REGULATORY REFORM TASK FORCE

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Regulatory Watch List for 2012: The Shifting Landscape for Hedge Funds and Other Private Funds

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The Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), which was adopted in July 2010 with the goals of reducing risk, increasing transparency and promoting market integrity within the financial system, significantly alters the space within which hedge funds and other private funds currently operate.

The majority of the regulations to implement the Dodd-Frank Act have yet to become effective, with the exception of hedge fund adviser registration, discussed in Section 5 below. Nonetheless, federal regulators are working diligently to implement the Dodd-Frank Act's mandates, and hedge funds and other private funds should begin preparing to comply with the new Dodd-Frank Act requirements now.

Changes and other developments that will be of interest to hedge funds and other private funds as they traverse the shifting regulatory landscape in 2012 are described below. Section 1 provides a general overview of the new regulatory regime that the Dodd-Frank Act imposes on over-the-counter (OTC) derivatives which, until now, have been largely unregulated, and the entities that use them. Section 2 describes (1) the rescission of a regulatory exclusion from the commodity pool operator definition that was previously available to registered investment companies, and (2) the repeal of two exemptions from commodity pool operator registration requirements for operators of funds whose shares are exempt from registration under the Securities Act of 1933. Section 3 discusses proposed changes to commodity pool operator registration and compliance requirements, and Sections 4 and 5 focus on Dodd-Frank Act changes to existing securities laws and regulations, including with respect to large trader reporting and investment advisers. Section 6 highlights some of the concerns raised by MF Global, Inc.'s collapse, which will be of particular interest to hedge funds and other private funds that participate in the futures market. Finally, Section 7 describes recent tax law developments including with respect to cleared swaps, the Foreign Account Tax Compliance Act (FATCA), carried interest and standardized swap documents. To access a particular section directly, please click on the relevant link below.

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1. The Dodd-Frank Act

- ***New Regulatory Regime for OTC Swaps***

Title VII of the Dodd-Frank Act imposes a new regulatory regime on OTC swaps. The law's new requirements include (1) the central clearing of swaps, (2) recordkeeping and reporting obligations with respect to swap transaction data, (3) position limits for certain futures and their economically equivalent swaps, and (4) for non-standard swaps that cannot be cleared (uncleared swaps), new documentation and margin requirements.[1]

The majority of the federal regulations required to implement Title VII of the Dodd-Frank Act, including the definition of a "swap," have been proposed, but few rules have been finalized. Furthermore, although final position limits and recordkeeping and reporting rules have been issued, these rules are subject to phased-in compliance periods. As a result, it is unlikely that compliance with Title VII's mandates will be required for market participants until the end of 2012, at the earliest.

To the extent that a hedge fund or other private fund engages in OTC transactions, it should begin preparing to comply with the Dodd-Frank Act's new requirements now. For starters, these funds should begin analyzing the applicability of, and developing systems to comply with, new regulatory requirements including, among others, position limits (if applicable) and recordkeeping and reporting obligations. In addition, the central clearing of swaps will require hedge funds and other private funds to establish swap clearing relationships with futures commission merchants (FCMs), which will require negotiation of, and entry into, numerous agreements. To the extent that these funds are able to continue to engage in uncleared swaps, they will need to amend their existing swap documentation to account for new swap documentation and margin requirements.

- ***New Requirements for Entities Using Swaps***

In addition to imposing a new regulatory regime on OTC swaps, the Dodd-Frank Act substantially expanded the reach of the Commodity Exchange Act (CEA), and the persons who are subject to Commodity Futures Trading Commission (CFTC) oversight thereunder, by amending the definitions of the terms commodity pool operator (CPO) and commodity trading advisor (CTA). Prior to the amendment, only persons who operated a fund that invested in, or that was authorized to invest in, futures or exchange-traded commodity options, fell within the CPO definition. Similarly, the CTA definition only extended to persons who were engaged in the business of providing advice, for compensation or profit, with respect to trading futures and exchange-traded commodity options. Under the pre-amendment CPO/CTA definitions, persons operating a pool investing in OTC swaps, or providing advice with respect to investing in OTC swaps, were not subject to regulation as CPOs or CTAs, respectively. The Dodd-Frank Act revised the CPO and CTA definitions to include swaps. As a result, persons who previously fell outside of the scope of these definitions, unless eligible for an exclusion or exemption from the regulatory definitions

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[1] Foreign exchange swaps and forwards will likely be exempt from some, but not all, of these requirements. For more information, please see Sutherland's April 29, 2011 Legal Alert titled "U.S. Treasury Secretary Proposes to Exempt FX Swaps and FX Forwards from Dodd-Frank's 'Swap' Definition."

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of these terms, will now be required to register with the CFTC as CPOs and CTAs, respectively, and will be subject to numerous regulatory requirements as a result.[2]

2. Rescission of Exclusions/Exemptions from CPO Registration

Currently, CFTC Regulation 4.5 excludes investment companies registered under the Investment Company Act of 1940, that trade commodity futures or commodity options, from the CPO definition. However, last February, the CFTC proposed an amendment to CFTC Regulation 4.5 that would only extend the Regulation 4.5 exclusion to an investment company if it represents that (1) no more than 5% of its portfolio will be invested in commodity futures, options or swaps for speculative purposes (otherwise they may only be used for bona fide hedging purposes), and (2) that it will not market itself to the public as a vehicle for trading in commodity futures, options or swaps. The proposed amendments are intended to address concerns that certain investment companies that offer futures-only investment products have evaded CFTC oversight by claiming the exclusion from the CPO definition contained in CFTC Regulation 4.5.

Also last February, the CFTC proposed to eliminate CPO registration exemptions, currently available under CFTC Regulations 4.13(a)(3) and 4.13(a)(4), that apply to operators of funds whose shares are exempt from registration under the Securities Act of 1933. To qualify for exemption under existing CFTC Regulation 4.13(a)(3), (1) the interests in such a fund can only be offered to qualified eligible persons (QEPs), accredited investors, or knowledgeable employees, and (2) the fund's aggregate initial margin and premiums attributable to commodity interests cannot exceed 5% of the liquidation value of the fund's portfolio. To qualify for exemption under existing CFTC Regulation 4.13(a)(4), the operator of such a fund must reasonably believe that all of the fund's participants are QEPs.

In proposing to repeal Regulations 4.13(a)(3) and 4.13(a)(4), the CFTC indicated that the passage of the Dodd-Frank Act changed the regulatory environment within which those regulations were originally adopted, and that their repeal is intended to further the Dodd-Frank Act's goals of increased accountability and transparency and to limit regulatory arbitrage.

Recent news reports have indicated that final drafts of the amendments to CFTC Regulation 4.5 have been circulated to CFTC Commissioners and will likely be approved in the next few days. The proposed regulations to repeal CFTC Regulations 4.13(a)(3) and 4.13(a)(4) are expected to be finalized in the first half of 2012. Once finalized, funds that have been relying on these existing exclusions/exemptions may have to register as CPOs with the CFTC.

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[2] Although the Dodd-Frank Act's amendments to the CPO and CTA definitions have taken effect, the CFTC has yet to finalize corresponding amendments to its regulations. More importantly, the CFTC has yet to finalize regulations to define key terms that are required under the Dodd-Frank Act. As a result, the CFTC issued a temporary exemptive relief order that permits swap market participants to operate under the pre-Dodd-Frank Act regulatory regime until the earlier of July 16, 2012, or the effective date of CFTC final regulations defining the key Dodd-Frank Act terms. Until the CFTC finalizes these regulations, operators of pools investing in swaps, and persons providing advice with respect to trading in swaps, need not register with the CFTC as CPOs and CTAs, respectively. For more information, please see Sutherland's July 15, 2011 Legal Alert, titled "CFTC Issues Final Order to Provide Temporary Relief from Provisions of the Dodd-Frank Act Slated to Become Effective on July 16, 2011 and Releases Agenda for Upcoming Meeting," and Sutherland's December 22, 2011 Legal Alert, titled "CFTC Extends Effective Date for Swap Regulation and Finalizes Certain Swap Data Recordkeeping and Reporting Requirements."

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3. Registration and Compliance Obligations for New CPOs

Newly minted CPOs will have to comply with a wide range of existing CFTC regulations, as well as several newly issued or proposed Securities and Exchange Commission (SEC) and CFTC requirements, including the following:

- ***New SEC and CFTC Reporting Forms***

Many hedge funds, other private funds and their investment advisers may be subject to new registration and/or reporting requirements as a result of amendments to the CEA made by the Dodd-Frank Act, and CFTC proposed rules and joint CFTC/SEC proposed rules.

SEC forms. Starting as early as June of this year, depending on the amount of assets under management (AUM), SEC-registered investment advisers, including those that are registered, or required to be registered, as CPOs or CTAs, will be required to file new Form PF with the SEC. The scope of information required to be included in Form PF will depend on the size of the reporting entity (whether its AUM is less than $1 billion or is equal to or exceeds $1 billion) and the types of funds it advises. Frequency of reporting (*i.e.*, annually versus quarterly) will also depend on the same $1 billion threshold for the amount of AUM. The stated purpose of Form PF is to assist in data collection for the Financial Stability Oversight Council, which is tasked with monitoring systemic risk and, therefore, is focused on collecting non-public information about private funds and their trading strategies.

Compliance with the Form PF filing requirements will be phased-in in two stages: (1) Most private fund advisers must begin filing Form PF following the end of their first fiscal year or fiscal quarter, as applicable, to end on or after December 15, 2012, and (2) the following advisers must begin filing Form PF following the end of their first fiscal year or fiscal quarter, as applicable, to end on or after June 15, 2012:

- Advisers with at least $5 billion in AUM attributable to hedge funds;
- Liquidity fund advisers with at least $5 billion in combined AUM attributable to liquidity funds and registered money market funds; and
- Advisers with at least $5 billion in AUM attributable to private equity funds.

The form filed with the SEC and the included information is confidential; however, the SEC may use the information in targeting advisers for examination and may share the information with other federal agencies.

CFTC forms. In February of last year the CFTC proposed to adopt new Forms CPO-PQR (for CPOs) and CTA-PR (for CTAs) with a goal similar to that of Form PF: increased data collection that would allow the CFTC to more effectively monitor risks posed by “participants in the commodity futures and derivatives markets.” Dual registrants (*i.e.*, advisers to private funds that are dually registered with the CFTC and the SEC), and CPOs and CTAs generally, will be required to submit reports on Form CPO-PQR or Form CTA-PR, as applicable, pursuant to CFTC proposed rules. The frequency of reporting on these forms will depend on, for CPOs and CTAs, their size (*i.e.*, small, mid-size or large) and, for private funds that are dual registrants, their AUMs (*i.e.*, less than $1 billion or is equal to or exceeds $1 billion).

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The CFTC is expected to finalize its proposed rules to adopt Forms CPO-PQR and CTA-PR in the first quarter of 2012, and compliance with these rules may be required as early as the second quarter of 2012.

- ***New CFTC Regulations Pertaining to the Privacy of Consumer Information***

Last October, the CFTC adopted two sets of rules pertaining to the use and disposal of consumer information by, among others, hedge funds or other private funds that are CPOs. The rules became effective in November 2011 and (1) restrict an entity's ability to share certain consumer information with affiliates for marketing purposes, and (2) establish standards for maintaining the privacy of consumer information.

- ***Process for Obtaining Relief from Certain Document Delivery and Recordkeeping Requirements***

Hedge funds and other private funds that have to register as CPOs will face a more streamlined process for obtaining exemptive relief from the (1) disclosure document delivery and acknowledgment requirements, (2) monthly account statement delivery requirement, and (3) requirement that a CPO keep its books and records at its main business address.[3] Pursuant to CFTC rules that were issued last May and became effective on June 17, 2011, in lieu of filing requests with the CFTC directly, CPOs can now obtain exemptive relief by electronically filing a claim with the National Futures Association (NFA). Exemptive relief previously afforded to a CPO will remain in effect so long as (1) the facts and circumstances upon which such prior relief was based have not materially changed, and (2) the conditions for relief in the rules are no more restrictive than those for the prior relief.

- ***Practice Points***

Hedge funds and other private funds registering as CPOs should note that the NFA showed increased attention to numerous CFTC requirements in 2011, including those pertaining to the use and format of disclosure documents, and is likely to continue this practice in 2012.

4. New SEC Large Trader Reporting Regime

In July 2011, the SEC adopted a rule that requires certain persons that trade in a large number of securities (*i.e.*, Large Traders) to file new Form 13H with the SEC.[4] Generally, a Large Trader is a natural person or entity that (1) during a calendar day, trades either two million shares or shares with a fair market value of $20 million, or (2) during any calendar month, trades either 20 million shares or shares with a fair market value of $200 million. Form 13H requests general information about the Large Trader, including the names of brokers with whom the Large Trader has brokerage accounts. The information provided to the SEC on Form 13H will not be made publicly available.

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[3] All of these requirements are found in Part 4 of the CFTC's regulations.

[4] The CFTC also adopted new Large Trader reporting rules for physical commodity swaps last summer. The CFTC's rules require routine position reports from clearing organizations, clearing members and swap dealers and also apply to reportable swap trader positions. For more information, see the final rule adopting release. After the final rules were adopted the CFTC's Division of Market Oversight issued temporary and conditional exemptive relief from certain requirements of the final rules– see the Division of Market Oversight's letter.

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5. Registration Under the Investment Advisers Act and the Implications Thereof[5]

The Dodd-Frank Act significantly changed the regulatory landscape for hedge fund managers and their advisers. Most importantly, hedge fund advisers must register with the SEC, and must do so quickly. The due date for registration is March 30, 2012. To ensure that they are registered by March 30, new hedge fund advisers should have their paperwork to the SEC within the next few days. The discussion below identifies a few of the other changes and their implications.

- ***SEC versus State Registration***

The Dodd-Frank Act raised the statutory threshold for registration as an investment adviser with the SEC from $25 million to $100 million in AUM. This change precludes most mid-sized advisers (those whose AUM is between $25 million and $100 million). Accordingly, mid-sized advisers currently registered with the SEC pursuant to the Investment Advisers Act of 1940 (Advisers Act) generally must withdraw their SEC registrations and register with one or more state securities authorities if they are (1) required to register in the state in which they maintain their principal offices and places of business, and (2) are subject to examination by that state.

- ***Exempt Reporting Advisers***

Advisers that *only* advise private funds and manage under $150 million in assets are exempt from having to register under the Advisers Act with the SEC. However, these advisers are nevertheless subject to extensive reporting requirements (and thus are called Exempt Reporting Advisers). Exempt Reporting Advisers are required to file, and periodically update, reports with the SEC via Form ADV (discussed below), which is the same form registered advisers are required to file.

- ***Registered Advisers***

Investment advisers that are registered or required to be registered with the SEC must (1) adopt and implement written policies and procedures reasonably designed to prevent violations of the Advisers Act, (2) review, at least annually, these policies and procedures, and (3) designate a Chief Compliance Officer responsible for administering the policies and procedures.

- ***SEC Filing Requirements***

Registered hedge fund advisers are required to make certain filings with the SEC, such as the two-part Form ADV. Part 1 of Form ADV requires advisers to publicly disclose information about their advisory businesses, such as the types of clients, personal information and information about certain related parties. Of note, Form ADV requires hedge fund advisers to disclose extensive information about the funds that are managed, including the name, structure, type of fund and information about service providers engaged by the fund. Parts 2A and 2B of Form ADV generally must be delivered to clients and

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[5] For more information, please see Sutherland's July 22, 2011 Legal Alert, titled "SEC Revamps Investment Adviser Regulatory Scheme as Mandated by the Dodd-Frank Act."

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require advisers to provide more specific information about their businesses and the persons responsible for managing client assets in "plain English." For example, advisers must disclose how they are compensated, their methods of analysis and investment strategies, their conflicts of interest and certain disciplinary information.

Advisers have other filing requirements, such as Form PF (discussed above) and Form 13F. Form 13F requires institutional investment managers who exercise investment discretion over $100 million or more of "Section 13(f) securities" to report these holdings to the SEC on Form 13F. Section 13(f) securities generally include stocks that trade on exchanges, certain equity options and warrants, closed-end investment companies, and certain convertible debt securities.

- ***Marketing and Solicitors***

Investment adviser advertising must not contain any false or misleading statements. There are rules for the use of testimonials, specific requirements related to the use of past specific investment recommendations, and disclosure requirements when using performance and benchmarks. Further, to the extent an adviser uses solicitors to assist in marketing investment advisory services, these arrangements are subject to an explicit cash solicitation rule under the Advisers Act; marketing interests in private funds involves marketing securities and is not subject to the cash solicitation rule. However, this type of marketing activity can raise broker-dealer registration issues.

- ***Compliance***

Advisers are subject to examinations by the SEC's Office of Compliance Inspections and Examinations. Examinations can be time-consuming affairs, lasting from several hours to months. In addition, advisers are subject to other compliance obligations, *i.e.*, with respect to conduct and books and records. For example, advisers must adopt a written code of ethics that requires a standard of business conduct that reflects an adviser's fiduciary obligations. The code must provide that an adviser's personnel report personal securities holdings and transactions, and seek pre-clearance approval for investments in initial public offerings and limited offerings, such as hedge funds.

Advisers are also required to retain certain books and records related to their advisory businesses. The SEC expects advisers to locate and produce books and records upon request. Advisers must also retain emails and other electronic communications that contain records subject to the books and records rules.

- ***Proxy Voting***

Advisers with voting authority with respect to client securities must implement written policies and procedures to ensure they vote proxies in the best interest of clients and address material conflicts of interest that may arise with clients. Additionally, advisers must instruct clients on how they can obtain an adviser's proxy policies and procedures as well as how to request information on how the adviser voted proxies.

- ***Custody***

Generally, advisers that have custody of client funds or securities must retain a qualified custodian to custody such assets. Hedge fund advisers either (1) are subject to surprise exams conducted by an accountant registered with the Public Company Accounting Oversight Board, or (2) must ensure that the

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funds they advise distribute to investors annual financial statements, audited by an independent public accountant, within 120 days of the fund's fiscal year end (180 days for funds of funds).

6. MF Global's Collapse Calls the Safety of Customer Collateral into Question

MF Global, Inc.'s recent collapse has raised questions about the safety of futures customers' collateral. Under existing commodities laws and regulations, customer collateral held by an FCM or derivatives clearing organization (DCO), as margin or otherwise, must be segregated from the proprietary funds of the FCM or DCO. Segregation of customer collateral is the primary protection afforded to futures customers and is considered sacrosanct by futures market participants.

Much of an approximately $1.2 billion shortfall in MF Global customer funds remains unaccounted for to date. Investigations into the whereabouts of the missing funds are ongoing, including whether the funds were misappropriated in the days leading up to MF Global's demise. In response to the unfolding developments from MF Global, the CFTC is expected to review and likely revise its regulations pertaining to how futures customer collateral can be held. Accordingly, hedge funds and other funds that currently invest in futures contracts will want to closely analyze any such response. In addition, because MF Global was a registered broker-dealer, MF Global's collapse may raise questions about existing securities laws and regulations and could lead to changes in customer fund segregation that would impact the way that hedge funds and other private funds currently do business.

7. Tax Considerations With Respect to Cleared Swaps, FATCA, Carried Interest and Standardized Swap Documents

The Dodd-Frank Act gives rise to significant tax considerations, notwithstanding the limited tax provisions in that legislation. The discussion below summarizes those significant tax considerations, as well as certain other recent tax developments relevant to hedge funds or other private funds.

- ***Clearing of Swap Transactions***

In connection with the enactment of the Dodd-Frank Act, concerns were raised that the swap clearing requirement would materially alter the U.S. federal income tax treatment of investments in covered derivative instruments, specifically causing them to be subject to the mark-to-market rules of Internal Revenue Code section 1256.

A "section 1256 contract" generally includes a contract that is traded, on or subject to, a qualified board or exchange. By requiring certain types of derivatives to be traded on exchanges, Dodd-Frank effectively would have subjected these transactions to the mark-to-market requirement and the special 40/60 capital gain characterization rule of section 1256. However, in order to prevent this unintended result, the Dodd-Frank Act changed the scope of the term "section 1256 contract" to exclude "any interest rate swap, currency swap, basis swap, interest rate cap, interest rate floor, commodity swap, equity swap, equity index swap, credit default swap, or similar agreement" from the definition of a section 1256 contract, and therefore excludes those instruments from the mark-to-market requirement and the special 40/60 gain characterization rule.

The effect of this change is greater certainty with respect to the tax treatment of the swaps, caps, floors, and similar agreements enumerated in the exception to the definition of a section 1256 contract. In addition, the Internal Revenue Service (IRS) has issued proposed rules that would clarify the definition of "notional principal contract," including within its terms credit default swaps.

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- ***Foreign Account Tax Compliance Act (FATCA)***

In 2010, Congress enacted FATCA to provide certain anti-avoidance reporting rules to prevent U.S. persons from hiding their identities behind foreign corporations, trusts, foundations and other types of foreign entities. Those provisions potentially have a far-reaching effect on hedge funds, both as U.S. payors and foreign recipients of covered amounts. Generally, FATCA will require 30% withholding on payments of specified amounts made to certain foreign entities if the owners of "United States accounts" held in these entities are not identified by the foreign entities. The IRS is in the process of promulgating rules to further define the types of payments and entities that are subject to FATCA. Proposed rules are expected to be issued in the near future.

- ***Structure and Carried Interest Proposals***

In many cases, the managers of investment ventures, including private equity and hedge fund managers, receive a percentage interest in the venture's profits for the services that they provide to that venture. This interest, which is commonly referred to as a "carried interest," currently is eligible to be taxed at long-term capital gains rates (depending upon the character of the venture's profits). Congress and the Obama Administration continue to focus attention on the taxation of carried interests, and this focus is expected to continue as part of a larger tax reform debate. A number of proposals have been introduced which would, among other things, tax some or all of the carried interest of investment managers as ordinary income. The tax law change is projected to be a significant revenue raiser and, therefore, is expected to continue to be proposed as an offset for other spending.

- ***Implications for Standardized Documents***

The tax provisions in standard documentation, including ISDA Master Agreements and the Futures Industry Association Cleared Derivatives Transactions Addendum (FIA Addendum)[6] are being updated to take into account changes arising from the Dodd-Frank Act and FATCA. It will be important for hedge funds and other private funds that regularly engage in derivatives transactions to understand the implications of the changes to these tax provisions, and to amend existing agreements to incorporate these provisions as necessary.

The impact of the new regulatory regime on hedge funds and other private funds, and other related topics, will be discussed at an upcoming roundtable.

If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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[6] The FIA Addendum is a form document that is currently being developed by swap market participants. It will overlay a futures customer account agreement so that the agreement may be used to clear swap transactions in accordance with the Dodd-Frank Act's mandatory clearing of swaps requirement. The FIA Addendum has yet to be finalized and, as such, is not yet publicly available.

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