CFTC Provides Temporary Relief Regarding Registration Deadlines for Certain CPOs and CTAs and the Treatment of Foreign Exchange Swaps and Deliverable Forwards

On October 11, 2012, the Division of Swap Dealer and Intermediary Oversight (the "Division") of the Commodity Futures Trading Commission ("CFTC") granted temporary no-action relief to commodity pool operators ("CPOs") and commodity trading advisors ("CTAs") who are required to register with the CFTC solely as a result of their swaps activities (each, a "Swap CPO/CTA"). The Division stated that they would not recommend that the CFTC seek enforcement action against a Swap CPO/CTA who is not registered with the CFTC by December 31, 2012, provided that such Swap CPO/CTA (i) has completed and filed with the NFA a registration application, including Forms 7-R and 8-R (along with fingerprint cards for each of its principals and associated persons), on or before December 31, 2012, and (ii) is subject to and makes a good faith effort to comply with the Commodity Exchange Act's ("CEA") regulations applicable to registered CPOs and CTAs after December 31, 2012, as if such Swap CPO/CTA was in fact registered (including, without limitation, complying with any applicable reporting requirements, the implementation of NFA/CFTC compliance policies and procedures, and conducting ethics training).

On October 12, 2012, the Division granted time-limited no-action relief to operators of collective investment vehicles that trade foreign exchange swaps[1] and "deliverable" foreign exchange forwards[2] and persons who provide advice concerning foreign exchange swaps and deliverable forwards, and who would have to register with the CFTC solely as a result of these respective activities. The no-action relief provides that the Division will not recommend that the CFTC seek enforcement action against CPOs and CTAs who would be required to apply for registration with the CFTC by December 31, 2012 solely as a result of their foreign exchange swap and deliverable forward activities, but do not apply for such registration, if the Secretary of the Treasury (the "Treasury") issues a final determination to exempt foreign exchange swaps and deliverable forwards from the term "swap" that becomes effective before December 31, 2012.

As discussed in our previous Alerts, which can be accessed here, here, and here, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended the CEA to provide that "deliverable" foreign exchange forwards and foreign exchange swaps are considered "swaps" subject to the CFTC's jurisdiction, unless the Treasury issues a written determination that such instruments should not be regulated as swaps. The Treasury proposed to exempt deliverable foreign exchange forwards and foreign exchange swaps from the definition of swaps, but the Treasury has not yet finalized this exemption, and is not expected to do so until after the 2012 presidential election. The Treasury's delay has created uncertainty for CPOs and CTAs that engage in these transactions. The Division's no-action relief provides temporary relief from CFTC registration for certain CPOs and CTAs until December 31 2012. The Treasury is expected to finalize its determination to permanently exempt foreign exchange swaps and deliverable forwards from the definition of "swap" in the CEA by December 31, 2012; however, if the Treasury fails to do so, CPOs and CTAs who engage in these instruments will be required to either register with the CFTC or file an exemption from registration by December 31, 2012.

Please contact the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.

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[1] A foreign exchange swap is defined in the CEA as a transaction that solely involves (i) an exchange of 2 different currencies on a specific date at a fixed rate that is agreed upon on the inception of the contract covering the exchange; and (ii) a reverse exchange of the 2 currencies described in (i) at a later date and at a fixed rate that is agreed upon on the inception of the contract covering the exchange.

[2] A "deliverable" foreign exchange forward is defined in the CEA as a transaction that solely involves the exchange of two different currencies on a specific future date at a fixed rate agreed upon on the inception of the contract covering the exchange.