

## CFTC Staff Responds to Frequently Asked Questions on CTA and CPO Registration and Compliance

On August 14, 2012, the Commodity Futures Trading Commission (“CFTC”) Staff released guidance entitled “Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations,” which discusses various compliance obligations of commodity pool operators (“CPOs”) and commodity trading advisors (“CTAs”) (the “Guidance”). The Guidance is in a question and answer format and is the CFTC Staff’s response to frequently asked questions relating to CTA/CPO registration and compliance obligations. This client alert discusses some of the highlights of the Guidance. The full Guidance can be accessed [here](#). The CFTC Staff expects to update or revise the Guidance as needed.

For a detailed discussion of the recent changes in CFTC rules affecting hedge funds, including a discussion of the CPO and CTA registration process and the available exemptions from CPO and CTA registration and compliance obligations, please refer to our “Whitepaper” which can be accessed [here](#).

### Delegation of CPO Rights and Obligations to Another Entity

Historically, a private fund’s general partner, manager or board of directors ordinarily has been considered to be the private fund’s CPO. Accordingly, an advisory firm that uses special purpose entities to serve as general partners or limited liability company managers of the private funds it advises may have multiple CPOs, each of which would be required (absent relief from the CFTC) to register separately as a CPO or claim an applicable exemption. The Guidance provides significant relief for firms in this situation by announcing that the general partner, managing member or board of directors of a commodity pool may delegate its CPO rights and obligations to another person, provided that such delegation is permitted by the commodity pool’s organizational documents and the laws of the jurisdiction in which the commodity pool is organized. Such delegate must (i) be qualified to serve as CPO and be registered as a CPO and (ii) agree to assume such CPO rights and obligations. In the event of a delegation of CPO rights and obligations, the delegating entity must agree to remain jointly and severally liable with respect to any violations of the Commodity Exchange Act (the “CEA”). This guidance means that an advisory firm may be required to register only itself as a CPO with respect to the private funds it advises, instead of having to register each of its special purpose CPOs; provided that the conditions and requirements discussed above are met. In this respect, the Guidance makes generally applicable relief previously granted in staff no-action letters to individual fund sponsors. Further, if a registered CPO is also an investment adviser registered with the Securities and Exchange Commission (the “SEC”) that is required to file SEC Form PF, the adviser would be able to limit its Form CPO-PQR filing to only Schedule A of Form CPO-PQR because of its dual registration status. (See “No Additional Guidance for Forms CPO-PQR and CTA-PR” below.)

### No Additional Guidance for CPOs of Funds-of-Funds

Although it was anticipated, based on prior CFTC statements, that the CFTC would provide revised guidance in this Q&A for CPOs of funds-of-funds analyzing the applicability of the Rule 4.13(a)(3) exemption from CPO registration, the CFTC has delayed issuing any such guidance. Instead, the CFTC Staff stated that CPOs of funds-of-funds may continue to rely on Appendix A to its Part 4 Rules (which the CFTC rescinded in February 2012) until the CFTC adopts revised guidance at a later date.

## Wholly Owned Trading Subsidiaries are Separate Commodity Pools

The CFTC Staff announced that a wholly owned trading subsidiary of a commodity pool, whose parent is operated by a registered CPO, is itself deemed to be and will be regulated as a commodity pool. As a result, the CPO of each trading subsidiary must seek its own exemption or register. Further, the Guidance states that wholly owned subsidiaries of commodity pools trading in derivatives are themselves commodity pools. This statement suggests that to the extent a commodity pool relying on an exemption from CPO registration pursuant to Regulation 4.13(a)(3) has one or more wholly owned trading subsidiaries, the sponsor of such pool should analyze separately each such subsidiary to determine whether such subsidiary will individually be able to rely on an exemption pursuant to Regulation 4.13(a)(3), and if so, will need to make a separate exemption filing for such subsidiary under Regulation 4.13(a)(3). The CFTC's position with respect to wholly owned trading subsidiaries of a commodity pool is similar to its position with respect to commodity subsidiaries operated by registered investment companies for the trading of derivatives – both the wholly owned trading subsidiaries and the commodity subsidiaries are themselves commodity pools. This is an expansive interpretation, as a wholly owned subsidiary could be viewed as having only one investor and thus not be within the definition of a “commodity pool,” and this interpretation may pose significant challenges for fund sponsors that have established SPVs to engage in commodities trading.

## No Additional Guidance for Forms CPO-PQR and CTA-PR

In February 2012, the CFTC announced new data collection and risk reporting rules for registered CPOs and CTAs. These rules will require registered CPOs and CTAs to file Forms CPO-PQR and CTA-PR, respectively. Large CPOs will be required to file Form CPO-PQR as early as November 2012. The CFTC Staff declined to release any additional guidance relating to Forms CPO-PQR and CTA-PR at this time as it believes that many registrants (specifically, CTAs and small and mid-sized CPOs) have not yet reviewed these Forms. The CFTC Staff stated that it will release additional guidance once all filers have had adequate time to review and comment on these Forms. The CFTC Staff did state that prior to the issuance of any additional guidance “entities are entitled to make reasonable assumptions consistent with a good faith effort in executing their compliance obligations.” The CFTC's approach leaves unanswered many questions that have been raised by those required to file Form CPO-PQR later this year.

## Limited Extension of Exemption Under Regulation 4.13(a)(4)

The CFTC Staff confirmed that pursuant to the notice of no action relief issued on July 10, 2012, a CPO that claimed exemption from registration because all of its operated pools qualified under Regulation 4.13(a)(4) may operate any new pools that qualify under Regulation 4.13(a)(4), without registering as a CPO, until December 31, 2012. CPOs that have claimed an exemption from registration under Regulation 4.13(a)(4), or the associated no action relief, will need to either (i) file an exemption to designate that their exempt pools are operating pursuant to Regulation 4.13(a)(3) by December 31, 2012 or (ii) if their pools do not qualify for exemption under Regulation 4.13(a)(3), register with the CFTC by December 31, 2012.

## Transitioning to Relief Under Rule 4.7, for CPOs Previously Exempt Under Rule 4.13(a)(4)

CPOs previously exempt from registration under Rule 4.13(a)(4), and who will not meet the criteria of the “de minimis” exemption from registration under Rule 4.13(a)(3), will need to register as CPOs by December 31, 2012. After registering, these CPOs may be able to claim relief under Rule 4.7 from most of the disclosure, reporting and recordkeeping requirements applicable to registered CPOs if all investors are “qualified eligible persons.” (For the definition of a “qualified eligible person,” see [Exhibit D](#) to the “Whitepaper.”) The Guidance clarifies that a CPO previously operating pursuant to a Rule 4.13(a)(4)

exemption will not be required to reaffirm that all existing participants continue to meet the “qualified eligible person” standard in order for the CPO to claim the exemption under Rule 4.7. However, new participants will be required to meet the qualified eligible person standard at the time of investment in order for the CPO to maintain the Rule 4.7 exemption. The Guidance does not address whether existing participants who are not qualified eligible participants will be similarly grandfathered or if they will need to be redeemed out of the pool before the Rule 4.7 exemption can be claimed.

## Guidance Relating to Registered Investment Companies

*The CPO of a Registered Investment Company is also the CPO for its Commodity Subsidiary*

The CFTC previously stated that CPOs of commodity subsidiaries used for trading in commodity interests by registered investment companies will be required to register with the CFTC. In the Guidance, the CFTC Staff stated that if a registered investment company’s CPO is making the determination regarding the engagement of CTAs and the allocation of the assets of its commodity subsidiary, then the CPO for such registered investment company should also be the CPO for its commodity subsidiary, unless the registered investment company’s CPO has delegated its rights and responsibilities in accordance with applicable law and the pool’s organizational documents. (See “Delegation of CPO Rights and Obligations to Another Entity” above.)

*Potential Liability of Mutual Fund Directors and Trustees*

In the Guidance, the CFTC Staff clarified that the board of directors and trustees of a mutual fund with an investment adviser who must register as a CPO are subject to potential liability under the CEA. Such directors and trustees are subject to the prohibitions under the CEA that are applicable to all market participants (including, but not limited to, the anti-fraud and anti-manipulation provisions), and may be liable in a private right of action if they violate the CEA or willfully aid, abet, counsel, induce or procure the commission of a violation of the CEA.

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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.