

## CFTC Addresses Compliance Dates for CPO/CTA Registration; Swap Definitions Finalized; CFTC Provides Cross-Border Guidance

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### CPO/CTA No-Action Letter

On July 10, 2012, the U.S. Commodity Futures Trading Commission (the “**CFTC**”) issued a no-action letter that will extend until December 31, 2012 relief from registration as a commodity pool operator (“**CPO**”) or commodity trading advisor (“**CTA**”) that was previously available to investment managers. The no-action letter, which was made public on July 13, 2012, comes in the wake of the adoption by the CFTC and SEC of final rules defining the terms “swap,” “security-based swap,” and “mixed swap,” which trigger numerous compliance dates under rules adopted pursuant to Title VII of the Dodd-Frank Act. Both the no-action letter and the definition rules will have significant consequences for investment managers whose funds trade in swaps, futures or commodity options (collectively, “**commodity interests**”) and therefore may be “commodity pools” under the CFTC rules.

In February 2012 the CFTC adopted amendments that (i) rescinded the Rule 4.13(a)(4) exemption from registration that was previously available for CPOs of private funds that are offered only to certain highly sophisticated investors and (ii) restricted the scope of the exclusion from CPO registration for registered investment companies (“**RICs**”) under Rule 4.5. (The amendments were discussed in Davis Polk’s February 23, 2012 client memorandum, available [here](#).) As a result of the amendments, the Rule 4.13(a)(4) exemption ceased to be available for any private fund launched on or after April 24, 2012, and the CPO of such a fund was required either to comply immediately with the requirements of a different exemption, or be registered with the CFTC. However, the Rule 4.13(a)(4) exemption would remain available until December 31, 2012 for CPOs of existing private funds that claimed the exemption prior to April 24, 2012. The CPO of a RIC relying on Rule 4.5 would need to comply with the amendments for purposes of registration by the later of December 31, 2012 or 60 days after the adoption of final rules under Dodd-Frank defining the term “swap” and establishing margin requirements for such instruments. (Due to the CFTC’s recent adoption of final rules defining the term “swap,” as discussed below, the compliance date will in fact be December 31, 2012.)

The CFTC received numerous requests for (i) an extension of the April 24, 2012 compliance date and (ii) an extension of the period of time during which CPOs of funds relying on the “limited trading” exemption under CFTC Rule 4.13(a)(3) (for private funds) or Rule 4.5 (for RICs) could exclude swaps from their calculations when determining their compliance with the commodity interest trading limits set forth in those exemptions.

In the no-action letter the CFTC declined to extend the period for including swaps in the trading thresholds under Rule 4.13(a)(3) and Rule 4.5. The CFTC did, however, extend the compliance date until December 31, 2012 for CPOs of new private funds whose investors meet the qualification requirements previously set forth in Rule 4.13(a)(4). The CFTC also confirmed that CPOs of RICs launched after April 24, 2012 would have a December 31, 2012 registration compliance date. In addition, the CFTC, noting that CTAs to private funds and RICs may face “similar challenges” to those faced by the CPOs to such vehicles, granted relief from registration until December 31, 2012 to CTAs of private funds or RICs whose CPOs are also exempt from registration.

The no-action relief provided by the CFTC is not self-executing. Eligible CPOs and CTAs must file a notice with the CFTC in order claim the relief. A claim, once submitted, will be effective upon filing so long as it is materially complete. A materially complete claim must (i) state the CPO’s or the CTA’s name, main business address and telephone number, (ii) state whether the filer is a CPO or a CTA and the

names of the pools (funds) for which the claim is being filed, (iii) be electronically signed by the CPO or the CTA, and (iv) be filed with the CFTC via email to [dsionaoaction@cftc.gov](mailto:dsionaoaction@cftc.gov) prior to the date upon which the CPO or the CTA first engages in business that would otherwise require registration.

## Final Swaps Definitions<sup>1</sup>

Over the past several weeks, the CFTC and SEC have issued several cornerstone rulemakings relating to swaps under the Dodd-Frank Act. The CFTC and SEC adopted final rules defining the terms “swap,” “security-based swap,” and “mixed swap.” These definitions are necessary for a determination of whether an instrument falls within the regulatory authority of the CFTC, the SEC, or both. The definitions are also crucial to a determination of whether an asset manager will be subject to regulation and registration as a CPO or CTA by virtue of its swaps activities.

Publication of the definition rules in the Federal Register will also trigger many key compliance dates for swaps market participants. Swap dealers and major swap participants (“**MSPs**”) will need to register with the CFTC within 60 days after such publication and will be subject to significant new obligations. Investment managers should review their swaps activities to determine whether their funds or other clients will need to register as a swap dealer or MSP.

Swap market participants other than swap dealers and MSPs will also be subject to new requirements in connection with their swaps activities – regardless of whether they must register with the CFTC – including mandatory central clearing and exchange-style trade execution for swaps; margin requirements; recordkeeping and reporting requirements; and new position limit rules. In addition to these requirements, market participants that transact with swap dealers or MSPs should be aware of new disclosure and documentation requirements for registered swap dealers and MSPs that will affect them indirectly. For example, swap dealers must obtain specific representations from counterparties under “know your counterparty” provisions and must, for uncleared swaps, provide daily marks to their counterparties.

## Cross-Border Guidance

The CFTC also recently addressed the reach of the new Dodd-Frank requirements to swaps transactions involving non-U.S. persons. In proposed guidance and a proposed exemptive order, the CFTC clarified that the requirements apply to the swap activities of any person that is a “U.S. person.” The CFTC proposed to interpret the term “U.S. person” broadly for purposes of the guidance and order. The guidance and order would define the term to include:

- A natural person who is a resident of the United States
- A corporation, partnership, limited liability company or other similar form of enterprise
  - that is organized in the United States or
  - in which the direct or indirect owners are responsible for the liabilities of the entity and one more of the owners is a U.S. person
- Any individual account (discretionary or not) where the beneficial owner is a U.S. person
- Any commodity pool, pooled account, or collective investment vehicle (whether or not it is organized in the United States) of which a majority ownership is held, directly or indirectly, by one or more U.S. persons

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<sup>1</sup> Please see our July 17 client memorandum entitled [Key Dodd-Frank Derivatives Issues for End Users](#) for additional information regarding swaps clearing, trade execution, reporting and recordkeeping, and position limits requirements that will affect end users of swaps.

- Any commodity pool, pooled account, or collective investment vehicle the operator of which would be required to register as a commodity pool operator with the CFTC
- A pension plan for the employees, officers, or principals of a legal entity with its principal place of business inside the United States
- An estate or trust, the income of which is subject to U.S. income tax regardless of its source

An asset manager that engages in swaps, whether on a proprietary basis or on behalf of its clients, should assess whether it or its clients are U.S. persons under this definition and thus would be subject to these requirements, bearing in mind that the definition captures entities and persons that may not be U.S. persons under the definition in Regulation S of the Securities Act.

- See the CFTC's [July 10 no-action letter](#)
- See Davis Polk's February 23, 2012 Client Memorandum [CFTC Adopts Amendments to Registration Exemptions for CPOs and CTAs and Proposes Harmonization Rules for Registered Fund CPOs](#)
- See Davis Polk's July 17, 2012 Client Memorandum [Key Dodd-Frank Derivatives Issues for End Users](#)

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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