

NFA Revises Petition to Restrict Exclusions from Commodity Pool Operator Definition

August 19, 2010

On June 29, National Futures Association (NFA) submitted to the Commodity Futures Trading Commission (CFTC) a petition for rulemaking (the Petition) that would revise the exclusions from the definition of a commodity pool operator (CPO) under CFTC Rule 4.5.¹ The Petition, as originally submitted, would have required the operator of any qualifying entity under Rule 4.5 (such as registered investment companies, banks, and insurance companies) seeking futures- and commodities-related performance to register with the CFTC as a CPO unless certain conditions were met. On August 18, NFA withdrew the Petition and submitted a revised Petition that makes clear NFA continues to support the imposition of the operating restrictions under Rule 4.5 but intends for the restrictions to apply only to registered investment companies.² The revised Petition does not change the restrictions that NFA is proposing.

If the CFTC adopts NFA's proposal, a registered investment company will no longer be able to claim that it is excluded from the CPO definition under Rule 4.5, and, therefore, not required to comply with the registration requirements, unless it limits the initial margin it posts for its speculative commodities-related trading to 5% of the liquidating value of its portfolio, and it does not market participation in the investment company as a means to obtain exposure to commodity futures or options. The intent of the proposal is effectively to require registered investment companies to register the operator of any fund investing, to any material extent, in listed futures or options other than for *bona fide* hedging purposes. For a full description of these requirements please see our July 1 LawFlash.

The potential impact of the rules that the CFTC must adopt with respect to swaps in implementing the provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act in connection with CPO registration is still unclear. However, in monitoring the progress of the NFA's Petition, registered investment companies may also want to consider the impact that over-the-counter derivatives holdings may have on their registration status.

¹ See the Morgan Lewis LawFlash regarding NFA's original Petition, "NFA Petitions the CFTC to Restrict Exclusions from the Commodity Pool Operator Definition for Investment Companies" (July 1, 2010), available at http://www.morganlewis.com/pubs/IM_CommodityPoolOperatorDef_LF_01jul10.pdf.

² NFA's withdrawal letter may be found on its website at <http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=3629>. The revised Petition may also be found on NFA's website at <http://www.nfa.futures.org/news/newsPetition.asp?ArticleID=3630>.

We will continue to monitor this issue, including any action taken by the CFTC to expand the types of investments for which CPO registration will be required, and keep you updated on further developments. If you have any questions or would like more information on the issue discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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