

Operators of, and Advisers to, New Private Funds Have Until December 31 2012, to Register with the CFTC

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On July 13, the Commodity Futures Trading Commission (CFTC) Division of Swap Dealer and Intermediary Oversight (DSIO) issued a [no-action letter](#) to grant relief to operators of, and advisers to, hedge funds and other private funds that invest in commodity futures, options and/or swaps (i.e., commodity interests). These operators and advisers will now have until December 31, 2012, to register with the CFTC as commodity pool operators (CPOs) and commodity trading advisors (CTAs), respectively, absent eligibility for an exclusion or exemption therefrom.

The DSIO's no-action letter was issued in response to a joint request for no-action relief from the Managed Funds Association, the Investment Adviser Association, the Alternative Investment Management Association, and the Investment Company Institute (collectively, the Trade Associations), which was prompted by recent amendments to the CFTC's CPO and CTA registration and compliance requirements. The amendments, which were adopted earlier this year and became effective on April 24, 2012, included, among other things, (1) the narrowing of the CFTC Rule 4.5 exclusion from CPO status for operators of registered investment companies that invest in commodity interests and (2) the repeal of CFTC Rule 4.13(a)(4), the so-called "sophisticated investor" exemption from CPO registration.¹ The ultimate impact of these amendments is that operators of funds that invest in commodity interests that claimed the aforementioned exclusion or exemption prior to April 24, 2012, and were thus not required to register as CPOs, will now have to do so by December 31, 2012.² The repeal of CFTC Rule 4.13(a)(4) also affected CTA registration requirements because previously, under CFTC Rule 4.14, persons eligible for the Rule 4.13(a)(4) exemption could claim exemption from CTA registration.

The Trade Associations' request for relief sought (1) an extension of time for compliance with the CPO and CTA registration requirements until December 31, 2012, for those entities that would otherwise have qualified for the CFTC Rule 4.5 exclusion or CFTC Rule 4.13(a)(4) exemption but for their amendment/repeal on April 24, 2012 (i.e., operators or advisers to funds that were launched after April 24, 2012, the effective date of the amendments) and (2) a 10-month delay in the inclusion of swap positions in calculations of margin requirements and premiums to determine eligibility for the narrowed CFTC Rule 4.5 exclusion. The DSIO granted the Trade Associations' request for additional time for CPO registration (and compliance with CPO obligations) until December 31, 2012. However, the DSIO

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

² With respect to operators of registered investment companies, this will be the case to the extent that they are no longer eligible for the narrowed CFTC Rule 4.5 exclusion. The CFTC has indicated that operators of registered investment companies that are affected by the narrowing of the CFTC Rule 4.5 exclusion would have until the *later* of December 31, 2012, or the adoption of final CFTC rules to further define the term "swap." The CFTC and the Securities and Exchange Commission adopted final rules to define "swap" on July 10. Thus, the December 31, 2012, date is expected to control. See note 3, *infra*. This is not the case with respect to the CFTC Rule 4.13(a)(4) exemption. Operators of funds that relied on the CFTC Rule 4.13(a)(4) exemption must register as CPOs by December 31, 2012, unless they are eligible for an alternative exclusion or exemption.

declined to delay the inclusion of swap positions in calculations of margin requirements citing, among other things, the recently adopted definition of “swap.”³

The no-action relief afforded by the DSIO letter only applies prospectively. Thus, operators and advisers to hedge funds and other private funds that (1) did not claim an exemption from CPO or CTA registration, respectively, prior to April 24, 2012, or (2) serve as operators or advisers to hedge funds or other private funds that were formed after April 24, 2012 but prior to July 13, 2012, the date of the DSIO no-action letter, may not avail themselves of the relief provided. However, the DSIO’s letter affords operators and advisers to funds launched after July 13, 2012, that invest in commodity interests, additional time to comply with CPO and CTA registration and compliance requirements, respectively. These operators and advisers must expressly claim the relief afforded by the DSIO no-action letter by filing a claim with the DSIO; relief is deemed effective upon filing and is conditioned on meeting certain criteria, as outlined in the no-action letter.



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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³ For more information, please see Sutherland’s July 11 Legal Alert, [“CFTC and SEC Finally Issue Product Definitions.”](#)