

## CFTC Proposes Repeal of Certain Commodity Pool Operator and Commodity Trading Advisor Exemptions

Written by Jeffrey D. Collins, Peter M. Rosenblum

February 25, 2011

### Exemptions Are Commonly Relied Upon By Investment Advisers to Hedge Funds and Other Private Funds

#### Elimination of Exemptions

On January 26, 2011, the U.S. Commodity Futures Trading Commission (“CFTC”) proposed certain amendments to current CFTC rules, including the elimination of two widely used exemptions from commodity pool operator (“CPO”) registration. If adopted, the proposed amendments would have a significant impact on advisers to funds currently operated as “exempt commodity pools,” including many hedge funds.

The CFTC proposal seeks to eliminate Rule 4.13(a)(3) which currently exempts CPOs from registration if (i) the pool is engaged in a de minimus amount of commodity trading (no more than 5% of the liquidation value of the pool’s portfolio is used to establish commodity interest trading positions or the aggregate net notional value of such positions does not exceed 100% of the liquidation value of the pool’s portfolio), and (ii) the pool’s investors meet certain minimum qualification requirements. The proposed amendments also seek to eliminate Rule 4.13(a)(4), which exempts from registration CPOs where the only investors are (i) natural persons that are “qualified eligible persons” as defined under CFTC rules (these are generally natural persons that meet the qualified purchaser standard) and (ii) entities that are “qualified eligible persons” or accredited investors.

Under the proposed rule amendments Rule 4.14(a)(8)(i)(D) would also be eliminated. That rule currently exempts advisers from registration as commodity trading advisers (“CTA”) if they provide commodity trading advice solely to CPOs that are exempt from registration under Rule 4.13(a)(3) or Rule 4.13(a)(4).

If, as currently proposed, Rule 4.13(a)(3), Rule 4.13(a)(4) and Rule 4.14 (a)(8)(i)(D) are repealed, CPOs and CTAs who were previously exempt from registration in reliance on these exemptions will be required to register with the CFTC, become members of the National Futures Association and comply with certain disclosure and reporting requirements.

#### Increased Reporting

The CFTC has also proposed new reporting requirements for registered CPOs and registered CTAs. CPOs and CTAs would be required to file quarterly reports on Form CPO-PQR and Form CTA-PR, respectively. These proposed reporting forms are similar to the Form PF proposed by the Securities and Exchange Commission (the “SEC”) to be used by private fund advisers that are subject to SEC oversight.

The reporting forms proposed by the CFTC and SEC are designed to be complementary and not duplicative. For managers registered with both the SEC and CFTC, filing Form PF would be deemed a filing with both the SEC and the CFTC. All private fund advisers required to file Form PF that are also registered CPOs would also be required to file quarterly only Schedule A of proposed Form CPO-PQR and those that are registered CTAs would also be required to file quarterly only Schedule A of Form CTA-PR.

The information required by Forms CPO-PQR and CTA-PR would be confidential (non-public) to the extent permitted under applicable law.

## Additional Proposals

The CFTC is also proposing to: (i) amend Rule 4.7 (a “regulation light” rule for registered CTAs and CPOs whose only clients are “qualified eligible persons” as defined in Rule 4.7) to (a) require CPOs to include certified financial statements in annual reports to investors and (b) conform the CFTC definition of accredited investor to the changes adopted by the SEC; (ii) require all individuals and entities claiming exemption under Rules 4.5, 4.13 and 4.14 to reaffirm their claim of exemption on an annual basis; and (iii) amend the requirements for risk disclosure statements (for the particular cases in which such statements are in fact required to be provided) to include a description of certain risks specific to swap transactions.

The CFTC is currently seeking public comment on all of these proposed rule amendments.

### RELATED INDUSTRIES

- [Investment Advisers & Private Funds](#)
- [Professional Services](#)

### RELATED PRACTICES

- [Fund Formation](#)
- [SBIC](#)
- [Capital Markets](#)

---

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.