sets forth the name and telephone number of a contact for each person who will be keeping required books and records in lieu of the CTA;

(iii) Specifies, by reference to the respective paragraph of Commission Regulations 4.33 and 4.7(c)(2), the books and records that such third-party recordkeeper will be keeping; and

(iv) Be signed by the CTA, and contain representations from the CTA that:

(A) It will promptly amend the statement if the contact information or location of any of the books and records required to be kept by Commission Regulations 4.33 and 4.7(c)(2) changes, by identifying in such amendment the new location and any other information that has changed;

(B) It remains responsible for ensuring that all books and records required to be maintained by Regulations 4.33 and 4.7(c)(2) are kept in accordance with Commission Regulation 1.31;

(C) Within 48 hours after a request by a representative of the Commission, it will obtain the original books and records from the location at which they are maintained, and provide them for inspection at the CTA's main business office; Provided, however, that if the original books and records are permitted to be, and are maintained, at a location outside the United States, its territories or possessions, the CTA will obtain and provide such original books and records for inspection at the CTA's main business office within 72 hours of such a request; and

(D) It will disclose in its Disclosure Document, if any, the location of its books and records that are required under Commission Regulations 4.33 and 4.7(c)(2).

The relief issued by this letter does not excuse any registrant from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. The Division also retains the authority to condition further, modify, suspend, terminate, or otherwise restrict the terms of the relief provided herein in its discretion.

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Should you have any questions, please do not hesitate to contact Amanda Olear, Associate Director, at 202-418-5283 or Michael Ehrstein, Special Counsel, at 202-418-5957.

Very truly yours,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Eileen T. Flaherty  
Director, Division of Swap Dealer  
And Intermediary Oversight

cc: Regina Thoele, National Futures Association