

CFTC Staff Delays Registration Deadline for Certain Fund of Fund Operators

Overview of the Relief

On November 30, 2012, the CFTC staff [published relief](#) for fund of fund operators¹ who would otherwise be required to register with the CFTC as commodity pool operators by December 31, 2012 but do not have access to information from the funds in which they invest necessary to determine whether registration is required. The relief delays the registration date for such persons until the [later](#) of June 30, 2013 or six months from the date the staff issues revised guidance (or the compliance date, if later) on the application of the *de minimis* thresholds in the context of Rules 4.5 and 4.13(a)(3). A filing by the operator with the CFTC in respect of a fund of funds must be made to claim this no-action relief, which will be effective upon receipt. The relief is available to fund of fund operators who meet the following conditions:

- The firm is the operator of one or more funds of funds;
- The commodity interest positions held [directly](#) by each such fund of funds meet the trading thresholds in CFTC Rules 4.5 or 4.13(a)(3);
- The firm does not and could not have reasonably known, with respect to each such fund, that the fund of funds' indirect exposure to commodity interests exceeds the trading thresholds, either calculated directly or through the use of Appendix A (discussed below); and
- The fund of funds is either an investment company registered under the Investment Company Act of 1940 (the "1940 Act"), or compliant with the non-trading threshold provisions of Rule 4.13(a)(3).

Background and Analysis

A fund of funds operator may need to register as a commodity pool operator by virtue of its pass-through exposure to commodity interests held by underlying funds as a result of the fund of fund's commitment of capital to an underlying fund, as well as because of its direct trading in commodity interests. However, it is often difficult for a fund of funds operator to get information about an underlying fund's commodity interest exposure.

In an effort to address this issue, in 2003 the CFTC published guidance for making this determination under the registration exemption in Rule 4.13(a)(3) in Appendix A to the CFTC's Part 4 Regulations ("Appendix A"). Appendix A provided a mechanism for a fund operator to infer whether a fund of fund's total commodity interest exposure, as a function of its combined direct and indirect commodity interest trading, would comply with the trading threshold restrictions of Rule 4.13(a)(3). In particular, Appendix A enumerated six situations under which a fund of funds operator could rely on Rule 4.13(a)(3). However, Appendix A was difficult to apply in practice as information from underlying fund managers was required to satisfy many of the enumerated situations. In addition, the enumerated situations did not address many circumstances. Appendix A was rescinded by the CFTC on February 24, 2012,² although subsequent staff

¹ The no action letter defines a fund of funds operator as "the operator of a vehicle that holds an interest...in a separately managed vehicle..." It appears that investment in even one separately managed vehicle (in addition to the fund's other investments) would be sufficient for a fund to qualify as a "fund of funds" for purposes of this definition.

² "Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations," 77 F.R. 11252 (Feb. 24, 2012). See our Alerts from [February 13, 2012](#) and [February 14, 2012](#).

guidance permitted continued reliance on Appendix A.³ At the same time as Appendix A was deleted, Rule 4.5 was amended to include commodity interest trading thresholds for funds registered under the 1940 Act, and Rules 4.5 and 4.13(a)(3) were amended to include swaps in the trading threshold calculations under both rules.

As a result of these amendments, fund of fund operators that could not satisfy the trading thresholds (and the other criteria of those rules) were required to be registered as commodity pool operators by December 31, 2012. This left many fund of fund operators trying to apply the Appendix A guidance to underlying funds which themselves were determining whether they could meet the new trading thresholds. To complicate matters, the CFTC staff has indicated that it expects to issue new guidance to replace Appendix A at some point. However, any material changes may pose operational difficulties in complying with those changes because of the lack of visibility that a fund of funds may have into the positions of an underlying fund.

The no-action letter addresses these concerns regarding the timing and content of revised guidance for fund of funds operators and any related operational adjustments. Since Rule 4.5 has *de minimis* trading threshold requirements for registered 1940 Act companies, as does Rule 4.13(a)(3) for private funds, the same issues arise in determining compliance for such registered funds under Rule 4.5. Accordingly, the letter provides relief under Rule 4.5 as well as under Rule 4.13(a)(3).

Private fund operators currently exempt from registration under Rules 4.13(a)(4) or 4.13(a)(3) and 1940 Act companies excluded from the fund operator definition under Rule 4.5 should consider whether they qualify for this no-action relief. In particular, this relief should be helpful to private equity and real estate fund of funds operators and many mutual funds. Eligible fund of fund operators should file a claim of relief for each fund of funds with the CFTC prior to December 31, 2012. The claim of relief must be filed with the Division of Swap Dealer and Intermediary Oversight of the CFTC via email.

Although we anticipate that the recently issued relief will be useful for a number of fund of fund operators, the relief will raise significant interpretive questions for some operators, including the appropriate means of calculating direct trading levels for purposes of the second bullet point above, and the circumstances in which fund operators can satisfy the “could not have reasonably known” condition in the third bullet point. Fund of fund operators should carefully consider the applicability of this relief to their funds before filing a claim for relief with the CFTC.

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

³ Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions—CPO/CTA: Amendments to Compliance Obligations (Aug. 14, 2012), available [here](#).