



U.S. COMMODITY FUTURES TRADING COMMISSION

Three Lafayette Centre
1155 21st Street, NW, Washington, DC 20581
Telephone: (202) 418-5977
Facsimile: (202) 418-5407
gbarnett@cftc.gov

Division of Swap Dealer and
Intermediary Oversight

Gary Barnett
Director

CFTC Letter No. 12-03

No-Action

July 10, 2012

Division of Clearing and Intermediary Oversight

Managed Funds Association
600 14th St., NW
Suite 900
Washington, DC 20005

Investment Adviser Association
1050 17th St., NW
Suite 725
Washington, DC 20036

Alternative Investment Management Association, Ltd.
2nd Fl.
167 Fleet St.
London EC4A 2EA

Investment Company Institute
1401 H St., NW
Washington, DC 20005

Re: Request for No-Action Relief from Rescission of Regulation 4.13(a)(4) and Amendments to Regulation 4.5

Ladies and Gentlemen:

This is in response to your correspondence, dated April 30, 2012, and May 21, 2012, to the Commodity Futures Trading Commission (“Commission”), in which you requested relief from compliance with the Commission’s rescission of Regulation 4.13(a)(4) and the amendments to Regulation 4.5.¹ Collectively, your correspondence requested a limited time period of no-action relief – in essence, an extension of the compliance date – for those commodity pool

¹ 77 FR 11252, Feb. 24, 2012. Corrections to the rule text were published in the Federal Register on March 26, 2012. 77 FR 17328, Mar. 26, 2012.

operators (“CPOs”) who would otherwise have been required to comply with the recent regulatory revisions on April 24, 2012.² You have also requested an extension of time in which a CPO may claim exemption under Regulations 4.13(a)(3) and 4.5 without including swaps within the threshold calculation until ten months after the effective date of final rules further defining the term “swap” and setting margin requirements. You filed your requests on behalf of CPOs who would have been exempt from registration or excluded from the definition of CPO, but for the recent regulatory amendments to Regulations 4.13 and 4.5.

It has been determined that the Division of Swap Dealer and Intermediary Oversight (“Division”) is the appropriate division to address your requests.

You have identified operational constraints that will prevent certain affected persons from becoming compliant with the Commission’s regulations within the time period set forth in the Commission’s recent final rule release.³ Specifically, your letters argue that the portfolio analysis necessary to determine whether registration is required and then the actual registration process, including the background check for principals and associated persons and the completion of the Series 3 exam by associated persons, can take several months, often due to circumstances beyond the CPO’s control. You further argue that a short implementation period would likely cause disruptions for investors as CPOs would delay launching new pools until the registration process was completed. Moreover, you assert that to require CPOs of pools launched after the effective date to comply with the regulatory amendments immediately results in disparate treatment of similarly situated entities wherein the timing of a pool’s launch is the sole determining factor with respect to the time allowed for transition into registration.⁴

You also argue that it is necessary to delay the inclusion of swaps within the trading threshold calculation until 10 months after the further definition of the term “swap” and the margin rules are finalized. You assert that time is needed to build systems to conduct threshold calculations and back testing to ensure that the trading strategy would comply with the trading limitations over time. You also state that some small firms may not have the ability to develop such systems and that the calculation would be required to be done manually. You further argue that staff will need to be trained to monitor compliance and that this could take weeks or months.

The Division has determined that it would not be consistent with the Dodd-Frank Wall Street Reform and Consumer Protection Act,⁵ which amended the statutory definitions of commodity pool, commodity pool operator, and commodity trading advisor to include “swaps,” to delay the inclusion of swaps within the trading threshold beyond December 31, 2012. The further definition of “swap” was adopted by the Commission on July 10, 2012, which the

² 77 FR 11252, Feb. 24, 2012.

³ See Letter from Managed Funds Association, Investment Adviser Association, and Alternative Investment Management Association at 3 (April 30, 2012) (contending that “market participants need additional time for portfolio analysis, registration, if necessary, and compliance.”); Letter from Investment Company Institute at 3 (asserting that “registered funds and their advisors need additional time, beyond what is currently provided, to meet their registration obligations under amended Rule 4.5.”).

⁴ See Letter from Managed Funds Association, Investment Adviser Association, and Alternative Investment Management Association at 6; Letter from Investment Company Institute at 2-3.

⁵ Pub. L. 111-203, 124 Stat. 1376 (2010)

Division believes provides CPOs and CTAs with sufficient time to conduct such calculations prior to December 31, 2012.

The Division also believes that it is not necessary to delay compliance with the inclusion of swaps within the threshold until the finalization of the margin requirements for uncleared swaps. CPOs should have the necessary information regarding margin payments made for their current swaps portfolio to calculate whether the operated pool exceeds the trading threshold. Moreover, the Commission clearly stated its intention regarding retroactive application of the margin requirements in the release proposing margin rules for uncleared swaps. The Commission stated that the “proposal would only cover swaps executed after the effective date of the regulation that are not cleared by a [derivatives clearing organization].”⁶ The Commission further stated its belief that “the pricing of existing swaps reflects the credit arrangements under which they were executed and that it would be unfair to the parties and disruptive to the markets to require that the new margin rules apply to those positions.”⁷ The Division believes that it should not be necessary to wait until the margin rules are finalized for CPOs to be capable of calculating the initial margin for uncleared swaps entered into prior to the effective date of that rule. Therefore, the Division will not grant relief from the requirement that swaps be included within the threshold by December 31, 2012 or 60 days after the adoption of a final rule further defining the term “swap,” whichever is later.

Based upon the representations made in your correspondence, however, the Division believes that granting no-action relief for CPOs and CTAs of new pools that prior to the Commission’s recent rescission of Regulation 4.13(a)(4) and amendments to Regulation 4.5 would have been exempt from registration or excluded from the definition of CPO is neither contrary to the purpose of the Commodity Exchange Act (“Act”) nor to the public interest. Furthermore, the Division believes that similar challenges may impact CTAs advising pools operated by such CPOs. Accordingly, the Division will not recommend that the Commission take an enforcement action against CPOs or CTAs for pools launched after the issuance of this letter for failure to register as such until **December 31, 2012**, provided that the CPOs and CTAs comply with the following requirements.

1. CPO Registration Compliance Date No-Action

The Division is granting no-action relief where each pool for which the CPO submits a claim to take advantage of the no-action relief, and remains in compliance with the following criteria:

- a. Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold without marketing to the public of the United States;
- b. The CPO reasonably believes, at the time of investment, that:

⁶ 76 FR 23732, 23734 (Apr. 28, 2011).

⁷ *Id.*

- i. Each natural person participant (including such person's self-directed employee benefit plan, if any) is a "qualified eligible person," as that term is defined in § 4.7(a)(2); and
- ii. Each non-natural person participant is a "qualified eligible person," as that term is defined in § 4.7, or an "accredited investor," as that term is defined in § 230.501(a)(1)-(3), (a)(7) and (a)(8) of title 17 of the Code of Federal Regulations.⁸

Additionally, the Division will grant no-action relief where each pool for which the CPO claims relief under the registration compliance date exception is a registered investment company under the Investment Company Act of 1940.

2. CTA Registration Compliance Date No-Action

The Division is granting no-action relief when the CTA submits a claim to take advantage of the relief, and remains in compliance with the following criteria:

- a. The CTA claims relief from registration under the no-action relief and its commodity interest trading advice is directed solely to, and for the sole use of, the pools that it operates;⁹ or
- b. The CTA's commodity interest trading advice is directed solely to, and for the sole use of, pools operated by CPOs who claim relief from CPO registration under §§ 4.13(a)(1), (a)(2), (a)(3), (a)(4), 4.5, or under no-action relief described in this letter.

A. Claim of No-Action Relief

This no-action relief is not self-executing. Rather, a CPO or CTA that is eligible for the exception must file a claim to perfect the use of the relief. A claim submitted by a CPO or CTA will be effective upon filing, so long as the claim is materially complete. As stated previously, all relief claimed pursuant to this notice shall be effective through December 31, 2012.

Specifically, the claim of no-action relief must:

- a. State the name, main business address, and main business telephone number of the CPO or CTA claiming the relief;
- b. State the capacity (i.e., CPO, CTA, or both) and, where applicable, the name of the pool(s), for which the claim is being filed;
- c. Be electronically signed by the CPO or CTA; and

⁸ This criteria is substantively identical to the criteria previously codified as § 4.13(a)(4) of the Commission's regulations.

⁹ This provision is substantively identical to the exemption in § 4.14(a)(5) of the Commission's regulations.

- d. Be filed with the Division using the email address *dsionoaction@cftc.gov* prior to the date upon which the CPO or CTA first engages in business that would otherwise require registration as such.

In granting CPOs and CTAs the no-action relief described herein, the Division seeks to strike the appropriate balance between the Commission's regulatory objectives as stated in the final rule and the need to provide market participants with sufficient time to adjust to the regulatory changes. The Division believes that setting a specific compliance date that applies to all similarly situated CPOs and CTAs is appropriate.

This letter, and the positions taken herein, represent the view of this Division only, and do not necessarily represent the position or view of the Commission or of any other office or division of the Commission. The relief issued by this letter does not excuse the affected persons from compliance with any other applicable requirements contained in the Act or in the Commission's regulations issued thereunder. For example, affected persons remain subject to all antifraud provisions of the Act. Moreover, the relief set forth in this letter is not available to pools launched prior to the issuance of this letter. Further, this letter, and the relief contained herein, is based upon the representations made to the Division. Any different, changed or omitted material facts or circumstances might render this letter void.

Should you have any questions, please do not hesitate to contact Amanda Olear, Special Counsel, at 202-418-5283.

Very truly yours,

Gary Barnett

cc: Regina Thoele, Compliance
 National Futures Association, Chicago