

Client Alert

Current Issues Relevant to Our Clients

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CFTC Allows General Solicitations for Certain Exempt Commodity Pools to Align with SEC Regulation D and Rule 144A

The staff of the Commodity Futures Trading Commission (the “CFTC”) recently issued relief for certain exempt commodity pool operators (“CPOs”) that permits general solicitation and general advertising in connection with offerings of commodity pools. The relief better aligns CPO exemptions in CFTC Regulations 4.7(b) and 4.13(a)(3) with changes made to Securities and Exchange Commission (the “SEC”) Rules 506 and 144A under the Jumpstart Our Business Startups Act (the “JOBS Act”). This Client Alert summarizes the relief and the conditions that CPOs must meet to rely on the relief. The relief is effective immediately, and you can obtain a copy of the CFTC exemptive letter [here](#).

Background

Among other things, the 2012 JOBS Act mandated that the SEC make certain amendments to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933 (the “Securities Act”) to eliminate the prohibitions against general solicitation or general advertising contained in those provisions for certain unregistered offerings. Rule 506 provides a safe harbor for the private offering exemption in Section 4(a)(2) of the Securities Act. Prior to the amendments, issuers relying on Rule 506 were prohibited from offering securities by any form of general solicitation or general advertising. Rule 144A is a non-exclusive safe harbor exemption from the Securities Act registration requirements for resales of certain securities to qualified institutional buyers as defined under the rule (“QIBS”). Prior to the JOBS Act amendments, Rule 144A securities could only be offered to QIBs or persons the seller reasonably believed to be QIBs.

In response to the JOBS Act, the SEC adopted Rule 506(c), which permits an issuer to engage in general solicitation or advertising in a Rule 506 offering, provided that the issuer meets the following conditions: (1) the terms and conditions of Rule 501 and Rules 502(a) and (d) must be satisfied, (2) all purchasers of the securities must be accredited investors, and (3) the issuer must take reasonable steps to verify that the purchasers are accredited investors. The SEC also made certain amendments to Rule 144A to allow for offers of Rule 144A securities to be made to the general public so long as the sales of such securities are restricted to QIBs. Notably, the JOBS Act did not require the CFTC to make similar changes to its rules and regulations. For more information about new Rule 506(c) and the amendments to Rule 144A, please see our September 9, 2013 Client Alert available [here](#).

Conflict With Existing CFTC Regulations

Under certain circumstances, entities relying on Rule 506(c) or employing resellers relying on Rule 144A may also be CPOs subject to CFTC regulation. For example, many hedge funds engage in investment activity that causes the fund to be treated as a “commodity pool” under CFTC rules, and fund managers rely on exemptions contained in CFTC Regulations 4.7 or 4.13(a)(3) either to avoid certain CFTC disclosure, reporting and recordkeeping requirements or to avoid CPO registration. In order for a CPO to rely on Regulation 4.7, its commodity pool interests can only be offered and sold to qualified eligible persons (“QEPs”), among other requirements. Similarly, Regulation 4.13(a)(3) requires that commodity pool interests be offered and sold without marketing to the public in the United States. Accordingly, general solicitation and advertising is inconsistent with the requirements of both Regulations 4.7 and 4.13(a)(3). This creates the potential for a situation where, without exemptive relief provided by the CFTC, a CPO making an offering of unregistered securities pursuant to Rules 506(c) or 144A would be unable to also claim the relief provided by CFTC Regulations 4.7 or 4.13(a)(3). Until the recent action by the CFTC, the result of this conflict meant that many private fund managers and CPOs were effectively unable to rely on new Rule 506(c) to offer fund or other pool interests through general solicitation or advertising because it would cause them to lose the ability to rely on CFTC exemptions.

To address this conflict, the CFTC staff issued its recent exemptive letter to allow CPOs of pools that engage in general solicitation or advertising in reliance on Rule 506(c) or Rule 144A to also rely on the exemptions available under Regulations 4.7 and 4.13(a)(3). The relief provided in the exemptive letter is limited only to CPOs

operating pools that rely on Rule 506(c) or Rule 144A. In addition, the relief provided in the exemptive letter is not self-executing. To claim the relief, a CPO must file a notice with the CFTC's Division of Swap Dealer and Intermediary Oversight. The notice is deemed to be effective upon filing and must contain the following information:

- The name, business address and main business telephone number of the CPO claiming the relief;
- The name of the pool(s) for which the claim is being filed;
- Whether the CPO claiming relief with respect to a pool that is a Rule 506(c) issuer or is using one or more Rule 144A resellers;
- Whether the CPO intends to rely on the exemptive relief pursuant to Regulation 4.7(b) or 4.13(a)(3) with respect to the listed pool(s) and a representation that the entity meets the conditions to claim the applicable exemption notwithstanding any prohibition on general solicitation or advertising therein.

The notice must be signed by the CPO and filed with the CFTC using the email address dsionoaaction@cftc.gov stating "JOBS Act Marketing Relief" in the subject line of the email.

Future Rulemaking

The CFTC relief will remain effective until the effective date of any final CFTC action in consideration of the JOBS Act and the SEC's related amendment to Rules 506 and 144A. Accordingly, this suggests that the CFTC may ultimately take action on these issues through rulemaking similar to the SEC actions with respect to Rules 506 and 144A.

For More Information

To discuss any topic covered here, please contact any member of the Investment Management Group or visit us online at chapman.com.

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