

Update on Commodity Pool Operator Registration Exemptions

The CFTC staff hosted a public roundtable on July 6, 2011 to discuss its proposed elimination or narrowing of exemptions from commodity pool operator registration. Representatives of the SEC and IRS also participated. The roundtable signals that the staff is moving forward with its proposals, even though the proposals are not part of the required rulemakings under the Dodd- Frank Act. It also suggests that the staff may modify certain aspects of its proposals in determining the details of the final rules. The record for the roundtable will remain open for submissions of additional comments for two weeks, after which time the staff expects to proceed with the rulemaking process.

In January 2011, the staff proposed to rescind the exemptions from registration as a commodity pool operator typically relied on by private investment fund sponsors (Rules 4.13(a)(3) and 4.13(a)(4)) and to limit the availability of the exclusion from the definition of a commodity pool operator for certain registered investment companies (Rule 4.5). If the proposals are adopted, sponsors of private funds will have to register with the CFTC if they use futures, options on futures or commodities, swaps and other over the counter derivatives (other than securities-based swaps, such as equity swaps and single-name credit default swaps), and certain types of foreign currency transactions in those funds. Further, registered investment companies that use more than a de minimis amount of commodity interests (in addition to bona fide hedging transactions) or that are marketed as vehicles for exposure to commodity interests will also have to register with the CFTC. Advisers to these funds will need to consider whether these proposed changes could result in an obligation to register with the CFTC as commodity trading advisors. See our previous [alert](#) on these proposals.

Specifically, during the roundtable the staff considered the following:

Rule 4.5

In its consideration of narrowing the exclusion under Rule 4.5, the roundtable focused on modifications to the existing threshold to claim the exclusion, limiting the marketing restriction to managed futures funds, requiring an investment adviser rather than a fund itself to register as the commodity pool operator and changes, if any, to the Series 3 proficiency exam. The roundtable also discussed harmonizing CFTC rules with the disclosure, reporting, document delivery, and books and records requirements of the SEC's rules, and the appropriate use of controlled foreign corporations.

Rule 4.13(a)(3)

The roundtable considered whether to retain a de minimis exemption, the appropriate threshold to claim such an exemption, avoiding duplication of SEC registration requirements, and the availability of an exemption for entities using swaps.

Rule 4.13(a)(4)

The roundtable discussed a family office exemption and an exemption for foreign commodity pool operators as alternative exemptions to the current exemption under Rule 4.13(a)(4).

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If you would like to learn more about the issues raised in this alert, please contact [Deborah Monson](#) or your usual Ropes and Gray advisor.