The CPO and CTA Regulatory Regimes: What Operators of and Advisers to Commodity Pools Should Expect in 2013

January 17, 2013

There were a number of significant changes to the regulatory regime for commodity pool operators (CPOs) and commodity trading advisors (CTAs) in 2012.[1] As a result of these changes, various types of collective investment vehicles that previously were not regulated by the CFTC, and their operators and advisers, became subject to CFTC oversight as of January 1, 2013. We anticipate additional significant developments for the CPO and CTA regulatory regimes in 2013, including as they apply to such persons. In particular, we expect there to be further developments with respect to the following areas, each of which is discussed in more detail below.

1. Application of the CPO Regulatory Regime to Funds of Funds
2. Continued Litigation With Respect to the CFTC's Narrowing of the CFTC Regulation 4.5 Exclusion From CPO Status for Registered Investment Companies
3. Issuance of CFTC Regulations to Harmonize CFTC and Securities and Exchange Commission (SEC) Requirements for Registered Investment Companies
4. Compliance With New Reporting Requirements
5. Additional Relief for Certain Persons From CPO and CTA Requirements
6. Additional Guidance With Respect to Compliance With CPO and CTA Requirements
7. Compliance With New Requirements for Swaps Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)

Background

The changes to the CPO and CTA regulatory regimes referenced above, which caused many persons and entities to fall within the CPO and CTA definitions and, therefore, the CFTC's jurisdiction, were triggered by the following events. Although each of these events occurred in 2012, the CFTC afforded market participants that were affected by the changes until December 31, 2012 to either: (1) register as CPOs or CTAs; or (2) to claim an exemption or exclusion therefrom.

- In February 2012, the CFTC adopted final regulations that, among other things: (1) narrowed an exclusion available to advisers of registered investment companies pursuant to CFTC Regulation 4.5

[1] As market participants are aware, CPOs are persons that are predominantly engaged in the business of operating a commodity pool, which is a collective investment vehicle that engages in commodity interest trading (i.e., futures, options and as of October 12, 2012, as explained below swaps). (A single commodity interest trade can cause an investment vehicle to be a commodity pool.) CTAs are persons that are predominantly engaged in the business of offering advice with respect to the trading of commodity interests for compensation. Both CPOs and CTAs must register as such with the Commodity Futures Trading Commission (CFTC), unless they are eligible for an exclusion or exemption therefrom, and are subject to the CFTC's oversight.

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by imposing trading thresholds on those registered investment companies seeking to qualify for the exclusion; and (2) rescinded an exemption from CPO registration under CFTC Regulation 4.13(a)(4) that was available to operators of private funds with only sophisticated investors. These final regulations, which also impacted exemptions from CTA registration to the extent that such exemptions were based on CFTC Regulations 4.5 and 4.13(a)(4), became effective in April 2012.[2]

- In October 2012, the CFTC's final rules to further define the term "swap," which was added to the Commodity Exchange Act (CEA) by the Dodd-Frank Act, became effective. As a result, swaps became a part of the list of commodity interests that can cause a person to be a CPO or a CTA.

The effects of these changes are being felt by registered investment companies and private investment funds, among others, which are trying to determine how best to comply with a new regime that remains unsettled in many respects.

1. Application of the CPO Regulatory Regime to Funds of Funds

Pursuant to the CEA and CFTC regulations promulgated thereunder, collective investment vehicles that indirectly obtain exposure to commodity interests by investing in commodity pools (Funds of Funds) are themselves commodity pools. As a result, operators of Funds of Funds are CPOs and may be required to register as such, depending on their eligibility for a regulatory exemption or exclusion therefrom.

Previously, CPOs of Funds of Funds could look to an "Appendix A" to Part 4 of the CFTC's regulations when determining whether they were eligible for an exemption from CPO registration available under CFTC Regulation 4.13(a)(3), which exempts from registration CPOs of commodity pools that only engage in a *de minimis* level of commodity interest trading. Appendix A described six scenarios prepared by the CFTC staff to assist CPOs of Funds of Funds in applying CFTC Regulation 4.13(a)(3)'s *de minimis* thresholds.

The CFTC rescinded Appendix A without explanation as part of the final regulations that amended CPO and CTA compliance obligations, which are discussed above. Following the adoption of these final regulations, the CFTC staff indicated that it would revise the guidance in Appendix A but that, until such guidance is issued, market participants could continue to rely on Appendix A. Further, in response to a request from the Investment Adviser Association and the Managed Funds Association, the CFTC issued a no-action letter on November 29, 2012 that permits CPOs of Funds of Funds to continue to rely on the rescinded Appendix A for purposes of CFTC Regulation 4.13(a)(3) as well as for purposes of revised CFTC Regulation 4.5, subject to certain conditions. The relief afforded by the no-action letter expires on the later of (1) June 20, 2013, and (2) the CFTC staff's issuance of revised Funds of Funds guidance.

Operators of, and advisers to, commodity pools that are structured as Funds of Funds should expect the CFTC staff to issue guidance as to the application of the *de minimis* trading thresholds in CFTC Regulations 4.13(a)(3) and 4.5 later this year.[3]

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[2] For more information, please see Sutherland's February 29, 2012 Legal Alert.
[3] For more information, please see Sutherland's December 7, 2012 Legal Alert.

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2. Continued Litigation With Respect to the CFTC's Narrowing of the CFTC Regulation 4.5 Exclusion From CPO Status for Registered Investment Companies

In April 2012, the Investment Company Institute (ICI) and the U.S. Chamber of Commerce (the Chamber) filed a joint lawsuit against the CFTC alleging that the CFTC violated the Administration Procedure Act (APA) in adopting the aforementioned amendments to CFTC Regulation 4.5 in February 2012. Specifically, the ICI and the Chamber alleged that: (1) the CFTC's amendments to CFTC Regulation 4.5 were "arbitrary and capricious" because the CFTC failed to consider their necessity; and (2) the CFTC failed to perform an adequate cost-benefit analysis, as required by the APA. One of the goals of the litigation was to forestall having advisers to registered investment companies be required to register as CPOs, by December 31, 2012, as a result of the new *de minimis* thresholds contained in CFTC Regulation 4.5. However, on December 12, 2012, the U.S. District Court for the District of Columbia dismissed the ICI and Chamber lawsuit, finding that there was nothing arbitrary or capricious about the CFTC's actions in promulgating the amendments to CFTC Regulation 4.5. The ICI and the Chamber subsequently filed an appeal and requested expedited consideration. On January 11, 2013, the CFTC filed a response to the ICI and Chamber's request for expedited consideration, arguing that the ICI and the Chamber do not meet the standards for expedited consideration, which are that a delay would cause irreparable injury and that the decision under review is subject to substantial challenge. Nevertheless, the ICI and Chamber's request was granted on January 15, 2013, and, therefore, a decision on the case may be issued by the District of Columbia Court of Appeals as early as Summer 2013.[4]

3. Issuance of CFTC Regulations to Harmonize CFTC and SEC Requirements for Registered Investment Companies

In light of the fact that investment companies that are registered as such under the Investment Company Act of 1940 (1940 Act) are already subject to regulation by the SEC, the CFTC issued proposed harmonization rules in tandem with its final rules to amend the compliance obligations for CPOs and CTAs (Proposed Harmonization Rules). The Proposed Harmonization Rules are intended to reconcile CFTC regulations with SEC regulations, to the extent that they apply to advisers of registered investment companies that previously qualified for the CFTC Regulation 4.5 exclusion from CPO status because, in some instances, CFTC rules are inconsistent with SEC rules. If adopted, the Proposed Harmonization Rules would facilitate compliance with CFTC disclosure, reporting and recordkeeping requirements for CPOs. Specifically, the Proposed Harmonization Rules address, among other things, CFTC regulations pertaining to: (1) the delivery of "Disclosure Documents" (akin to prospectuses) to pool participants and the contents thereof, including performance data; (2) the cycle for updating Disclosure Documents; and (3) financial reporting to pool participants.

Although advisers to registered investment companies may have been required to register as CPOs as of December 31, 2012, such advisers will not be required to meet the CPO disclosure, reporting and recordkeeping obligations discussed above until 60 days after the effective date of the Proposed Harmonization Rules. The CFTC is expected to finalize the Proposed Harmonization Rules in the coming months and, therefore, advisers to registered investment companies that have registered as CPOs should expect to begin complying with such CPO disclosure, reporting and recordkeeping requirements, as amended by the Proposed Harmonization Rules, in 2013.

[4] For more information, please see Sutherland's December 14, 2012 Legal Alert.

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4. Compliance With New Reporting Requirements

As part of the final regulations adopted in February 2012 and referenced above, CPOs and CTAs are now required to file new Forms CPO-PQR and CTA-PR, respectively. The purpose of the new forms is for the CFTC to collect additional data with the goal of using such data to more effectively monitor risks posed by participants in the commodity futures and derivatives markets. Forms CPO-PQR and CTA-PR require CPOs and CTAs, respectively, to disclose information about their assets under management (AUM), use of leverage, counterparty credit-risk exposure, and trading and investment decisions for each commodity pool that they direct or advise.

CPOs and CTAs will be required to submit Forms CPO-PQR and CTA-PR quarterly or annually depending on their size (*i.e.*, small, mid-size or large). Whether advisers to private funds that are registered with both the CFTC and SEC have to submit the reports quarterly or annually will depend on their AUM. In addition, depending on their size, as measured by AUM, certain CPOs will be required to complete Form CPO-PQR in its entirety, whereas other CPOs will only be required to complete a portion or portions of the Form CPO-PQR. All CTAs will be required to complete Form CTA-PR in its entirety.

Certain large CPOs should have already filed their first Forms CPO-PQR for the calendar quarter that ended on September 30, 2012. However, many CPOs and all CTAs will be required to file their completed Forms CPO-PQR and CTA-PR in the first quarter of 2013 for the 2012 calendar year.

Notwithstanding that it will not be issued in time to assist those CPOs that have had to make such filings already, the CFTC has indicated that additional guidance on Forms CPO-PQR and CTA-PR will be forthcoming in 2013.

5. Additional Relief for Certain Persons From CPO and CTA Requirements

The CFTC staff received requests for no-action relief from the CPO and CTA registration requirements from different types of collective investment vehicles, and their operators, that were previously excluded from CFTC oversight, either because: (1) swaps were previously excluded from the list of commodity interests that can trigger CPO and CTA status; or (2) of the aforementioned amendments impacting CPO and CTA registration. The CFTC staff issued a series of no-action letters affording relief to broad categories of persons and entities late last year, ranging from real estate investment trusts (REITs) to securitization vehicles, among others. We anticipate that the CFTC staff will continue to afford no-action relief in 2013. Whether such relief will be afforded to broad categories of persons remains to be seen; it seems likely that any relief afforded will be applicable to only those persons or entities that have requested it. Certain of the relief afforded to broad categories of persons by the CFTC in 2012 is summarized below.

Relief Issued Thus Far
▪ *Business Development Companies.* Business development companies (BDCs) are entities created by, and subject to regulation under, the Investment Company Act of 1940. However, a BDC is not an investment company registered as such under the 1940 Act. Accordingly, BDCs are technically ineligible for the exclusion from CPO status that is available to advisers of registered investment companies pursuant to CFTC Regulation 4.5. On December 4, 2012, the CFTC's Division of Swap Dealer and Intermediary Oversight (DSIO) issued a no-action letter that, in effect, permits operators of and advisers to BDCs to rely on the CFTC Regulation 4.5 exclusion as if they were registered investment companies. However, rather than make the CFTC Regulation 4.5 exclusion directly

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applicable to BDCs, the DSIO opted to generally restate the requirements of CFTC Regulation 4.5 in its no-action letter.[5]

- *Family Offices.* Family offices are professional organizations that are wholly owned by clients in a family and exclusively controlled, directly or indirectly, by one or more members of a family and/or entities controlled by a family. Previously, most family offices that engaged in commodity interest trading were able to rely on an exemption from CPO registration available to "sophisticated investors" under CFTC Regulation 4.13(a)(4). However, as noted above, the CFTC adopted final regulations in February 2012 that amended the compliance obligations for CPOs and CTAs and rescinded the exemption from registration under CFTC Regulation 4.13(a)(4). As a result, persons that relied on CFTC Regulation 4.13(a)(4) prior to April 24, 2012, the effective date of the CFTC's final regulations rescinding the CFTC Regulation 4.13(a)(4) exemption, would have been required to register as CPOs or claim an alternate exemption or exclusion by December 31, 2012. However, on November 29, 2013, the DSIO issued a no-action letter that exempts family offices from registration, subject to their meeting certain conditions and compliance with applicable SEC requirements.[6]

- *Equity REITs.* On October 11, 2012, the DSIO issued an interpretation indicating that REITs that hold income-producing real estate and engage in real estate management activities—including leasing and maintaining real estate, providing a variety of tenant services, and developing and redeveloping real estate (equity REITs)—are not within the statutory definition of commodity pool. In order to qualify for the relief afforded by the DSIO's interpretation, an equity REIT must meet several conditions, including that the equity REIT primarily derives its income from the ownership and management of real estate and uses derivatives for the limited purpose of mitigating its exposure to changes in interest rates or fluctuations in currency. The operator of, or adviser to, an equity REIT that satisfies the conditions for the interpretation is excluded from CPO status.

- *Mortgage REITs.* Mortgage REITs (mREITs) are collective investment vehicles that own direct or indirect interests in mortgages on real estate or other interests in real property. Generally, in addition to engaging in activities ranging from acquiring mortgages or servicing underlying assets to buying whole loans or mortgage-backed securities, mREITs use interest rate swaps, swaptions, caps, floors, or collars to hedge interest rate or foreign exchange swaps to transform income. In some instances, mREITs use certain credit default swaps to hedge the risk of default on their mortgage-based securities holdings. Such transactions constitute commodity interest trading, which would cause mREITs to be commodity pools and, therefore, trigger CPO registration for mREIT operators. On December 7, 2012, the DSIO issued a no-action letter affording relief from the CPO registration requirement to operators of mREITs. The relief afforded by the letter is conditioned, in part, on an mREIT limiting: (1) its income from commodity interest positions; and (2) initial margin and premiums for its commodity interest positions.

- *Securitization Vehicles.* The DSIO issued three letters, one in October 2012 and two in December 2012, to afford relief and guidance to operators of, advisers to, and investors in, securitization vehicles, which could be regarded as commodity pools if they enter into swap transactions. The October 2012 letter is a CFTC staff interpretation and concludes that certain standard securitization vehicles meeting five criteria, including that such securitizations comply with SEC Regulation AB or SEC Rule 3a-7, are not commodity pools and, therefore, do not need to register a CPO. According to

[5] For more information, please see Sutherland's December 5, 2012 Legal Alert. *See also* note 3, *supra.*
[6] *See* note 2, *supra.*

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the CFTC staff, the five criteria "essentially define a type of passive investment in and financing of financial assets which receive only limited types of support from swap transactions."[7] The first December 2012 letter broadens the scope of the October 2012 letter to include certain more active securitization vehicles that do not meet the criteria in the October 2012 letter but satisfy other enumerated criteria. It also provides relief to so-called legacy securitization vehicles that were formed prior to October 12, 2012, and extended the CPO registration deadline with respect to operators of securitization vehicles not meeting the criteria set forth in the October 2012 and December 2012 letters until March 31, 2013. The second December 2012 letter was issued because the first December 2012 letter did not address the interests of investors in securitization vehicles and clarifies that investors in securitization vehicles that meet the requirements laid out in the first December 2012 letter would not have to register as CPOs. Both the October 2012 and December 2012 letters make clear that they are not intended to be the exclusive relief afforded to securitization vehicles and that, to the extent that a securitization vehicle does not satisfy the criteria of the October 2012 and December 2012 letters, it may contact the DSIO to seek additional relief or guidance.

- *Alternative to Fingerprinting to Establish Fitness of Principals Residing Outside the United States.* As part of the CPO and CTA registration processes, the natural person principals of a CPO or CTA must submit individual registration applications to the National Futures Association (NFA). Such applications must be accompanied by the natural person principal's fingerprints. Last December, the DSIO issued a no-action letter that waives the fingerprinting requirement for principals that have not resided in the United States since reaching 18 years of age (non-U.S. principals). In lieu of submitting fingerprints, such non-U.S. principals may submit a certification that a reasonable criminal history background check was conducted using a reputable commercial service and that such background check did not reveal any matters that constitute a disqualification from principal status.

6. Additional Guidance With Respect to Compliance With CPO and CTA Requirements

The NFA—the self-regulatory organization to which the CFTC has delegated intermediary registration and certain oversight functions with respect to CPOs and CTAs—issued guidance in 2012 to facilitate compliance with new CFTC and NFA requirements and will continue to do so in 2013. Recent guidance provided by the NFA in 2012 is summarized below.

Guidance Issued Thus Far by the NFA

- *Annual Affirmation of Exemption or Exclusion Requirement.* On December 3, 2012, the NFA issued guidance concerning the annual affirmation of eligibility for certain exemptions and exclusions from CPO and CTA registration requirements. Pursuant to the CFTC's final regulations to amend CPO and CTA compliance obligations that were issued in February 2012, persons claiming an exemption or exclusion from CPO or CTA registration under CFTC Regulations 4.5, 4.13(a)(1), 4.13(a)(2), 4.13(a)(3), 4.13(a)(5) or 4.14(a)(8) must affirm their eligibility for an exemption or exclusion on an annual basis, within 60 days of the calendar year end, beginning with the calendar year ending on December 31, 2012. Failure to affirm the relevant exemption or exclusion within 60 days of the calendar year end results in automatic withdrawal of the exemption or exclusion, which would then subject a person to all applicable CPO or CTA compliance requirements. For the calendar year that ended on December 31, 2012, the deadline for affirming an exemption or exclusion is March 1, 2013. Affected persons may complete the annual affirmation via the NFA's Exemptions Filing System. Going forward, the NFA will provide an annual e-mail reminder of the affirmation process, starting with the affirmation required in 2014 for the 2013 calendar year.

[7] *See* page 2 of the first December 2012 letter.

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- *Application of NFA Bylaw 1101 to Registered Investment Companies*. By its terms, NFA Bylaw 1101 imposes a due diligence requirement on NFA members: it stipulates that NFA members may not conduct customer business with non-NFA members that are required to be registered. In December 2012, the NFA issued NFA Notice I-12-34, which provides guidance to a CPO that advises a registered investment company but does not have access to information relating to the registered investment company's investors on when the CPO will be deemed to be in compliance with Bylaw 1101. The CPO will satisfy its diligence obligation so long as the CPO ensures that: (1) any futures commission merchant through which the registered investment company transacts is properly registered in the appropriate capacity and is a member of the NFA; and (2) any subadviser that provides investment management services to the registered investment company is properly registered in the appropriate capacity and is a member of the NFA or is exempt from CTA registration.

7. Compliance With New Requirements for Swaps Pursuant to the Dodd-Frank Act

Operators of and advisers to commodity pools should be prepared to comply with a host of swaps requirements that will take effect in 2013, to the extent that the pools they operate/advise engage in swap transactions. These requirements will include mandatory clearing, recordkeeping and reporting of swap transaction data and margin requirements for uncleared swaps. In addition, certain CPOs may be required to ensure that the commodity pools they operate abide by position limits to the extent that such pools engage in certain agricultural, energy and metals commodity interest transactions.

- *Mandatory Clearing.* To date, the CFTC has issued one mandatory clearing determination that applies to certain classes of interest rate swaps and credit default swaps. Commodity pools are financial entities. Therefore, to the extent that a commodity pool engages in interest rate swaps or credit default swaps that fall within the scope of this first mandatory clearing determination, it will be required to clear such transactions beginning on June 10, 2013.[8] Additional mandatory clearing determinations pertaining to other types of swaps are expected in 2013.

- *Recordkeeping and Reporting of Swap Transaction Data*. The Dodd-Frank Act requires that each swap counterparty maintain certain records with respect to the transactions in which it engages and report certain information about its swaps to a swap data repository. Compliance with the recordkeeping requirement is already necessary for: (1) swaps that were executed prior to the enactment date of the Dodd-Frank Act that remained open after that date; and (2) swaps that were executed in the period between the date of enactment of the Dodd-Frank Act and the relevant compliance date for the new recordkeeping requirements which, for commodity pools, is April 10, 2013 ((1) and (2) together, are historical swaps). There are three types of reporting requirements that apply: (1) general reporting; (2) real-time reporting; and (3) historical swaps reporting. To the extent that commodity pools engage in swaps with "swap dealers" or "major swap participants" (which are the two new categories of CFTC-registrants created by the Dodd-Frank Act), such counterparties will largely bear the reporting obligation; such counterparties may already be reporting the relevant information, depending on the type of swap. If a swap dealer or major swap participant is not a counterparty to a commodity pool's swap, the commodity pool and its counterparty must designate a reporting counterparty. In such a circumstance, the reporting counterparty must comply with the reporting requirements beginning on April 10, 2013.

[8] For more information, please see Sutherland's November 30, 2012 Legal Alert.

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Commodity pools also must obtain legal entity identifiers, which are required for reporting, by this date.

- *Margin Requirements for Uncleared Swaps*. The Dodd-Frank Act requires the CFTC, the SEC and certain federal banking regulators to establish margin requirements for over-the-counter swaps. The CFTC, the SEC and the federal banking regulators have proposed rules that would establish margin collection requirements for swap dealers and major swap participants. Under the proposed rules, to the extent that a commodity pool's counterparty is a swap dealer or major swap participant, the commodity pool will be required to post margin for uncleared swaps with zero thresholds. However, none of the CFTC, the SEC or the federal banking regulators has finalized their margin rules, and it is not expected that they will do so until the second quarter of 2013, at the earliest.[9]

- *Position Limits*. In 2011 the CFTC adopted final rules to establish position limits for certain physical commodity futures and for derivatives that are economically equivalent to those futures. The International Swaps and Derivatives Association, Inc., and the Securities Industry and Financial Markets Association initiated a lawsuit against the CFTC claiming that the CFTC violated the CEA and the APA in adopting the position limits rules because, among other things, the CFTC failed to conduct a proper cost-benefit analysis with respect to the rules and failed to show that position limits are necessary and appropriate. The U.S. District Court for the District of Columbia issued a memorandum opinion and order that vacated and remanded the position limits rules last September.[10] The CFTC has subsequently appealed the decision. Accordingly, compliance with the position limits rules is not necessary. However, depending on the outcome of the CFTC's appeal, compliance may be necessary in the future. Moreover, the CFTC may re-propose position limits rules sometime in 2013. To the extent that new position limits are imposed in the future, CPOs of commodity pools that engage in certain agricultural, energy and metals transactions may be required to comply with them.

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[9] For more information, please see Sutherland's October 8, 2012 Legal Alert.
[10] For more information, please see Sutherland's September 28, 2012 Legal Alert.

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