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Legal Update

CFTC Gives Funds-of-Funds Temporary No-Action Relief from CPO Registration

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On November 29, 2012, the Commodity Futures Trading Commission ("CFTC") announced that it will provide temporary no-action relief for operators of certain funds-of-funds ("FOF") from the CFTC's requirements for registration of Commodity Pool Operators ("CPO"). The CFTC recognized that absent such relief, FOF operators may be required to register with the CFTC as CPOs by December 31, 2012, even though they may not have enough information to determine if CPO registration is required.

Operators of FOFs that invest in commodity interests, either directly or indirectly through underlying investee funds, are required to register as CPOs, unless the operator is eligible for an exemption under CFTC Regulation 4.13(a)(3) (the "De Minimis Exemption"). The De Minimis Exemption provides relief from CPO registration for certain CPOs that trade a de minimis amount of commodity interest positions. Whether a FOF operator can claim the De Minimis Exemption requires an analysis of its indirect commodity trading, to ensure that the trading activities of its underlying investee funds meet the requirements of the exemption.

Previously, a FOF operator could rely on "Appendix A" to CFTC Regulation 4, which provided guidance on the application of the De Minimis Exemption for FOF operators. Although the CFTC rescinded Appendix A earlier this year, it subsequently determined that FOF operators could continue to rely on Appendix A until further guidance was issued regarding the application of the De Minimis Exemption. Despite the guidance provided in Appendix A, the CFTC acknowledged in its no-action letter that many FOF operators may not have enough information to determine whether CPO registration is required. Further Appendix A may not provide guidance that can be applied practically to many FOF structures. As a result, the CFTC has issued temporary no-action relief for certain FOF operators until the latter of June 30, 2012 or 6 months after the CFTC issues revised guidance on the application of the De Minimis Exemption to FOF operators.

This no-action relief is not self-executing and FOF operators that wish to take advantage of this temporary relief must file a claim with the CFTC by December 31, 2012 for such relief to take effect. Further, in order to take advantage of the relief, the FOF operator must maintain compliance with the following requirements:

(a) The operator currently structures its operations in whole or in part as a CPO of one or more "Funds of Funds;" and

(b) The amount of commodity interest positions to which the investor fund is directly exposed does not exceed the levels specified in CFTC Regulation 4.5 or 4.13(a)(3)(ii)(A) or (B); and

(c) The operator does not know and could not have reasonably known that the investor fund's indirect exposure to commodity interests derived from contributions to investee funds exceed the levels specified in CFTC Regulations 4.5 or 4.13(a)(3)(ii)(A) or (B), either calculated directly, or through the use of Appendix A; and

(d) The commodity pool for which the CPO seeks relief is either:

   (i) an investment company registered as such under the Investment Company Act of 1940; or

   (ii) compliant with the provisions of CFTC Regulation 4.13(a)(3) (i), (iii) and (iv).

To discuss further, please contact your primary Kleinberg Kaplan attorney or:

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