December 11, 2012

CFTC No-Action Relief for Funds-of-Funds

The Commodity Futures Trading Commission (CFTC) recently issued a No-Action Letter that provides relief to advisers to funds-of-funds. This No-Action Letter, which was issued on November 29, 2012, gives comfort to an adviser to a "fund-of-funds" (that is, an investment fund that invests some or all of its assets in other investment funds) that otherwise may have needed to register as a commodity pool operator (CPO) with the CFTC and the National Futures Association (NFA) before December 31, 2012. In this No-Action Letter, the CFTC's Division of Swap Dealer and Intermediary Oversight (the Division) states that it will not recommend enforcement action against advisers to funds-of-funds that fail to register as a CPO until the later of June 30, 2013, or six months following the effective date of any guidance issued regarding the de minimis thresholds in Rule 4.13(a)(3). Fund-of-funds advisers must submit a claim by December 31, 2012, with the CFTC in order to take advantage of the No-Action relief. **Rescission of Appendix A** The need for this No-Action relief results from the February 2012 rescission of Appendix A of Part 4 of the CFTC Rules (Appendix A). Appendix A provided guidance on the application of the CFTC Rule 4.13(a)(3) de minimis exemption for funds-of-funds that indirectly hold commodity interests by virtue of their pass-through exposure to commodity interests held by underlying investment funds. Without Appendix A, it was unclear how a fund-of-funds could avoid registering as a CPO. Following the rescission of Appendix A, the Division released Questions and Answers Guidance (Q&A Guidance), which provided some guidance (in spite of the technical rescission of Appendix A) for fund-of-funds advisers on how to apply the de minimis thresholds and interpretations contained in Appendix A. However, advisers to funds-of-funds expressed concern about uncertainties created by the Q&A Guidance and the anticipation of further guidance the CFTC has indicated it would give to funds-of-funds regarding this issue. Accordingly, the Division deemed it appropriate to provide No-Action relief for advisers to funds-of-funds that may otherwise have been required to register as a CPO with the CFTC by December 31, 2012. **No-Action Relief** The No-Action Letter provides relief, but is not self-executing. In order for an adviser to a fund-of-funds that is not a registered mutual fund to avail itself of the No-Action relief provided by the Letter, the adviser must submit a claim and remain in compliance with the following criteria:

> (a) The adviser must be functioning as a commodity pool operator to one or more funds-of-funds (but is not yet registered as a CPO with the CFTC);
>
> (b) The amount of commodity interest positions to which the fund-of-funds is directly exposed must not exceed the de minimis levels specified in CFTC Rule 4.13(a)(3);
>
> (c) The adviser must not know and could not have reasonably known that the fund-of-funds' indirect exposure to commodity interests derived from contributions to underlying funds exceeds the de minimis levels specified in CFTC Rule 4.13(a)(3), either calculated directly or through the use of Appendix A; and

(d) The commodity pool for which the adviser seeks relief is compliant with the other provisions of CFTC Rule 4.13.

Perfecting a Claim To perfect a claim of the relief granted by the No-Action Letter, the claim must:

> (a) state the name, main business address, and main business telephone number of the adviser claiming the relief;
>
> (b) state the capacity in which the adviser is functioning (i.e., as a commodity pool operator) and the name of the pool(s) (i.e., the name of the fund-of-funds), for which the claim is being filed;
>
> (c) be signed by the adviser, which may be accomplished by making the claim in a signed PDF statement from the adviser; and

(d) be filed with the Division prior to December 31, 2012, via e-mail using the e-mail address dsinoaction@cftc.gov and stating "Fund-of-Funds" in the subject line of the e-mail. A claim submitted will be effective upon filing, so long as the claim is materially complete. Once the claim is effective, the fund-of-funds adviser will not be required to register with the CFTC as a CPO until the later of June 30, 2013, or six months following the effective date of any CFTC guidance issued regarding the de minimis thresholds.