

## Investment Management Alert

August 21, 2013

### **Non-U.S. Managers' Offshore Pools Must Be Looked Through for U.S. Swaps Regulation**

Swaps market participants that are not "U.S. persons" may not be subject to the full requirements of the Commodity Futures Trading Commission's (CFTC) swaps regulation, depending on with whom they enter into a swap. Also, persons that "deal" in swaps or have significant swap positions that are not U.S. persons are not required to count swaps with non-U.S. persons toward their determination as to whether they are required to register as swap dealers. In addition, non-U.S. person registered as swap dealers or major swap participants are permitted to substitute compliance with foreign similar requirements for certain of the requirements of the CFTC swaps regulation.

In January 2012, the CFTC provided a temporary definition of U.S. person status for commodity pools and other funds based solely on the place of organization of the pool or fund. Effective on October 9, 2013, the definition of U.S. person for commodity pools or other funds will be expanded to include, in addition to funds organized in the United States, commodity pools or other funds with their principal place of business in the United States<sup>1</sup> or that are majority owned by any of the following:<sup>2</sup>

- natural persons resident of the United States
- estates of decedents who were residents of the United States at the time of death
- corporations, partnerships, limited liability companies, trusts or other entities incorporated under the laws of a state of the United States or with a principal place of business in the United States
- pension plans for employees of an entity described in the above bullet (unless established primarily for foreign affiliates) or
- trusts governed by the laws of a state or other jurisdiction in the United States, if a court within the United States is able to exercise primary supervision over the administration of the trust.

Commodity pools and other funds are required to "look-through" funds that invest in them for the purposes of the above determination only if the commodity pool and the investor fund(s) are under common control. In addition, a fund manager may reasonably rely on bona fide representations from its unrelated investors as to their status as U.S. persons.

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<sup>1</sup> The principal place of business of a fund is determined by reference to the location of the senior personnel responsible for either the formation and promotion of the collective investment vehicle or the implementation of the vehicle's investment strategy.

<sup>2</sup> The only exception to the majority owned commodity pool look-through is for funds that are publicly offered only to non-U.S. persons and not offered to U.S. persons.

Because of the place of business prong of the U.S. person definition, most commodity pools and other funds managed by United States managers will be U.S. persons. Non-United States based managers will, however, need to request information from the investors in their non-U.S. organized funds to determine whether their funds are U.S. persons.

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