

NFA Proposes Waiving Proficiency Exam Requirements in Connection with Certain Swaps Activities

Among its many provisions, the Dodd-Frank Act amended the definitions of Commodity Pool Operator (“CPO”) and Commodity Trading Advisor (“CTA”) to include firms managing funds or accounts that engage in “swaps.” The CFTC recently defined “swaps” very broadly. As a result of these developments, firms engaged in a broad range of swaps transactions that were not previously required to register as CPOs or CTAs must now register or find a registration exemption on which to rely. For a firm that is required to register, the firm’s “Associated Persons” ordinarily must satisfy a proficiency examination requirement. However, there is no proficiency examination specific to swaps and none of the existing proficiency examinations test for either the product or regulatory knowledge that is relevant to swaps activities.

As a result:

- NFA has adopted a new registration rule to provide that an Associated Person who limits his or her activity to swaps will not need to take and pass any proficiency exam to become designated as a “Swap AP” (see below for further information on “Swap APs”).
- Additionally, NFA has adopted a new registration rule to exempt from the proficiency requirements Associated Persons of a CPO that is required to be registered solely due to the firm’s swaps activities. This rule provides an Associated Person with an exemption from the proficiency requirements even if the CPO’s pool engages in a de minimis amount of futures trading.
 - This rule applies when, but for the trading of swaps, the CPO would be eligible for the exemption from registration under CFTC Rule 4.13(a)(3) (the de minimis exemption) or the exclusion from the definition of a commodity pool under CFTC Rule 4.5(c).
 - The CPO must obtain a waiver of the Series 3 exam requirement for its Associated Persons under NFA Rule 402 for this exemption to apply.
- Finally, NFA amended its bylaws to require that registered CPOs and CTAs whose activities involve swaps and the Associated Persons of these firms must be approved by NFA as “Swap Firms” or “Swap APs,” respectively. Firms may file a request for this approval electronically through NFA’s online registration system. Each firm seeking Swap Firm designation must have at least one individual who is a listed principal, is registered as an Associated Person, and is designated as a Swap AP.

These provisions will be effective as early as September 1, 2012, unless the CFTC notifies NFA that the CFTC has determined to review the proposal for approval.

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