NFA Guidance on Transitioning From an Exemption From CPO Registration Under CFTC Rule 4.13(a)(4) to Registration or an Alternative Exemption

June 29, 2012

On June 27, the National Futures Association (NFA) issued Notice I-12-12 "Guidance to Persons Operating or Advising Funds Pursuant to an Exemption under CFTC Regulation 4.13(a)(4)" (the NFA Guidance). The NFA Guidance was provided in connection with final rules, adopted by the Commodity Futures Trading Commission (CFTC) on February 9 (Final Rules), that amend CFTC regulations governing the registration of commodity pool operators (CPOs). Among other things, the Final Rules rescinded CFTC Regulation 4.13(a)(4), the so-called "sophisticated investor" exemption, which afforded an exemption from CPO registration to operators of certain private funds. Regulation 4.13(a)(4)'s rescission took effect on April 24, 2012.[1] However, advisers to funds that claimed the CFTC Regulation 4.13(a)(4) exemption prior to April 24, 2012, are not required to register as CPOs or claim an alternative exemption until January 1, 2013.

The NFA Guidance confirms that an adviser to a pool that claimed the CFTC Regulation 4.13(a)(4) exemption prior to April 24, 2012, may initiate the CPO registration process prior to December 31, 2012, and delay the effective date of its CPO registration (and related compliance requirements) until January 1, 2013.[2] In addition, according to the NFA Guidance, pre-filing with delayed effectiveness will also be available for those advisers to private funds that are seeking to (1) qualify for an exemption from CPO registration under CFTC Regulation 4.13(a)(3) (which exempts advisers to pools that conduct a *de minimis* amount of commodity trading activity) or (2) register as CPOs and seek relief from certain regulatory requirements under CFTC Regulation 4.7 (which is often referred to as "CPO lite" and is only available to CPOs operating pools with only "qualified eligible person" participants), CFTC Regulation 4.12 (applicable to securities pools that have no more than 10% of their assets invested in commodity interests and for commodity exchange traded funds) or CFTC Advisory 18-96 (which affords relief to certain registered CPOs with respect to offshore commodity pools). The NFA Guidance also clarifies that any person that opts to pre-file for an exemption will not become subject to CPO reporting and disclosure requirements until the delayed effective date of January 1, 2013.

The Final Rules also imposed a new obligation requiring any person seeking to maintain an existing exemption to reaffirm such exemption annually by electronically filing a notice of exemption with the NFA within 60 days after calendar year end. Significantly, the NFA Guidance states that failure to do so will result in such person being "*deemed to have requested a withdrawal*" of such exemption.

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[1] For more information about the CFTC's amendments to CPO registration requirements, please see Sutherland's February 29 Legal Alert, CFTC Issues Rules to Increase Oversight of Funds That Invest in Commodity Interests.

[2] The NFA notes that commodity trading advisors that no longer qualify for an exemption under CFTC Regulation 4.14(a)(8)(D) should similarly begin the registration process so that they may continue to advise commodity pools after December 31, 2012.

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