

December 11, 2012

CFTC No-Action Relief for Funds-of-Funds

The Commodity Futures Trading Commission (CFTC) recently issued a No-Action Letter that provides relief to advisers to funds-of-funds. This No-Action Letter, which was issued on November 29, 2012, gives comfort to an adviser to a "fund-of-funds" (that is, an investment fund that invests some or all of its assets in other investment funds) that otherwise may have needed to register as a commodity pool operator (CPO) with the CFTC and the National Futures Association (NFA) before December 31, 2012.

In this No-Action Letter, the CFTC's Division of Swap Dealer and Intermediary Oversight (the Division) states that it will not recommend enforcement action against advisers to funds-of-funds that fail to register as a CPO until the later of June 30, 2013, or six months following the effective date of any guidance issued regarding the de minimis thresholds in Rule 4.13(a)(3). Fund-of-funds advisers must submit a claim **by December 31, 2012**, with the CFTC in order to take advantage of the No-Action relief.

Rescission of Appendix A

The need for this No-Action relief results from the February 2012 rescission of Appendix A of Part 4 of the CFTC Rules (Appendix A). Appendix A provided guidance on the application of the CFTC Rule 4.13(a)(3) de minimis exemption for funds-of-funds that indirectly hold commodity interests by virtue of their pass-through exposure to commodity interests held by underlying investment funds. Without Appendix A, it was unclear how a fund-of-funds could avoid registering as a CPO.

Following the rescission of Appendix A, the Division released Questions and Answers Guidance (Q&A Guidance), which provided some guidance (in spite of the technical rescission of Appendix A) for fund-of-funds advisers on how to apply the de minimis thresholds and interpretations contained in Appendix A. However, advisers to funds-of-funds expressed concern about uncertainties created by the Q&A Guidance and the anticipation of further guidance the CFTC has indicated it would give to funds-of-funds regarding this issue. Accordingly, the Division deemed it appropriate to provide No-Action relief for advisers to funds-of-funds that may otherwise have been required to register as a CPO with the CFTC by December 31, 2012.



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No-Action Relief

The No-Action Letter provides relief, but is not self-executing. In order for an adviser to a fund-of-funds that is not a registered mutual fund to avail itself of the No-Action relief provided by the Letter, the adviser must submit a claim and remain in compliance with the following criteria:

- (a) The adviser must be functioning as a commodity pool operator to one or more funds-of-funds (but is not yet registered as a CPO with the CFTC);
- (b) The amount of commodity interest positions to which the fund-of-funds is directly exposed must not exceed the de minimis levels specified in CFTC Rule 4.13(a)(3);
- (c) The adviser must not know and could not have reasonably known that the fund-of-funds' indirect exposure to commodity interests derived from contributions to underlying funds exceeds the de minimis levels specified in CFTC Rule 4.13(a)(3), either calculated directly or through the use of Appendix A; and
- (d) The commodity pool for which the adviser seeks relief is compliant with the other provisions of CFTC Rule 4.13.

Perfecting a Claim

To perfect a claim of the relief granted by the No-Action Letter, the claim must:

- (a) state the name, main business address, and main business telephone number of the adviser claiming the relief;
- (b) state the capacity in which the adviser is functioning (i.e., as a commodity pool operator) and the name of the pool(s) (i.e., the name of the fund-of-funds), for which the claim is being filed;
- (c) be signed by the adviser, which may be accomplished by making the claim in a signed PDF statement from the adviser; and
- (d) be filed with the Division prior to December 31, 2012, via e-mail using the e-mail address dsinoaction@cftc.gov and stating "Fund-of-Funds" in the subject line of the e-mail.

A claim submitted will be effective upon filing, so long as the claim is materially complete. Once the claim is effective, the fund-of-funds adviser will not be required to register with the CFTC as a CPO until the later of June 30, 2013, or six months following the effective date of any CFTC guidance issued regarding the de minimis thresholds.

The Day Pitney attorneys listed to the right are available to discuss any issues or questions you may have regarding this No-Action relief.

This communication is provided for educational and informational purposes only and is not intended and should not be construed as legal advice. This communication may be deemed advertising under applicable state laws. Prior results do not guarantee a similar outcome.

If you have any questions regarding this communication, please contact Day Pitney LLP at 7 Times Square, New York, NY 10036, (212) 297 5800.

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