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Client Memorandum July 2012

CFTC confirms December 31, 2012 registration deadline for CPOs

In February 2012, the Commodity Futures Trading Commission ("**CFTC**") rescinded long-standing exemptions from registration as commodity pool operators ("**CPOs**") that were available to managers of commodity pools that were registered investment companies or private funds meeting certain tests. As a result of the rescission, (a) managers of funds that were relying on those exemptions on April 24, 2012 were given until December 31, 2012 to register as CPOs, and (b) managers who were not relying on the exemptions on April 24, 2012 (which includes managers of new funds) were required to register as CPOs prior to the commencement of marketing of the funds, unless (in both cases) their level of investment in "commodity interests" fell below certain *de minimis* thresholds. Under its current interpretation, this rule applies with respect to any fund that has at least one U.S. investor.

On July 13, 2012, the CFTC published a "no-action" letter clarifying the rule in two important ways:

Effective date for inclusion of swaps in *de minimis* calculations

Historically, "commodity interests" were largely limited to futures and options contracts. However, with effect from the effective date of the final definitional rules for "swaps" and other derivatives products (which was approved by the CFTC and the SEC on July 10, 2012 and will become effective 60 days after publication in the Federal Register), the definition of "commodity interest" will be expanded to include swaps. This will significantly increase the number of fund managers who will be subject to the CPO registration obligation.

The original rule indicated that swaps did not need to be counted toward the *de minimis* threshold until the CFTC had also published final rules on margin for uncleared swaps – which could be several months away and therefore extended the period before funds with significant swap transactions breached the *de minimis* threshold.

In the no-action letter, the CFTC stated that the inclusion of swaps in the de minimis threshold calculation will not be deferred until the margin rule has been finalized.

Consequently, a manager will be required to register as a CPO by **December 31, 2012** with respect to any fund that has invested in commodity interests (including swaps) (a) the notional value of which exceeds 100% of the liquidation value of the fund or (b) the

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aggregate initial margin and premiums of which exceed 5% of the liquidation value of the fund.

Managers of funds that invest in commodity interests but do not exceed the *de minimis* thresholds will be required to file an exemption with the National Futures Association ("**NFA**") prior to **December 31, 2012**.

Extension of registration deadline for managers of new funds

On a more positive note, the CFTC has, subject to certain conditions, **extended the registration deadline to December 31, 2012** for managers of funds who were not relying on one of the exemptions prior to April 24, 2012. In order to take advantage of the relief, the funds must meet certain requirements and the managers must also file a notification with the CFTC's Division of Swap Dealer and Intermediary Oversight in order to take advantage of the CFTC's no-action relief December 31, 2012. The relief becomes effective upon filing, as long as the notification is complete. The relief is not available for funds launched prior to the issuance of the no-action letter.

Consequences for managers

As a result of the rescission of the exemptions and the no-action letter, it is now clear that a manager of a fund investing in any swaps (other than security-based swaps based on a single loan or security or a narrow basket of 9 or fewer securities) will be required by December 31, 2012 to:

(a) determine whether it has U.S. investors (for these purposes, the definition of "U.S. Person" set out in the CFTC's proposed rule on Cross-Border Application of Certain Swaps Provisions of the Commodity Exchange Act may be instructive, but there is no guidance as to whether it is conclusive);

(b) calculate whether its commodity interest investments (including swaps) breach the *de minimis* exemption;

(c) if it does have US investors but its commodity interests are below the *de minimis* thresholds, file an exemption notice with the NFA; and

(d) if it has US investors and its commodity interests are above the *de minimis* thresholds, register as a CPO with the NFA which involves having at least one qualified Associated Person, who must pass a Series 3 examination.

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