

NFA Announces Waiver of Proficiency Exam Requirement in Connection with Certain Swaps Activities

On October 3, 2012, the National Futures Association (“NFA”) released a Notice to Members (the “Notice”) announcing amendments to NFA Bylaw 301 and Registration Rules 401 and 402, which (1) provide for a swaps exemption from the proficiency examination requirement, and (2) establish a process for designation as a “swaps firm” or “swaps associated person.” These developments are relevant to any fund manager that is registered or is preparing to register as a commodity pool operator (“CPO”) or commodity trading advisor (“CTA”) and engages in swaps activities. The full Notice can be accessed [here](#). Our previous Alert discussing these amendments can be accessed [here](#).

Swaps Exemption from the Proficiency Examination Requirement

In the Notice, the NFA announced that effective immediately, proficiency examination requirements will not apply to associated persons (“APs”) of registered CPOs and CTAs whose activities that are subject to Commodity Futures Trading Commission (“CFTC”) jurisdiction are limited to swaps.

As discussed in our earlier [Alert](#), effective October 12, 2012, fund sponsors and advisers that can use instruments within the CFTC’s definition of “swaps” will be within the CFTC’s definition of CPO and CTA. Without this new exemption from the proficiency examination requirement, APs of firms that must register as a CPO or CTA because of the use of swaps would have to pass the Series 3 exam unless another exemption applied. However, the Series 3 exam covers futures and options, and has not been revised to cover swaps. With this new exemption, APs whose activities are limited solely to swaps will be automatically exempt. APs of CPOs that would be exempt from registration under CFTC Rule 4.13(a)(3) or excluded from the definition of CPO under CFTC Rule 4.5(c)(2)(iii)(A) or (B), but for their swaps activities, must send a signed request to the NFA seeking a waiver for its APs from the Series 3 exam on this basis. The proficiency exam exemption, in either case, also applies to APs whose activities are limited to supervising other APs who are exempt from the proficiency exam requirement.

“Swaps Firm” and “Swaps AP” Designation

Pursuant to amended NFA Bylaw 301, NFA Member CPOs, CTAs and their APs that engage in swaps activities subject to the CFTC’s jurisdiction must be approved by the NFA as a swaps firm or swaps AP, as applicable. Additionally, amended NFA Bylaw 301 provides that a swaps firm must at all times have at least one principal that is registered as an AP and designated as a swaps AP. These amendments to Bylaw 301 are effective January 1, 2013; however, firms may request swaps firm and swaps AP designations effective immediately.

The Notice described the process by which CPOs, CTAs and APs will be able to designate themselves as a swaps firm or swaps AP, as applicable. For CPOs and CTAs, Form 7-R will ask a series of swaps-related questions. If the CPO or CTA answers “yes” to the first question (“Will the firm’s commodity interest activities include swaps transactions subject to the jurisdiction of the Commodity Futures Trading Commission?”), the CPO or CTA will be automatically designated as a swaps firm and will then need to answer a second question (“Will the firm limit its commodity interest activities exclusively to swaps transactions subject to the jurisdiction of the Commodity Futures Trading Commission?”).

In order to designate an AP as a swaps AP, the firm will answer similar swaps-related questions with respect to its APs on Form 8-R. If the AP answers “yes” to the first question (“Will your activities involve the solicitation of customers for swaps transactions subject to the jurisdiction of the Commodity Futures Trading

Commission or the supervision of persons involved in such solicitation of activities?”), the AP will automatically be designated as a swaps AP and will then need to answer a second question (“Will you limit your solicitation activities exclusively to the solicitation or the supervision of persons involved in the solicitation of customers for swaps transactions subject to the jurisdiction of the Commodity Futures Trading Commission?”).

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