

## CFTC Provides Exemptive Relief for Commodity Pool Operators Relying on the JOBS Act's General Solicitation Amendments and Clarifies Certain Recordkeeping and Reporting Requirements Applicable to Certain Registered CPOs

Earlier this week, the Commodity Futures Trading Commission's ("CFTC") Division of Swap Dealer and Intermediary Oversight (the "Division") issued a series of exemptive and no-action letters applicable to commodity pool operators ("CPOs"). These letters facilitate the use of the JOBS Act general solicitation provisions by private fund managers that are relying on exemptive relief under CFTC Rules 4.7(b) or 4.13(a)(3), permit greater use of third-party recordkeepers by registered CPOs, and clarify reporting requirements for certain registered CPOs.

### Exemptive Relief for CPOs Relying on the JOBS Act's General Solicitation Amendments

#### *Background*

In response to the Jumpstart Our Business Startups Act ("JOBS Act"), in July 2013 the Securities and Exchange Commission ("SEC") amended Rule 506 of Regulation D ("Rule 506"), promulgated under Section 4(a)(2) of the Securities Act of 1933 (the "Securities Act") to adopt Rule 506(c). Rule 506(c) permits issuers to engage in "general solicitation" and "general advertising" in certain offerings made under Rule 506, so long as all purchasers of the securities in such offerings are accredited investors and certain other conditions are met.<sup>1</sup> The SEC confirmed that its general solicitation mandate affects only Rule 506, and not offerings under 4(a)(2) of the Securities Act. However, under many circumstances, CFTC rules prevented private fund sponsors from taking advantage of Rule 506(c). In particular, private fund sponsors who relied on a CPO registration exemption under CFTC Regulation 4.13(a)(3) or exemptive relief from certain registered CPO obligations under CFTC Regulation 4.7(b) were constrained from engaging in general advertising or general solicitation under Rule 506(c). CFTC Regulation 4.13(a)(3) requires that interests in an applicable pool must be "offered and sold without marketing to the public in the United States" and CFTC Regulation 4.7(b) requires the CPO to offer or sell interests in a pool solely to qualified eligible persons ("QEPs") in an offering which qualifies for a registration exemption pursuant to section 4(2) of the Securities Act (now section 4(a)(2), as amended by the JOBS Act) or Regulation S.

#### *CFTC Relief*

On September 9, 2014, the Division published CFTC Exemptive Letter No. 14-116 ("Letter 14-116"), which provides exemptive relief from certain provisions in Regulations 4.7(b) and 4.13(a)(3) and permits CPOs relying on these Regulations to engage in general advertising and general solicitation under Rule 506(c). Subject to certain conditions discussed below, the Division granted exemptive relief from the Regulation 4.7(b) requirements that an offering be exempt pursuant to section 4(a)(2) of the Securities Act and be offered

---

<sup>1</sup> In response to the JOBS Act, the SEC also amended Rule 144A under the Securities Act to permit entities reselling securities pursuant to Rule 144A ("144A Resellers") to engage in general solicitation, so long as the purchaser is (or is reasonably believed to be) a qualified institutional buyer. Letter 14-116 also provides exemptive relief from the ban on general solicitation or general advertising for a CPO relying on Regulations 4.7(b) or 4.13(a)(3) that is using one or more 144A Resellers.

solely to QEPs and the Regulation 4.13(a)(3) requirement that securities be “offered and sold without marketing to the public.”

In order for a CPO to rely on the Division’s exemptive relief provided in Letter 14-116, the CPO must be relying on the registration exemption provided by Rule 506(c) and must file a notice with the Division claiming such exemptive relief. Such notice will be effective upon filing and must:

- (a) State the name, business address, and main business telephone number of the CPO claiming the relief;
- (b) State the name of the pool(s) for which the claim is being filed;
- (c) State that the CPO claiming relief is an issuer relying on Rule 506(c);
- (d) Specify 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);
  - (i) If relying on Regulation 4.7(b), the CPO must represent it meets the conditions of the exemption, other than the requirements that the offering be exempt pursuant to section 4(a)(2) of the Securities Act and be offered solely to QEPs, and that it is still required to sell the participations of its pool(s) to QEPs;
  - (ii) If relying on Regulation 4.13(a)(3), the CPO must represent that it meets the conditions of the exemption, other than the prohibition against marketing to the public;
- (e) Be signed by the CPO; and
- (f) Be filed with the Division via email using the email address [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov) and state “JOBS Act Marketing Relief” in the subject line of such email.

## Exemptive Relief for Registered CPOs to Use Additional Third-Party Recordkeepers

On September 8, 2014, the Division published Exemptive Letter No. 14-114 (“Letter 14-114”), which provides exemptive relief to registered CPOs to use additional third-party recordkeepers other than those specifically mentioned in the adopting release “Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators” (the “Harmonization Rule”).<sup>2</sup> The Harmonization Rule provided that required books and records not kept at a registered CPO’s main business office could instead be kept at “the pool’s administrator, distributor or custodian, or a bank or registered broker or dealer acting in a similar capacity with respect to the pool.” Letter 14-114 permits a registered CPO to use *any* third-party recordkeeper provided that: (1) the CPO’s timely access to required records is maintained and (2) the CPO timely and completely files the statements required pursuant to CFTC Regulation 4.7(b)(4) and 4.23(c) (such statement must identify the recordkeeper, the recordkeeper’s contact information, which records shall be so kept, and include representations regarding the continued and proper keeping of those records). Letter 14-114 does not provide any exemptive relief with respect to the requirement under Regulation 4.23 that records be kept in accordance with Regulation 1.31, regardless of whether such records are maintained by the CPO or a third-party recordkeeper. (Regulation 1.31 sets forth a number of requirements for electronically-stored records that are difficult to comply with, including keeping “only CFTC-required records on the medium employed (e.g., a disk or sheets of microfiche),” developing an “audit system,” preserving records “exclusively in a non-rewritable, non-erasable format” and engaging a

<sup>2</sup> 78 FR 52308 (Aug. 22, 2013).

third-party technical consultant.) However, the Division stated that it intends to perform a review of the requirements under Regulation 1.31, and their applicability to the current technological environment.

## Relief from Certain Reporting Requirements for Certain Registered CPOs

On September 8, 2014, the Division published two letters relating to the reporting requirements applicable to certain registered CPOs under certain circumstances.

### *No Form CPO-PQR Requirement for Registered CPOs That Only Operate Pools Pursuant to Regulation 4.13(a)(3) or 4.5*

Exemptive Letter No. 14-115 provides exemptive relief from the requirement to file Form CPO-PQR under Regulation 4.27(c) for registered CPOs that only operate pools pursuant to a claim of exemption from registration (*i.e.*, 4.13(a)(3) pools), or for which they maintain an exclusion from the definition of commodity pool operator (*i.e.*, 4.5 pools).

### *Consolidated Annual Report and Form CPO-PQR*

No-Action Letter No. 14-112 permits a CPO of a parent commodity pool (“Parent Pool”) that is not registered as an investment company under the Investment Company Act of 1940 that uses a wholly-owned subsidiary to trade in commodity interests (“Trading Subsidiary”) to file with the National Futures Association: (i) an annual report for the Parent Pool that contains the consolidated financial statements for both the Parent Pool and the Trading Subsidiary, pursuant to Regulation 4.7(b)(3) or 4.22(c), as applicable and (ii) a Form CPO-PQR for the Parent Pool that contains consolidated Form CPO-PQR data for both the Parent Pool and the Trading Subsidiary. Additionally, in order to claim this no-action relief, (i) the CPO of the Parent Pool must also be the CPO of the Trading Subsidiary, (ii) the exposure to the Trading Subsidiary by the participants in the Parent Pool must be shared pro rata and (iii) the CPO must file a claim for no-action relief with the CFTC.

\*\*\*\*\*

Please contact [Deborah Monson](#), [Nicole Cross](#) or the Ropes & Gray attorney who usually advises you with any questions you may have or if you would like additional information.