Financial Services & Products ADVISORY

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CFTC Extends Compliance Date for Amended Rules 4.5 and 4.13(a)(4) Regarding CPO/CTA Registration

Introduction

On July 13, 2012, the Commodity Futures Trading Commission (CFTC) Division of Swap Dealer and Intermediary Oversight (DSIO) issued a letter (the "No Action Letter") to the Managed Funds Association, the Investment Company Institute, and other industry associations that extends relief from compliance with the changes to Regulations 4.13(a)(4) and 4.5 until the end of the year for commodity pool operators (CPOs) and commodity trading advisors (CTAs) of pools launched after July 13, 2012. This means that CPOs and CTAs for pools launched after July 13, 2012, may rely on the rescinded 4.13(a)(4) exemption and the amended 4.5 exclusion through the end of the year if they comply with certain criteria.

Background

In February, the CFTC adopted several important rule changes affecting CPOs, including changes to CFTC Regulations 4.13(a)(4) and 4.5. The CFTC rescinded CFTC Regulation 4.13(a)(4), which exempted CPOs to private pools from registration if all participants met certain suitability standards. The CFTC also adopted amendments to Regulation 4.5 that severely limit the ability of operators of registered investment companies (namely their investment advisers) to claim exemption from the CFTC's disclosure, recordkeeping and reporting requirements, and these amendments became effective as of April 24, 2012. According to the adopted amendments, CPOs and CTAs that had filed exemption notices in accordance with Regulations 4.13(a)(4) or 4.5 prior to April 24, 2012, were allowed to continue to operate under the relevant exemption through December 31, 2012. CPOs or CTAs that had failed to file exemption notices prior to April 24, 2012, or that were formed following that date, however, could not rely on the exemptions. Under the recently issued No Action Letter, however, DSIO will not recommend that the CFTC take an enforcement action against CPOs or CTAs for pools launched after July 13, 2012, through the end of the year, provided that the CPOs and CTAs satisfy the criteria described below.

Criteria for Relying on No-Action Relief - CPOs

DSIO is only granting no-action relief for pools for which the CPO submits a claim and remains in compliance with:

1. the pool for which the CPO is claiming relief is a registered investment company under the Investment Company Act of 1940; or

2. a. interests in the pool are exempt from registration under the U.S. Securities Act of 1933, and such interests must be offered and sold without marketing to the public of the United States; and

   b. the CPO reasonably believes, at the time of investment, that:

      – each natural person participant is a "qualified eligible person" as defined in CFTC Regulation 4.7(a)(2); and

      – each non-natural person participant is a "qualified eligible person" as defined in CFTC Regulation 4.7 or is an "accredited investor."

Criteria for Relying on No-Action Relief – CTAs

Additionally, DSIO will grant no-action relief to CTAs that submit a claim in compliance with the following:

1. The CTA claims relief from registration under the no-action relief and its commodity interest trading advice is directed solely to, and for the use of, the pools that it operates.
2. The CTA's commodity interest trading advice is directed solely to, and for the sole use of, pools operated by CPOs who claim relief from CPO registration under Regulations 4.13(a)(1), (a)(2), (a)(3), (a)(4), 4.5, or under the No Action Letter.

In order to rely on the no-action relief, eligible CPOs and CTAs must file a claim directly with the CFTC, rather than the National Futures Association (NFA), via e-mail to dsionoaction@cftc.gov. A submitted claim will be effective upon filing as long as the claim is materially complete and contains:

1. the name, business address, and business telephone number of the CPO or CTA claiming relief;
2. the capacity (CPO, CTA or both) and, if applicable, the name of the pool(s) for which the claim is being filed; and
3. the electronic signature of the CPO or CTA.

Please note that CPOs making trading decisions for the pools that they operate must also claim relief as a CTA, as indicated above. This means, if the same entity both operates and advises a pool for which relief is available under the No Action Letter, the entity must indicate that it is claiming both CPO and CTA relief.

The industry associations had also requested that the CFTC extend the compliance date for including "swaps" within the CPO trading threshold calculation for purposes of Regulations 4.13(a)(3) and 4.5 until 10 months after the further definition of the term "swap" and certain margin rules are finalized. DSIO determined, however, it would not be consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act to delay the inclusion of swaps within the trading threshold beyond December 31, 2012.

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