



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. 12-38
No-Action
November 29, 2012
Division of Swap Dealer and Intermediary Oversight

Karen L. Barr
Investment Adviser Association
1050 17th Street, NW
Suite 725
Washington, DC 20036-5514

Stuart J. Kaswell
Managed Funds Association
600 14th Street, N.W.
Suite 900
Washington, DC 20005

Re: Request for Delayed Compliance Date of Amended Part 4; Rescission of Former
Appendix A

Ms. Barr and Mr. Kaswell:

This is in response to your letter, dated November 9, 2012, to the Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“Commission”). The issues that you raise have additionally been presented in separate written and telephonic conversations with other counsel (together, “the Communications”). Collectively, the Communications request that the Division address the effects of the rescission of Appendix A¹ of Part 4 of the Commission’s Regulations (“Prior Appendix A”) both by adopting new guidance and by providing a period of time in which any affected commodity pool operators (“CPOs”) would have to come into compliance with any changes adopted in such guidance. Absent relief, Fund of Fund operators may be required to register with the Commission by December 31, 2012, yet may not have access to the information from the Investee Funds that is necessary to make the determination as to whether registration is in fact required.

¹ Prior Appendix A was removed from Part 4 of the Commission’s Regulation and replaced by Form CPO-PQR in “Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations” 77 FR 11252 (Feb. 24, 2012).

Prior Appendix A had provided guidance on the application of Regulation 4.13(a)(3)² to those entities who indirectly trade commodity interests as a result of their investments in other vehicles. That is, the operator of a vehicle that holds an interest (“Investor Fund” or “Fund of Funds”) in a separately managed vehicle (“Investee Fund”) may find that it would have to register as a CPO by virtue of its pass-through exposure to commodity interests held by the Investee Fund as a result of its commitment of capital to the Investee Fund. Prior Appendix A provided guidance to Investor Funds as to when the operator of such an Investor Fund or Fund of Funds may be able to avail itself of the CPO registration exemption provided in Regulation 4.13(a)(3), specifically by addressing how a Fund of Funds may apply the Regulation 4.13(a)(3) de minimis trading threshold requirement.

The Communications state, generally, that Fund of Funds operators, while relying on Prior Appendix A pursuant to recent Division guidance,³ are concerned that any material changes to that guidance may pose significant operational challenges. Specifically, as Investor Funds necessarily rely on Investee Fund operators to manage Investee Funds’ allocations of commodity interest exposure, those Investor Funds are similarly reliant on such Investee Fund operators to both provide information about the composition of Investee Funds’ portfolio exposures, and redeem Investor Funds’ participations in Investee Funds should the Investor Fund determine to make changes to its commodity interest positions. Considering the lack of visibility that an Investor Fund may have regarding the positions of an Investee Fund, in many instances such opaqueness may not allow an Investor Fund operator to perform the direct calculations required to determine whether it satisfies the requirements of Regulation 4.13(a)(3). As Prior Appendix A enumerated certain situations under which an Investor Fund may infer its compliance with the de minimis trading thresholds of Regulation 4.13(a)(3), any changes that the Division makes to those situations, either through modification or deletion, may impose upon such Investor Fund an obligation to register with the Commission, even though the Investor Fund’s exposure to commodity interests remains unchanged. Such Investor Fund may subsequently be allowed to de-register upon such time as they either liquidate sufficient direct positions, or redeem sufficient indirect positions through the Investee Fund or Funds, to bring themselves into compliance with the limits imposed by Regulation 4.13(a)(3) and amended guidance thereto.

Further, the Communications request that any future revised guidance for Fund of Funds operators be broadened to include Regulation 4.5. Specifically, the Communications suggest that the threshold calculation tests for both Regulations 4.5 and 4.13(a)(3) are identical and that, consequently, the Division should provide guidance to Fund of Fund operators with respect to the application of both tests, given that Fund of Fund operators may be required to calculate the Regulation 4.5 and 4.13(a)(3) thresholds with respect to different Commission Regulations.

² Prior Appendix A offered Investor Funds a mechanism to infer whether such Investor Funds’ total commodity interest exposure, as a function of their combined direct and indirect commodity interest trading, would comply with the trading restrictions of Regulation 4.13(a)(3). Specifically, Prior Appendix A enumerated six factual situations which the Commission believed would be broadly applicable to Funds of Funds.

³ Commodity Futures Trading Commission, Division of Swap Dealer and Intermediary Oversight Responds to Frequently Asked Questions – CPO/CTA: Amendments to Compliance Obligations (Aug. 14, 2012) at 6-7, available at http://cftc.gov/ucm/groups/public/@newsroom/documents/file/faq_cpocta.pdf.

Absent relief, Fund of Fund operators may be required to register with the Commission by December 31, 2012, yet may not have access to the information from the Investee Funds that is necessary to make the determination as to whether registration is in fact required.

Based on the foregoing, the Division believes that it is appropriate to provide certain relief for CPOs that may have to register as a result of their indirect exposure to commodity interests until such time as the Division issues revised guidance on the application of the de minimis thresholds to Fund of Funds operators in the context of Regulations 4.5 and 4.13(a)(3). Accordingly, the Division will not recommend that the Commission take an enforcement action against CPOs of Funds of Funds for failure to register as such until the later of **June 30, 2013**, or six months from the date that the Division issues revised guidance on the application of the calculation of de minimis thresholds in the context of Regulations 4.5 and 4.13(a)(3), provided that the CPOs comply with the following requirements.

CPO Registration Compliance Date No-Action

The Division will not recommend enforcement action against any operator of a Fund of Funds on condition that operator submits a claim to take advantage of the relief, and remains in compliance with the following criteria:

- a. The commodity pool 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 Commission Regulation 4.5 or 4.13(a)(3)(ii)(A) or (B); and
- c. The commodity pool 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 Commission Regulations 4.5 or 4.13(a)(3)(ii)(A) or (B), either calculated directly, or through the use of Prior 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 Commission Regulation 4.13(a)(3) (i), (iii) and (iv).

Claiming the No-Action Relief

This relief is not self-executing. Rather, an eligible CPO must file a claim to perfect the relief. A claim submitted by a CPO 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 the later of June 30, 2013 *or* six months after the effective date of revised guidance (or the compliance date, if later) regarding the application of de minimis thresholds to Funds of Funds in the context of Regulations 4.5 and 4.13(a)(3).⁴

Specifically, the claim of no-action relief must:

- a. State the name, main business address, and main business telephone number of the CPO claiming the relief;
- b. State the capacity (i.e., CPO) and the name of the pool(s), for which the claim is being filed;
- c. Be signed by the CPO;⁵ and
- d. Be filed with the Division prior to December 31, 2012 via email using the email address *dsionoaction@cfrc.gov* and stating “Fund-of-Funds” in the subject line of such email.

In granting CPOs the relief described herein, the Division seeks to strike the appropriate balance between the Commission’s regulatory objectives and addressing the public concerns regarding the timing and content of revised guidance for Fund of Funds operators and operational adjustments in complying therewith. As such, the Division believes that not recommending enforcement action until the later of June 30, 2013 *or* six months after the issuance of revised guidance for Funds of Funds with respect to Regulations 4.5 and 4.13(a)(3) will address both of these concerns.

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. 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.

⁴ Although the Commission currently contemplates the issuance of such guidance, it currently does not offer a date certain by which such guidance may be issued.

⁵ This may be accomplished through attaching a signed PDF statement from the CPO.

Should you have any questions, please do not hesitate to contact Amanda Olear, Special Counsel, at 202-418-5283 or Michael Ehrstein, Attorney-Advisor, at 202-418-5957.

Very truly yours,

Gary Barnett
Director
Division of Swap Dealer
and Intermediary Oversight

cc: Regina Thoele, Compliance
National Futures Association, Chicago