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## CFTC Staff Issues No-Action Letter Permitting Certain CPOs and CTAs to Remain Exempt from Registration Through December 31, 2012

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**On July 13, 2012, the Division of Swap Dealer and Intermediary Oversight of the US Commodity Futures Trading Commission issued a no-action letter (“Letter”) that will enable certain commodity pool operators and commodity trading advisors to remain exempt from registration as CPOs and CTAs, respectively, through December 31, 2012.<sup>1</sup> The Letter extends from July 13<sup>th</sup> until December 31<sup>st</sup> the ability of a CPO to remain exempt from registration with respect to certain newly launched pools without regard to the level of commodity trading in which the pools engage.**

### Overview

As background, recent CFTC rule changes expanding CFTC registration obligations for many fund managers went into effect on April 24, 2012, precluding managers from claiming a commonly relied upon CPO registration exemption—CFTC Rule 4.13(a)(4)—with respect to any new pool on or after that date. The CFTC’s rulemaking, however, enabled pre-existing claims of Rule 4.13(a)(4) to survive through the end of 2012. The Letter now effectively enables CPOs to resume making new, temporary claims for the registration relief previously available under Rule 4.13(a)(4). It does not appear, however, to enable a CPO to claim such relief with respect to a pool that would have triggered a CPO registration obligation at any point between April 24, 2012 and July 13, 2012.

<sup>1</sup> See CFTC No-Action Letter 12-03 (July 13, 2012) to the Managed Funds Association, the Investment Adviser Association, the Alternative Investment Management Association, Ltd., and the Investment Company Institute. The Letter was issued to the recipient trade associations in response to concerns that recent CFTC rulemaking limiting the availability of certain CPO registration exemptions did not afford CPOs nearly enough time to comply with related registration and compliance burdens, particularly with respect to certain private pools launched on or after April 24, 2012 (for which the need for such registration and compliance was immediate).

## Relief Issued

The Letter makes available temporary CPO registration relief for the CPO of any pool that is both:

- Launched<sup>2</sup> after the issuance of the Letter; and
- Either (a) an investment company registered with the US Securities and Exchange Commission, or (b) a pool operated in compliance with the offering and investor suitability criteria applicable to pools operated in reliance on the CPO registration exemption in Rule 4.13(a)(4).<sup>3</sup>

The Letter imposes no limit on the extent to which the CPO's relevant pool may engage in commodity interest trading activity.

The Letter also extends temporary CTA registration relief to a CTA that either:

- Is providing commodity trading advice solely to pools with respect to which it is also the CPO; or
- Directing its commodity trading advice solely to, and for the sole use of, pools operated by CPOs claiming CPO registration relief under Rule 4.13(a)(1), (2), (3), or (4), CFTC Rule 4.5, or the CPO registration relief made available under the Letter.

The Letter does not impose any obligation on CPOs and CTAs to disclose to their pool participants and clients, respectively, that they have claimed relief under the Letter, but a CPO or CTA may wish to do so nonetheless.

## Filing Required

The relief made available by the Letter is not self-executing. It must be claimed through an electronic filing with the Division prior to the date upon which the CPO or CTA first engages in business that would otherwise require it to be registered.

Claims must be emailed to [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov) and must:

- State the name and main business address and telephone number of the CPO or CTA claiming the relief;
- State the capacity (i.e., CPO and/or CTA) for which relief is being claimed and, if claiming CPO relief, the name of the pools for which relief is being claimed; and
- Be electronically signed by the CPO or CTA.

<sup>2</sup> The Letter uses the term "launch" without elaboration. Presumably a "launch" occurs no later than the first date on which a pool commences trading activity. Another potential reference point would be the date on which a subscription agreement for the relevant pool is first delivered to a prospective participant in the pool (being the date by which CFTC Rule 4.13 specifies that a CPO seeking to rely on certain of that Rule's registration exemptions must submit a claim for relief under that Rule).

<sup>3</sup> The offering and investor suitability criteria of Rule 4.13(a)(4) require that: (i) interests in the pool are exempt from registration under the US Securities Act of 1933; (ii) such interests are offered and sold without marketing to the public in the United States; and (iii) the CPO reasonably believes at the time of investment that (a) each natural person participant in the pool is a "qualified eligible person" as defined in CFTC Rule 4.7(a)(2), and (b) each non-natural person participant in the pool is a qualified eligible person or an "accredited investor" as defined in SEC Rule 501(a)(1)-(3), (7), or (8). As noted above, as of April 24, 2012, a CPO can no longer newly claim registration relief under Rule 4.13(a)(4). Any claim for relief under Rule 4.13(a)(4) that was made prior to such date will automatically terminate on December 31, 2012.

## Termination of Relief

The relief provided by the Letter will expire on January 1, 2013. Any person relying on the relief must ensure that it is in full compliance with any applicable CPO and/or CTA registration requirements (or the terms of any alternative registration exemption) that may apply to it on and after that date.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

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