

September 19, 2014

CFTC Staff Issues Exemptive Letter Facilitating Broader Marketing of Certain Commodity Pools

If you wish to receive more information on the topics covered in this publication, you may contact your regular Shearman & Sterling contact person or any of the following:

John W. Finley III
New York
+1.212.848.4346
sean.finley@shearman.com

Nathan J. Greene
New York
+1.212.848.4668
ngreene@shearman.com

Will Forster
New York
+1.212.848.5412
will.forster@shearman.com

Nhung Pham
New York
+1.212.848.7885
nhung.pham@shearman.com

On September 9, 2014, the Division of Swap Dealer and Intermediary Oversight (“Division”) of the US Commodity Futures Trading Commission (“CFTC”) issued an exemptive letter (“Letter”)¹ harmonizing certain CFTC restrictions on the marketing of commodity pools with recent US Securities and Exchange Commission (“SEC”) rulemaking permitting general solicitation and general advertising in connection with certain unregistered securities offerings. Specifically, the Letter will enable commodity pool operators (“CPOs”) to rely on the broad regulatory relief of CFTC Rule 4.7(b) and the CPO registration exemption in CFTC Rule 4.13(a)(3), even though interests in the applicable commodity pools may be marketed to the public.

Overview

As part of the Jumpstart Our Business Startups Act (“JOBS Act”), Congress directed the SEC to amend its rules to permit general solicitation and general advertising in connection with certain unregistered offerings of securities pursuant to Rule 506 of Regulation D under the US Securities Act of 1933, as amended (“Securities Act”).² Pursuant to that directive, in 2013, the SEC adopted Rule 506(c), which permits an issuer to engage in general solicitation or

¹ See CFTC Letter No. 14-116 (Sept. 9, 2014).

² See Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 Fed. Reg. 54464 (Sept. 5, 2012) and 78 Fed. Reg. 44771 (Jul. 24, 2013). Rule 506 of Regulation D generally provides that offers and sales of securities that satisfy the conditions of that Rule shall be deemed to be transactions not involving any public offering within the meaning of Section 4(a)(2) of the Securities Act. Rule 506 historically required that issuers relying on the Rule not conduct their offering by means of any general solicitation or general advertising. Additional information about the JOBS Act can be found [here](#).

general advertising when offering and selling securities in reliance on Rule 506 if, among other things:

- All purchasers of the securities are “accredited investors” as defined in Regulation D; and
- The issuer takes reasonable steps to verify that the purchasers are accredited investors.

Pursuant to the same legislative directive, the SEC also amended Rule 144A(d)(1) under the Securities Act to effectively permit general solicitation and general advertising by persons engaged in unregistered resales of securities pursuant to Rule 144A.³

Prior to the issuance of the Letter, CPOs could have been effectively foreclosed from relying on certain CFTC regulatory relief with respect to their operation of commodity pools that offer securities pursuant to general solicitation or general advertising in reliance on Rule 506(c), or the securities of which are resold pursuant to general solicitation or general advertising in reliance on amended Rule 144A. That potentially foreclosed regulatory relief included:

- The CPO registration exemption set forth in CFTC Rule 4.13(a)(3), which requires, among other things, that the relevant pool offer and sell its securities without marketing to the public; and
- The CPO regulatory relief set forth in CFTC Rule 4.7(b), which requires, among other things, that interests in the relevant pool be offered (as well as sold) solely to “qualified eligible persons” as defined in CFTC Rule 4.7(a) (“QEPs”).⁴

Relief Granted

The Letter permits CPOs to qualify for the CFTC Rule 4.13(a)(3) registration exemption and CFTC Rule 4.7(b) regulatory relief with respect to commodity pools that offer their securities pursuant to general solicitation or general advertising in accordance with Rule 506(c), or the securities of which are resold pursuant to general solicitation or general advertising in accordance with Rule 144A, provided that the CPO satisfies all other conditions to CFTC Rule 4.13(a)(3) and CFTC Rule 4.7(b), as applicable.⁵

Filing Required

The relief made available by the Letter is not self-executing. Rather, it must be claimed through an electronic filing with the Division. Each filing must:

- State the name, business address, and main business telephone number of the CPO claiming the relief;
- State the name of the pool(s) for which the claim is being filed;

³ See 78 Fed. Reg. at 44786. SEC Rule 144A provides a non-exclusive safe harbor from the registration requirements of the Securities Act for certain resales of securities to “qualified institutional buyers” as defined in Rule 144A (“QIBs”). Although Rule 144A historically did not expressly prohibit general solicitation, the Rule effectively imposed such a restriction by requiring that resellers relying on the Rule offer the applicable securities (as well as sell the securities) solely to QIBs or persons they reasonably believed were QIBs. The SEC’s amendments to Rule 144A(d)(1) have eliminated the need to offer the securities solely to QIBs, thereby permitting general solicitation and general advertising.

⁴ CFTC Rule 4.7(b) provides relief from certain of the disclosure, reporting, and recordkeeping requirements otherwise applicable to CFTC-registered CPOs.

⁵ Any CPO seeking to rely on the Letter and the underlying regulatory relief must continue to comply with all other applicable requirements of the Commodity Exchange Act and the CFTC’s rules, including all applicable antifraud provisions.

- State whether each commodity pool for which the CPO is claiming relief is an issuer relying on Rule 506(c) or is using one or more resellers relying on Rule 144A;
- Specify whether the CPO intends to rely on CFTC Rule 4.7(b) or CFTC Rule 4.13(a)(3) with respect to each specified pool;
 - If relying on CFTC Rule 4.7(b), represent that the CPO meets the conditions of the exemption, other than that provision's requirements that the offering be exempt pursuant to Section 4(a)(2) of the Securities Act⁶ and be offered solely to QEPs, such that the CPO meets the remaining conditions and is still required to sell the interests in its pool(s) solely to QEPs;
 - If relying on CFTC Rule 4.13(a)(3), represent that the CPO meets the conditions of the exemption, other than that provision's prohibition against marketing to the public;
- Be signed by the CPO; and
- Be filed with the Division via email using the email address dsionoaction@cftc.gov and stating "JOBS Act Marketing Relief" in the email's subject line.

A claim submitted by a CPO will be effective upon filing, so long as the claim is materially complete and accurate.

Potential Termination of Relief

Relief claimed pursuant to the Letter is not subject to a specified expiration date. However, the Division noted the possibility that it might seek to address this area in future rulemaking, in which case, the Division noted, the Letter's relief will remain effective only until the effective date of any such final rulemaking.

⁶ This requirement seems to suggest that issuers engaged in Rule 506(c)-compliant offerings would not qualify for the Section 4(a)(2) registration exemption if such offerings entailed general solicitation or general advertising. However, Rule 506 expressly provides that offers and sales of securities made in compliance with Rule 506(c) shall be deemed to be transactions not involving any public offering within the meaning of Section 4(a)(2) of the Securities Act.