

CLIENT UPDATE

CFTC GRANTS NO-ACTION RELIEF EXTENDING COMPLIANCE DATE FOR CPO AND CTA REGISTRATION

NEW YORK

Byungkwon Lim
blim@debevoise.com

Gary E. Murphy
gemurphy@debevoise.com

Michael J. Decker
mjdecker@debevoise.com

In a no-action letter dated July 13, 2012 (the “No-Action Letter”), the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (the “CFTC”) provided for limited temporary relief from registration for commodity pool operators (each, a “CPO”) and commodity trading advisors (each, a “CTA”) that would have been exempt or excluded from registration but for the recent amendments to sections 4.13 and 4.5 of the CFTC Regulations (the “Final Rules”).¹ The Division provides no-action relief to such CPOs or CTAs for failure to register as such until December 31, 2012, subject to certain requirements, including filing a notice claiming the benefit of such no-action relief with the Division. Such no-action relief is available to pools launched after the July 13, 2012 issuance date of the No-Action Letter.

BACKGROUND

Section 1a(10) of the Commodity Exchange Act (the “CEA”) defines a commodity pool to be any investment trust, syndicate or similar form of enterprise operated for the purpose of trading in commodity interests, which as amended by the Dodd-Frank Wall Street Reform

¹ The Final Rules are detailed in our February 13, 2012 Client Update, “Amendments to CFTC Part 4 Regulations Regarding Commodity Pool Operators and Commodity Trading Advisors.” A summary and the full text of the update can be found at: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=e42014f7-c21f-4106-8932-383132e8b16a>

and Consumer Protection Act (the “Dodd-Frank Act”), includes futures and swaps (as defined in section 1a(47) of the CEA).

A sponsor or operator of a commodity pool (such as the general partner or investment adviser of a private fund) is required to register with the CFTC as a CPO unless an exemption is available under the CEA or the CFTC Regulations. Sections 4.13(a)(3) and 4.5 of the CFTC Regulations provide for application of a *de minimis* exemption if specified tests are met (the “*de minimis* exemption”). Under the Final Rules, the CFTC repealed section 4.13(a)(4), an exemption from CPO registration which had been available to CPOs of private funds that rely on section 3(c)(7) of the Investment Company Act of 1940 (the “Investment Company Act”) for exemption from registration under the Investment Company Act.

The Final Rules required compliance with the revised section 4.13 regime by (a) December 31, 2012 for CPOs that had been exempt in reliance on section 4.13(a)(4), or (b) 60 days following publication of the amendments in the Federal Register (or April 24, 2012) for all other CPOs.

Under the Dodd-Frank Act, swaps are to be included in *de minimis* exemption threshold calculations as “commodity interests” by the later of December 31, 2012 or 60 days after the adoption of a final rule further defining the term “swap.” As such rule was adopted by the CFTC on July 10, 2012, the compliance date is in fact December 31, 2012.

DIVISION DENIES REQUEST FOR FURTHER DELAY OF INCLUSION OF SWAPS IN *DE MINIMIS* CALCULATION

Pursuant to the no-action request to which the Division responded with the No-Action Letter, certain private fund and adviser trade associations and interest groups (the “Requesting Parties”) requested that the CFTC delay the requirement that swaps be included as “commodity interests” when calculating *de minimis* exemption thresholds until 10 months after the further definition of the term “swap” and the margin rules for uncleared swaps are each finalized.

The Division rejected both requests for relief. The compliance date for inclusion of the notional amount of a “swap,” when calculating *de minimis* exemption thresholds, remains December 31, 2012. In other words, until December 31, 2012, CPOs may take into account only the notional amount of futures contracts, options on futures, exchange-traded options on commodities, retail forex transactions, and securities futures contracts, or the initial margin, premium or required minimum deposit paid for such commodity interests (other than swaps) in determining eligibility for the *de minimis* exemption.

The exclusion of swaps in calculating a *de minimis* exemption threshold until December 31, 2012 is self-executing and does not require any additional action.

NO-ACTION RELIEF: EXTENSION OF COMPLIANCE DATE UNTIL DECEMBER 31, 2012

The Requesting Parties also requested relief from registration for CPOs and CTAs of new pools that would have been exempt from registration or excluded from the definition of CPO or CTA prior to the CFTC's rescission of section 4.13(a)(4) and amendments to section 4.5.

The Division agreed to provide such requested no-action relief in respect of pools launched after the issuance of the No-Action Letter on July 13, 2012,² thus delaying until December 31, 2012 enforcement actions for failure to register as a CPO or CTA, *provided* that the CPOs and CTAs comply with certain requirements detailed below.

Those CPOs that timely filed a notice of eligibility for exemption under section 4.13(a)(4) in connection with the repeal of such exemption (which became effective on April 24, 2012) will not be affected by this no-action relief, since the compliance date for such CPOs either to register with the CFTC or to be eligible for the *de minimis* exemption is December 31, 2012.

SUBSTANTIVE REQUIREMENTS FOR NO-ACTION RELIEF

CPOs that wish to take advantage of the no-action relief must comply with the following criteria, which are substantively identical to the previous section 4.13(a)(4) criteria: (a) interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public of the United States; and (b) the CPO reasonably believes, at the time of investment, that: (i) each natural person participant (including such person's self-directed employee benefit plan, if any) is a "qualified eligible person," as that term is defined in section 4.7(a)(2) and (ii) each non-natural person participant is a "qualified eligible person," as that term is defined in section 4.7, or an "accredited investor," as that term is defined in § 230.501(a)(1)-(3), (a)(7) and (a)(8) of title 17 of the Code of Federal Regulations.

² The Division indicated in our follow-up correspondence with it that the stated no-action relief is only effective for pools launched after the issuance of the No-Action Letter because the Division is prohibited from granting retroactive no-action relief.

Additionally, the Division indicates that it will grant no-action relief where each pool for which the CPO claims relief under the registration compliance date exception is a registered investment company under the Investment Company Act of 1940.

In short, all CPOs of newly launched pools that rely on section 3(c)(7) of the Investment Company Act for exemption from investment company registration will be exempt from registration as a CPO until December 31, 2012 without the need to rely on the *de minimis* exemption under section 4.13(a)(3).

We note that the Division listed all prior section 4.13(a)(4) requirements, including the requirement that pools not be marketed to the public in the United States. The CFTC has not yet determined whether this requirement (which was based on the private placement exemption under the Securities Act) will be eliminated or modified in light of the change to the Securities Act under the JOBS Act, which requirement also must be satisfied in claiming the *de minimis* exemption. The Division staff is waiting for the SEC regulation to address the JOBS Act amendment before making a decision. It is not yet clear if the CFTC will make a corresponding change to the *de minimis* exemption.

The Division granted corresponding relief regarding CTA registration for CTAs that advise commodity pools whose CPOs claim the above no-action relief. CTAs that wish to take advantage of the no-action relief must comply with the following criteria, which are largely identical to the section 4.14(a)(5) criteria relating to the previous section 4.13(a)(4) exemption: (a) the CTA claims relief from registration under the no-action relief and its commodity interest trading advice is directed solely to, and for the sole use of, the pools that it operates or (b) 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 sections 4.13(a)(1), (a)(2), (a)(3), (a)(4), 4.5, or under the No-Action Letter.

PROCEDURAL REQUIREMENTS FOR CLAIMING NO-ACTION RELIEF

This no-action relief is not self-executing. A CPO or CTA that is eligible for the compliance date exception must file a claim to perfect the use of the relief. A claim submitted by a CPO or CTA will be effective upon filing so long as the claim is materially complete. The claim of no-action relief must: (a) state the name, main business address and main business telephone number of the CPO or CTA claiming the relief; (b) state the capacity (i.e., CPO, CTA, or both) and, where applicable, the name of the pool(s), for which the claim is being filed; (c) be electronically signed by the CPO or CTA and (d) be filed with the Division using the email address dsionoaction@cftc.gov prior to the date upon which the CPO or CTA first engages in business that would otherwise require registration as such.

We suggest that the general partners, investment managers or other operators of, or advisers to, all pools to be launched after the issuance of the No-Action Letter should consider claiming the benefit of this no-action relief if additional time is needed to establish a monitoring system for compliance with requirements of the *de minimis* exemption.

Please do not hesitate to contact us if you have any questions.

* * *

July 16, 2012