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Could You Be A Commodity Trading Advisor or Commodity Pool Operator and Not Know It?

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As the **Commodity Futures Trading Commission's ("CFTC")** Division of Swap Dealer and Intermediary Oversight recently reminded market participants in a Staff Advisory, entities that meet the definition of a commodity trading advisor ("CTA") are subject to various regulatory requirements and may be required to register as a CTA with the **National Futures Association ("NFA")**. The Staff Advisory is an indication that the CFTC is turning to compliance with its regulatory and registration requirements now that the rulemaking process of the **Dodd-Frank Act** is finishing. Given this transition, as well as the recently expanded scope of the CFTC's regulatory oversight over CTAs and commodity pool operators ("CPOs"), entities that advise others or are pooled investment vehicles for futures, options, or swaps should consider whether they might be subject to the CFTC's CTA and CPO regulatory requirements.

The number of entities subject to the CFTC's CTA and CPO regulatory regime expanded after the passage of the Dodd-Frank Act, which broadened the definitions of CTA and CPO to include pooled investment entities trading in swaps or entities advising about trading in swaps. Under the Commodity Exchange Act ("CEA"), as revised by Dodd-Frank, a CTA is defined as an entity that advises others as to the value or advisability of trading in commodity interests, including futures, security futures products, options, and swaps. The CEA defines a CPO as an investment enterprise that solicits, accepts, or receives funds, securities, or property for the purpose of trading in commodity interests, including futures, security futures products, options, and swaps.

The CTA and CPO regulatory regime also expanded after the CFTC adopted a final rule in February 2012 that eliminated a key exemption from registration that many entities had previously relied upon. This exemption applied to CPOs if the investors in the fund met certain criteria that indicated they were sophisticated investors.

Many energy and other commodity entities may be affected by these changes. Entities that previously were not required to register as a CTA or CPO may now be required to. While the landscape is not entirely clear at this point, the CFTC has indicated that activities involving energy management agreements could in some situations make an entity a CTA[1]. Given this changing and expanding regulatory landscape and the Division of Swap Dealer and Intermediary Oversight reminder, entities that may not have considered themselves CTAs or CPOs in the past should reevaluate whether they (1) now fall under the definition of a CTA or CPO, (2) are required to register

with the NFA, and (3) may qualify for exemptions from registration. Those failing to do so may be subject to regulatory action by the CFTC and NFA.

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[1] See Further Definition of "Swap," "Security-Base Swap," and ''Security-Based Swap Agreement,'' Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 Fed. Reg. 48,208 at 48,243, available at http://www.cftc.gov/ucm/groups/public/@lrfederalregister/documents/file/2012-18003a.pdf ("Conversely, were swaps to be executed by one party on behalf of another party as a result of, or pursuant to, an EMA, the parties thereto would need to consider their respective roles thereunder (e.g. principal versus agent) and whether commodity trading advisor, introducing broker, futures commission merchant, or other registration or other elements of the Dodd-Frank Act regime were implicated.").

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