CFTC Amends Reporting Requirements for Commodity Pool Operators

On November 9, the Commodity Futures Trading Commission (CFTC) published amendments to its rules governing reporting requirements for commodity pool operators (CPOs). The new rules become effective on December 9, 2009 and apply to annual reports for fiscal years ending on December 31, 2009 or later.

International Financial Reporting Standards

The new rules allow all commodity pools operated pursuant to CFTC Rule 4.13 to use International Financial Reporting Standards (IFRS) instead of U.S. Generally Accepted Accounting Principles (GAAP). A CPO may be eligible to claim an exemption for a pool under Rule 4.13 if, among other things, the pool is a small pool, the pool engages in limited commodity interest trading, or the pool admits only sophisticated or non-U.S. investors. Because pools operated pursuant to Rule 4.13 are not required to issue financial reports at all, the CFTC determined that there was no need to specify how reports, if issued, should be prepared.

A commodity pool not operated under Rule 4.13 but organized outside the U.S. also may use IFRS if it meets the following conditions: (i) the pool's financial statements contain a condensed Schedule of Investments, (ii) the statements report special allocations of partnership equity in accordance with CFTC Interpretative Letter 94-3, (iii) if IFRS would require that the pool consolidate its financial statements with another entity (such as a feeder consolidating with its master fund), all applicable disclosures required by U.S. GAAP for the feeder are presented with the reporting pool's consolidated financial statements, and (iv) the use of IFRS does not conflict with any representations in the pool's offering memoranda or other document provided to participants or prospective participants. To use IFRS in preparing annual financial statements and monthly or quarterly reports to participants, an eligible CPO must file a notice with National Futures Association (NFA) within 90 days of the end of the pool's fiscal year. These rule changes codify relief that the CFTC staff had granted previously on a case-by-case basis.

Pools with Multiple Series or Classes of Interests

The new rules address reporting by pools organized with more than one series or class of ownership interest. For pools structured with a limitation on liability among the different series or classes, reports may include only the information for the series or class being reported. For multi-class or series funds not structured with a limitation on liability among the different series or classes, net asset value and other required information must be presented for the pool as a whole, as well as for each series or class.

Extensions for Funds of Funds Filing Annual Reports

Pools that invest in other funds may request additional time to issue annual reports, from a 60-day extension period to a 90-day extension period, for a total of 180 days from the pool's fiscal year end. This change reflects a significant increase in requested extensions by funds of funds in recent years and conforms CFTC rules to the requirements applicable to registered advisers under the Investment Advisers Act of 1940. CPOs that previously claimed an extension will not need to file new notices in subsequent years.

Pools in Liquidation

The rules clarify and streamline procedures for CPOs filing final reports for pools that have ceased operations. Pools in liquidation are required to file a final report within 90 days of the pool's cessation of trading. However, if a CPO has not distributed all funds to participants by the date the report is issued:

- the final report may contain only the Statements of Operations and Changes in Net Assets, an explanation of the winding down of the pool's operations, and written disclosure that all interests in the pool have been redeemed and distributed, or if all funds have not been distributed at the time the report is issued, disclosure of the value of the assets remaining to be distributed and the expected timeframe for their distribution;
- if the CPO does not complete the distribution of funds within the timeframe specified in the final report, the CPO will be required to provide notice to NFA and the pool's participants concerning the value of the pool's remaining assets, the expected timeframe for liquidation, any fees and expenses that will continue to be charged to the pool, and the extent to which reports will continue to be provided to participants pursuant to the pool's operative documents;
- the CPO must continue to comply with periodic and annual reporting requirements; and
- the CPO may prepare unaudited final reports as long as the CPO obtains waivers from all of the pool's participants and certifies to NFA that it has obtained such waivers.

Policies Regarding Special Allocations, Unrealized Gains and Losses, and Expenses

The rules also codify staff interpretations regarding annual reporting of special allocations of partnership equity; combining, in a pool's Statement of Operations, gains and losses on regulated futures transactions with gains and losses on non-CFTC regulated transactions that are part of the same trading strategy; and disclosing in the notes to the financial statements the amounts of management and incentive fees and expenses indirectly incurred by a pool as a result of investing more than 5% of the pool's net asset value in a single fund.

Account Statements for Pools Operating under Rule 4.7

Finally, the rules clarify that monthly or quarterly account statements for a pool operating under Rule 4.7 must disclose either the net asset value per outstanding participation unit of the pool, or the total value of the participant's interest in the pool, as of the end of the applicable period. The clarification is intended to ensure that participants in non-unitized pools receive sufficient information to determine the value of their investments.

If you have any questions or would like further information, please contact any of our Hedge Fund attorneys.