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Memorandum

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Why Your Investment Management Company May Soon Be a CFTC-Regulated Entity

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"Any manager or advisor of a fund that executes swaps contracts – *even a private fund that uses swaps or commodities only incidentally or solely for hedging purposes* – would be well advised to review the fund's trading activities [and] consider the need to register…"

Until now, operators and advisors of investment vehicles that trade in listed futures contracts and commodity options (so-called commodity "pools") have enjoyed exemption from registration with the U.S. Commodity Futures Trading Commission ("CFTC") provided they managed pools of capital funded solely by sophisticated investors.[1] In addition, CFTC registration and compliance requirements historically have been keyed to positions in listed futures and commodity options contracts, and they have not attempted to regulate swap trading or hedging. That meant many investment managers could enter into swaps for hedging or speculative purposes without being subject to CFTC registration requirements. Because of CFTC rule changes presently going into effect, many fund operators and advisors previously outside of the CFTC's jurisdiction may now be subject to its regulatory regime.

The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")[2] and the CFTC rules implementing the Dodd-Frank Act have transformed the regulation of entities defined as commodity trading advisors ("CTAs") and commodity pool operators ("CPOs"). Managers and advisors of private funds that were previously not regulated by the CFTC should be aware that many will now be subject to registration requirements as a consequence of the Dodd-Frank Act's statutory inclusion of swaps trading within the scope of regulated commodity trading activities and the CFTC's elimination of a regulatory exemption widely used by fund managers. For these managers and advisors, registration will mean being subject to an enhanced compliance regime under the Commodity Exchange Act ("CEA") and related CFTC regulations. This memorandum describes the practical consequences to managers and advisors of private funds affected by the Dodd-Frank Act and the CFTC's rule changes regarding CPO and CTA regulation.

OVERVIEW

In February 2012, the CFTC adopted final rules ("Final Rules") amending several aspects of existing CPO and CTA registration and compliance requirements under the CEA in response to the Dodd-Frank Act's mandates.[3] Though the changes are highly

1 All of the investors had to satisfy the criteria for so-called "qualified eligible persons," or "QEPs." *See* 17 C.F.R. § 4.14(a)(4) (2011) (commonly referred to as the "All-QEPs Exemption").

2 Pub. L. 111-203 (July 21, 2010).

3 Commodity Pool Operators and Commodity Trading Advisors: Compliance Obligations, 77 Fed. Reg. 11252 (Feb. 24, 2012).

technical, key consequences for investment managers and advisors of private funds[4] include:

- All operators of pools or advisors of clients that trade swaps[5] must now consider whether they are subject to CFTC registration, even if they do not trade traditional commodity-based contracts. (Until the CFTC provides final definitions for the term "swap" in this context, determinations as to a fund's swap exposure unfortunately may require some educated guesswork, using existing proposed definitions[6] and conservative legal and industry views as guidance.)
- An operator of one or more derivatives-trading private funds that previously had not registered as a CPO on the basis that its pools were comprised solely of the funds of QEPs now will have to either register with the CFTC or rely on an alternative exemption to registration. This change in particular may affect a number of private fund managers, as we discuss below.
- Because CFTC rules generally afford an advisor that also is (or advises) an operator of a particular pool an exemption from CTA registration if it (or the CPO it advises) is exempt from registration as a CPO,[7] any CTA that "piggybacked" on the CPO "All-QEPs Exemption" may likewise have to register with the CFTC. We note, however, that many CTAs are likely to be able to rely on other remaining exemptions from registration, as we discuss below.
- All registered CPOs and CTAs must periodically file new Forms CPO-PQR or CTA-PR, as applicable.
- The consequences above apply to operators and advisors of pools that invest directly in commodity interests *or indirectly* by investing in other funds subject to the new CFTC rules (notably, funds of funds).[8]

This memorandum briefly describes (i) the Dodd-Frank Act's mandate that the CFTC consider swap trading activity for the purpose of identifying CPOs and CTAs that should be subject to regulation, (ii) the CFTC's rescission of the All-QEPs Exemption and its decision to leave intact another exemption for *de minimis* trading in commodity interests, (iii) the CFTC's implementation of more robust reporting and disclosure requirements for registered CPOs and CTAs, (iv) changes to the "lite touch" compliance regime for operators and advisors of pools sold to QEPs, and (v) the effective dates for compliance with the Final Rules.

BROADER REGULATORY SCOPE: SCRUTINIZING "POOLS" THAT ENTER INTO "SWAPS"

The CEA has long required certain entities engaged in commodities trading-related businesses to register as CPOs and CTAs (absent an exemption). Prior to the Dodd-Frank Act, CFTC registration requirements focused on operators of pools and advisors of clients that traded in commodity interests, which, at the time, included listed futures contracts and commodity options – but did *not* include swaps or other over-the-counter derivatives contracts.

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4 By "private funds," we refer to investment vehicles that are exempt from registration as investment companies under Section 3(c)(1) or 3(c)(7) of the Investment Company Act of 1940 (the "Investment Company Act"). Prior to the implementation of the Dodd-Frank Act, many investment advisers of these private funds were also exempt from registration under the "private adviser exemption" of Section 203(b)(3) of the Investment Advisers Act of 1940 (the "Investment Advisers Act"), provided that they advised fewer than 15 clients and did not market themselves to the public as investment advisers (among other criteria). Section 403 of the Dodd-Frank Act removed this exemption, although the Dodd-Frank Act simultaneously added other more narrowly tailored exemptions. *See, e.g.,* Sections 407-09 of the Dodd-Frank Act.

In adopting its Final Rules, the CFTC noted that several of the changes to the preexisting CPO and CTA registration and reporting regime were made in connection with the Dodd-Frank Act's elimination of the private adviser exemption (among other changes). Rescission of the "All-QEPs Exemption," for example, was made in order to subject similarly situated entities (i.e., operators and advisors of commodity pools and investment advisers of private funds) "to similar regulatory obligations … in order to provide improved transparency and increased accountability with respect to these pools" and to "limit regulatory arbitrage" by parties seeking to avoid oversight by either the CFTC or the U.S. Securities and Exchange Commission ("SEC"). 77 Fed. Reg. 11252, 11264 (quoting its original proposal to rescind 17 C.F.R. § 4.13(a)(4)).

5 The term "swaps," for purposes of the Final Rules and this memorandum, does not include security-based swaps.

6 *See* Further Definition of "Swap," "Security-Based Swap," and "Security-Based Swap Agreement"; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 76 Fed. Reg. 29818 (proposed May 23, 2011).

7 *See* 17 C.F.R. § 4.14(a)(5) (2011). A private fund advisor that is not itself an exempt CPO could be exempt from CTA registration under the CFTC's rule 4.14(a)(8), provided (among other things) it is registered or exempt from registration under the Investment Advisers Act, it advises a CPO that is exempt under rule 4.13(a)(3), it provides commodity trading advice solely incidental to its business of providing general investment advice and it does not market itself to the public as providing commodity trading advice. 17 C.F.R. 4.14(a)(8) (2011).

8 The CFTC takes the view that "a fund investing in an unaffiliated commodity pool is itself a commodity pool." 77 Fed. Reg. 11252, 11268.

As a result of the Dodd-Frank Act, however, the CFTC must treat commodity interests as including swaps. By adding to the CEA a definition of "commodity pool," and by amending existing definitions of "commodity pool operator" and "commodity trading advisor" – in each case to expressly reference "commodity interests" *including "swaps"*[9] – the Dodd-Frank Act statutorily subjects operators of pools and advisors of clients trading in swaps to the standard set of CPO and CTA regulations under Part 4 of the CFTC's regulations.[10]

THE RESCINDED "ALL-QEPS EXEMPTION"

Part 4 of the CFTC's regulations provides for a number of exemptions from CPO and CTA registration requirements and additional exemptive relief from some compliance obligations, if certain requirements are met. One of the exemptions from the CPO registration requirements most often relied on by private fund managers – but which has now been rescinded – is set forth in the CFTC's rule 4.13(a)(4), commonly referred to as the "All-QEPs Exemption." That rule generally provides a registration exemption if:

1. the interests in the operator's pool are exempt from registration under the Securities Act of 1933 (the "Securities Act") and are offered and sold without marketing to the public in the U.S.; and
2. the operator of the pool reasonably believes (at the time of its formation) that:
    a. Each natural person pool participant is a "qualified eligible person"; and
    b. Each non-natural person pool participant is a "qualified eligible person" or an "accredited investor," as defined under Regulation D promulgated under the Securities Act ("Reg D").

In the past, generally any manager of a "3(c)(7) fund" could rely on the exemption from CPO registration under the "All-QEPs Exemption." The exemption from registration under Section 3(c)(7) of the Investment Company Act is afforded to funds that sell interests in the funds only to "qualified purchasers."[11] "Qualified purchasers," in turn, is a class of investors which is within the definition of "qualified eligible person" as used by the now-defunct "All-QEPs Exemption."[12] Similarly, many (but not all) managers of "3(c)(1) funds" rely on the same exemption from CPO registration.[13]

THE RETAINED "DE MINIMUS EXEMPTION" FOR CPOS

In its proposed rules regarding amendments to CPO

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9 Section 721 of the Dodd-Frank Act added to the CEA a definition of "commodity pool," which means "any investment trust, syndicate, or similar form of enterprise operated for the purpose of trading in commodity interests, including any … commodity for future delivery, security futures product, *or swap* …." (Emphasis added.) Section 721 also amended existing definitions of "commodity trading advisor" to refer to any person who "for compensation or profit, engages in the business of advising others, … as to the value of or the advisability of trading in … any contract of sale of a commodity for future deliver, security futures product, *or swap* …." and amended the definition of "commodity pool operator" to refer to any person "engaged in a business that is of the nature of a commodity pool, … and who, in connection therewith, solicits, accepts or receives from others, funds, securities, or property, either directly or through capital contributions, … for the purpose of trading in commodity interests, including any … commodity for future delivery, security futures product, *or swap* …." (Emphasis added).

10 CPOs and CTAs that are not exempt from registration with the CFTC must comply with a range of reporting, disclosure, record-keeping, ministerial and professional certification requirements (including the requirement that key personnel pass the National Commodities Futures Examination's "Series 3" exam). They also must join the National Futures Association ("NFA"), abide by NFA's professional conduct and self-examination rules and submit disclosure documents for the NFA's advance review. (As we discuss below, some of these obligations are eased for CPOs that take advantage of the CFTC's "lite touch" compliance requirements under its rule 4.7).

11 "Qualified purchaser" is defined in Section 2 of the Investment Company Act.

12 *See* 17 C.F.R. § 4.7(a)(2) (2011). Other notable examples of persons or entities included within the definition of "qualified eligible person" are:

1. A registered futures commission merchant or retail foreign exchange dealer.
2. A registered broker dealer.
3. A registered CPO or CTA which has been registered for more than two years or which operates a pool, or advises commodity accounts, having total assets in excess of $5,000,000.
4. A registered investment adviser which has been registered for more than two years or advises securities account having total assets in excess of $5,000,000.
5. A "knowledgeable employee" as defined in Rule 3c-5 under the Investment Company Act.
6. The CPO, CTA or investment adviser of the pool offered or sold, a principal thereof, his or her immediate family members.
7. A trust or an organization such as a foundation, if the trustee or other person-making the investment decision, and each person establishing the trust or organization, is a qualified eligible person.
8. A non-United States person.
9. An entity in which all of the unit owners or participants are qualified eligible persons.

13 A private fund is exempt from registration as an investment company under Section 3(c)(1) of the Investment Company Act if it is sold to natural and non-natural persons that are "accredited investors" (as defined under Reg D). This is a lower qualification threshold than the "qualified purchaser" requirement, and it therefore allows a "3(c)(1) fund" access to a broader universe of potential fund investors. The definition of "qualified eligible person" under the "All-QEPs Exemption" included "accredited investors" but only to the extent they were institutions and not natural persons.

and CTA compliance obligations, the CFTC considered rescinding another exemption to registration – the so-called "De Minimis Exemption" under CFTC rule 4.13(a)(3).[14] Ultimately, however, the CFTC concluded that regulating entities with small exposures to commodity interests "is not the best use of the Commission's limited resources."[15] As such, the exemption survives and, given the rescission of the "All-QEPs Exemption," investment managers and advisors seeking to minimize CFTC compliance obligations and CFTC oversight may choose to conform their business to its requirements.

This exemption is available to a CPO operating a pool where:

1. the interests in an operator's pool are exempt from registration under the Securities Act and are offered and sold without marketing to the public in the U.S.;
2. the pool interests are offered only to "accredited investors" as defined under Reg D; and
3. *either:*
    a. the pool's aggregate initial margin and premiums required to establish its commodity interest positions does not exceed 5% of the liquidation value of the pool's portfolio (after taking account of unrealized gains or losses on such positions); or
    b. the aggregate net notional value of the pool's commodity interest positions does not exceed 100% of the liquidation value of the pool's portfolio (after taking account of unrealized gains or losses on such positions).[16]

The CFTC did not materially modify other registration exemptions[17] that exist for CPOs that are not otherwise subject to federal regulation.[18] An operator of a pool that is similar to a private fund and that uses derivatives to a substantial extent may, however, find it difficult to conform to the requirements of those remaining exemptions.[19]

STATUTORY EXEMPTIONS FOR PRIVATE CTAS

Private fund advisors that provide commodity trading advice but that are not otherwise pool operators (or do not solely advise CPOs), should be aware that two other important exemptions to CTA registration survived Dodd-Frank and the Final Rule. The first, Section 4m(1) of the CEA provides an exemption for CTAs that have not advised more than 15 clients in the past 12 months and that do not hold themselves out to the general public as CTAs. For the purpose of this exemption, certain groups of family members generally count as *one* "person," as do legal organizations (such as corporations, limited liability companies or limited partnerships) and two or more legal organizations with identical owners (unless the CTA is providing individualized trading advice for the benefit of individual equity owners of the legal organizations).[20]

In addition, Section 4m(3) of the CEA exempts from registration any CTA that is registered with the SEC as an investment adviser if (i) its business does not consist "primarily" of acting as a CTA, (ii) it does not hold itself out to the public as a CTA and (iii) it does not act as a CTA to any pool engaged "primarily in" holding or

14 Commodity Pool Operators and Commodity Trading Advisors: Amendments to Compliance Obligations, 76 Fed. Reg. 7976 (proposed Feb. 11, 2011).

15 77 Fed. Reg. 11252, 11261.

16 *See* 17 C.F.R. § 4.13(a)(3) (2011). In the adopting release of the Final Rules, the CFTC also provided new guidance as to the application of the "net notional test" of its rule 4.13(a)(3)(ii)(B) and the permissibility of netting swaps cleared by the same clearing house. *See* 77 Fed. Reg. 11252, 11262-3.

17 *See, e.g.,* 17 C.F.R. §§ 4.13(a)(1) (for so-called "closely-held pools"), 4.13(a)(2) (regarding very small pools).

18 The CFTC, however, did amend rule 4.5 under the CEA, which generally excludes from registration entities that are regulated under other areas of federal law (including operators of investment companies registered with the SEC). As amended, rule 4.5 now requires an exempt investment company to represent that it uses commodity interests solely for *bona fide* hedging purposes or, to the extent that the commodity interests are not so used, that they do not cross a trading threshold (comparable to rule 4.13(a)(3)'s margin threshold test discussed above). 17 C.F.R. § 4.5 (2011). The investment company must also not market itself to the public as a vehicle for providing investment exposure to commodity interests. *See* 17 C.F.R. § 4.5(c)(2) (2011).

19 The CFTC so far has declined the invitation of commenters to establish a "family office" exemption for managers of funds pooled from wealthy and sophisticated members of the same family. The CFTC pointed out, however, that family offices have been relying on a long history of interpretive letters and no-action letters stating that a qualifying family office is not a "pool." 77 Fed. Reg. 11252, 11263.

20 *See* 17 C.F.R. § 4.14(a)(10) (2011).

trading commodity interests (including futures, options and swaps, among others).

STRENGTHENED COMPLIANCE OBLIGATIONS

Among the CFTC's stated objectives in adopting the Final Rules are its intent to increase the transparency of the activities of CPOs, CTAs and the commodity pools that they operate or advise, and to facilitate the collection of data that will assist the Financial Stability Oversight Council ("FSOC")[21] in evaluating systemic risk. To those ends, the Final Rules not only expand the scope of entities and commodity interests subject to its jurisdiction, as discussed above, but also impose more significant disclosure, reporting and record-keeping requirements and new certifications, as summarized below.

New Reporting Requirements: Forms CPO-PQR and CTA-PR

Rules promulgated by the SEC (in consultation with the CFTC) already require investment advisers to private funds to report information on Form PF to the SEC (which makes the information available to FSOC).[22] In addition, the Final Rules add a new rule 4.27 under the CEA and require registered CPOs and CTAs to report certain information to the CFTC on Forms CPO-PQR and CTA-PR, respectively. This new requirement supplements the Form PF reporting obligations of advisors registered with the SEC and CFTC (so-called "dual registrants").

Form CPO-PQR must be filed quarterly for "large" CPOs[23] but only annually for all others. Three schedules set forth information required to be included in Form CPO-PQR. Schedule A must be completed and filed by *all* registered CPOs, and it solicits basic information about the CPO and specific information about the pools, including the pools' key relationships and investment positions. The information requested by Schedule A is not materially different from that already collected from registered CPOs by the NFA, the futures industry's self-regulatory organization. Schedule B must be completed by a CPO that is at least mid-sized[24] unless that CPO has already filed a Form PF for all the funds that it operates. Schedule B solicits information regarding the investment strategy, significant borrowings, counterparty exposure and clearing entities used by the pools operated by the subject CPO. Schedule C must be completed by large CPOs, and like Schedule B it is not required if the covered funds' relevant data already are reported on a Form PF. Schedule C solicits information about aggregate portfolios of the pools as well as certain risk metrics about any large pool.[25] Other than portions of Schedule A, Form CPO-PQR is not subject to public disclosure.

All CTAs are required to complete and file Form CTA-PR annually. Form CTA-PR generally collects basic demographic information related to the advisor and the names of pools advised by the CTA. Data supplied on Form CTA-PR is expressly subject to public disclosure, except for that portion naming pools advised by the CTA.

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21 The Dodd-Frank Act created FSOC, which is composed of state and federal financial regulators and is charged with identifying and responding to risks to the financial stability of the United States and its financial systems and with promoting market discipline.

22 Private fund advisers registered with the SEC and with at least $150 million in private fund assets under management must file Form PF. These advisers are divided into two groups – large advisers (*e.g.*, advisers with at least $1 to $2 billion in assets under management, depending on the type of fund assets) and smaller advisors. Reporting obligations depend on the group to which an adviser belongs. Smaller private fund advisers must file Form PF only annually and report only basic information regarding the private funds they advise (*e.g.*, regarding size, leverage, investor types and concentration, liquidity, and fund performance). Smaller advisers managing hedge funds must also report information about fund strategy, counterparty credit risk, and use of trading and clearing mechanisms. Large private fund advisers must provide more detailed information than smaller advisers (generally relating to fund exposures, leverage, risk profile, and liquidity) and must report quarterly (except for large private equity funds, which must only report annually).

Private fund advisers that are CPOs or CTAs under the CFTC's definitions may comply with some of their reporting obligations by providing certain required information on Form PF (rather than reporting the same information on multiple forms to different agencies).

Private fund information reported on Form PF is not intended to be made available to the public.

23 A large CPO is a CPO that has at least $1.5 billion in aggregated "pool assets under management" at the close of business on any day during the reporting period. Pool asset under management means the amount of all assets that are under the control of the CPO.

24 A mid-sized CPO is a CPO that has at least $150 million in aggregate pool assets under management at the close of business of any day during the reporting period.

25 A large pool is one that has a net asset value individually, or in combination with any other pool that is under a common operator, has the same investment strategy and invests side by side in substantially the same assets, of at least $500 million at the close of business on any day during the reporting period.

Annual Notice of Continued Exemption

Under the Final Rules, CPOs and CTAs claiming certain registration exemptions now must either affirm within 60 days of each calendar year end that they remain eligible for their claimed exemptions or be deemed to have withdrawn their notices of exemption.[26]

Standard Risk Disclosure Statement

The CFTC revised existing mandatory disclosure statements for CPOs and CTAs to include references to the use of swaps. These statements must be included in all disclosure documents that CPOs and CTAs file in advance with the NFA and subsequently deliver to existing or prospective pool participants. The disclosure generally cautions investors about the risks associated with exposure to swaps positions, including market risk, credit risk, counterparty credit risk, funding risk, liquidity risk and operational risk.[27]

REVISED RELIEF UNDER THE "LITE TOUCH" COMPLIANCE REGIME

Rule 4.7 under the CEA provides relief from certain Part 4 compliance requirements for registered CPOs that operate pools whose participants are "qualified eligible persons."[28] The relief also is afforded to registered CTAs that advise clients that are "qualified eligible persons." Under this "lite touch" regime, rule 4.7 provides a CPO with:

1. an exemption from the requirement to provide various disclosure documents and statements (including related to investment programs, conflicts of interests and risk factors) to prospective participants in the pool before the delivery of a subscription agreement as would generally be required under rules 4.21, 4.24, 4.25 and 4.26 under the CEA;
2. an exemption from certain record-keeping requirements of rule 4.23 under the CEA;
3. permission to provide quarterly account statements to pool participants that only include net asset value information in lieu of providing standard reports (which must include more detailed commodity interest trading information) as required by rules 4.22(a) and (b) under the CEA; and
4. permission to distribute annual reports to pool participants (with a copy delivered to the NFA) containing simplified financial information in lieu of the full annual report required under rules 4.22(c) and (d) under the CEA. After the Final Rules become effective, however, such annual reports will be required to contain financial statements that have been computed and presented in accordance with generally accepted accounting principles and certified by a certified public accountant.

A qualifying CTA enjoys comparable relief from disclosure document requirements pursuant to rules 4.31, 4.34, 4.35 and 4.36 under the CEA and relief from certain record-keeping obligation under rule 4.33.

EFFECTIVE DATES

Generally, these amendments to CFTC regulations take effect on April 24, 2012. That being said, the Dodd-Frank Act's inclusion of swaps in the definitions of "commodity pool,""commodity pool operator" and "commodity trading advisor" may not take effect – by virtue of the fact that the term "swap" requires further definition – until the earlier of (i) July 16, 2012 and (ii) the effective date of any final rule promulgated by the CFTC further defining the term "swap."[29]

In addition, the Final Rules provide a longer time period for CPOs currently claiming exemption under the "All-QEPs Exemption," to accommodate the effect of the

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26 77 Fed. Reg. 11252, 11284-5 (to be codified at 17 C.F.R. §§ 4.13(b)(4), 4.14(a)(8)(iii)(D)). We note that the rules as reflected in the Federal Register may have erroneously specified a 30-day notice period.

27 77 Fed. Reg. 11252, 11285 (to be codified at 17 C.F.R. 4.24(b)(5)).

28 *See* 17 C.F.R. § 4.7 (2011).

29 See CFTC Final Order, Effective Date for Swap Regulation, 76 Fed. Reg. 42508 (July 19, 2011) and CFTC Final Order, Amendment to July 14, 2011 Order for Swap Regulation, 76 Fed. Reg. 80233 (Dec. 23, 2011) (collectively, the "Final Orders"). We note the CFTC's most recent guidance did not directly address the application of its prior Final Orders to the Final Rules, which creates some ambiguity as to whether a fund's use of swaps should be considered, in the near term, for the purpose of determining whether CPO and CTA definitional requirements are met, and whether registration exemptions based on various threshold and notional value tests articulated above are available.

rescission of that exemption – they must register (unless another exemption is available) by December 31, 2012. It remains an open question, however, whether this longer compliance period will benefit a CPO that operates pools that only have qualified eligible persons as participants but also that engages in substantial swaps trading, rather than traditional commodity trading.

CONCLUSION

The inclusion of swaps trading within the scope of regulated commodity pool activities, together with the elimination of the "All-QEPs Exemptions," will likely necessitate the registration of many private fund managers and advisors as CPOs and CTAs. Registration, in turn, will subject many to newly-enhanced regulatory requirements under the CEA and the CFTC regulations. Therefore, any manager or advisor of a fund that executes swaps contracts – *even a private fund that uses swaps or commodities only incidentally or solely for hedging purposes* – would be well advised to:

- review the fund's trading activities (and the trading activities of any feeder funds in which the fund invests) and participation structure to ascertain whether other CPO and CTA registration exemptions remain available;
- review the fund's participant structure to ascertain whether "lite touch" compliance rules are applicable; and
- consider the need to register with the NFA and to establish the new reporting, disclosure and internal compliance procedures required under CFTC regulations.

This exercise may prove to be challenging for investment managers and advisors for a number of reasons – including because the characterization of certain trading activities may be legally uncertain (particularly while the regulatory definition of the term "swap" remains pending) or because the scope of a fund-of-fund's indirect exposure to investment funds' swap trades may be difficult to ascertain. Nonetheless, we recommend that managers and advisors begin addressing these questions early. By considering the registration requirements now, managers and advisors will be better prepared to meet new registration obligations and the myriad of related, but likely unfamiliar, compliance obligations. Alternatively, they may be able to timely structure their funds' future funding and trading activities with a view to avoiding unintended regulatory consequences.

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QUESTIONS

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