

CLIENT MEMORANDUM

CPO Alert: CFTC Staff Issues JOBS Act, Reporting and Recordkeeping Relief

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The Commodity Futures Trading Commission staff issued several letters this month providing commodity pool operators with relief from certain regulatory requirements related to their operation of commodity pools. Highlights of these letters follow.

JOBS Act Relief

On April 5, 2012, Congress enacted the Jumpstart Our Business Startups Act (“JOBS Act”). The JOBS Act sought to “increase American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”¹ Among other things, it required the Securities and Exchange Commission to amend Regulation D²

¹ Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012). For more information on the JOBS Act, please see our client memoranda entitled [JOBS Act Increases The Ability of Portfolio Companies, Start-Up Ventures and Small Businesses To Raise Capital and Access The Public Markets](#) and [JOBS Act Eliminates Restrictions On General Solicitation and General Advertising For Insurance-Linked Securities](#), dated Apr. 3, 2012 and Apr. 18, 2012, respectively.

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and Rule 144A³ to eliminate the prohibition against general solicitation and general advertising in connection with the offering of securities in certain specified situations. As a result, the SEC adopted new Rule 506(c) of Regulation D as an additional safe harbor for private offerings under Section 4(a)(2), and amended Rule 144A to permit general solicitation or general advertising in connection with the reselling of securities.⁴

Certain CFTC registration and compliance exemptions for CPOs are available only where the offering of pool interests does not involve the use of general solicitation or general advertising. Specifically, CFTC Rule 4.7, which exempts registered CPOs from certain disclosure, recordkeeping and reporting requirements, requires, among other things, that the pool's interests are *offered* solely to "qualified eligible persons." Likewise, CFTC Rule 4.13(a)(3), which exempts CPOs from registration, requires, among other things, that pool interests are "offered and sold without marketing to the public." Unlike with respect to the SEC rules, the JOBS Act did not require the CFTC to amend Rule 4.7 or Rule 4.13(a)(3). Thus, the CPO of a privately offered pool relying on Rule 4.7 or Rule 4.13(a)(3) was unable to take advantage of the new safe harbor in Rule 506(c) to engage in general solicitation or general advertising.

On September 9, 2014, the CFTC's Division of Swap Dealer and Intermediary Oversight ("DSIO") granted exemptive relief aimed at harmonizing CFTC Rules 4.7 and 4.13(a)(3) with SEC Rules 506(c) and 144A.⁵ Pursuant to this relief, a CPO may rely on Rule 4.7 or 4.13(a)(3), as applicable, notwithstanding that the interests of the pools it operates are being offered by general solicitation or general advertising provided such offerings comply with Rule 506(c) or Rule 144A, as applicable. Any CPO relying on this relief must file a notice with DSIO.

It should be noted, however, that there may be additional state and/or foreign law restrictions prohibiting or otherwise limiting the use of general solicitation or general advertising in securities offerings.

² Section 5 of the Securities Act of 1933 (the "Securities Act") requires the registration of securities offerings with the SEC. Section 4(a)(2) of the Securities Act provides a statutory exemption from the registration requirement of Section 5 for private offerings of securities. Rule 506 of Regulation D provides a non-exclusive safe harbor for private offerings under Section 4(a)(2).

³ Rule 144A is a non-exclusive safe harbor from, among other things, the registration requirements of the Securities Act for resales of certain securities. Prior to the SEC's amendment of Rule 144A, a seller relying on Rule 144A was limited to *offering* the applicable securities to "qualified institutional buyers" ("QIB"). The amendments, however, require only that the securities are *sold* to a QIB (or someone reasonably believed to be a QIB).

⁴ [Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings](#), 77 Fed. Reg. 54464 (Sept. 5, 2012) ("Proposing Release"), and 78 Fed. Reg. 44771 (Jul. 24, 2013) ("Adopting Release"). For more information on the Proposing Release and the Adopting Release, please see our client memoranda entitled [SEC Proposes Rules Easing Prohibition on General Solicitations](#) and [SEC Lifts Ban on General Solicitation for Certain Private Offerings, Disqualifies "Bad Actors" From Participating In Regulation D Private Offerings and Proposes Rules to Assist in Monitoring Market Practices](#), dated Sept. 4, 2012 and Jul. 18, 2013, respectively.

⁵ CFTC Exemption Letter No. 14-116 (Sept. 9, 2014).

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Form CPO-PQR Relief For Certain Registered CPOs

CFTC Rule 4.27 requires any CPO that is registered or required to be registered to file CFTC Form CPO-PQR. DSIO has now granted exemptive relief from the Form CPO-PQR filing requirement to any registered CPO that, with respect to each pool it operates, is either excluded from the definition of CPO or exempt from registration as a CPO.⁶ Thus, if a registered CPO operates only pools with respect to which it has claimed a 4.13(a)(3) exemption or a 4.5 exclusion, the CPO, although registered, would not be required to file Form CPO-PQR.

Form CPO-PQR and Annual Report Relief For CPOs of Trading Subsidiaries

As noted above, CFTC Rule 4.27 generally requires any CPO that is registered or required to be registered to file CFTC Form CPO-PQR and report with respect to each pool it operates. Generally, this would include an entity that is a wholly owned trading subsidiary ("Trading Subsidiary") of a pool ("Parent Pool") due to the fact that the CFTC has recently taken the position that even a wholly owned investment entity is a commodity pool. In addition, CFTC Rules 4.7 and 4.22 require a registered CPO to prepare and file annual audited financial statements for each pool it operates as a registered CPO, which may include Trading Subsidiaries. DSIO issued a no-action letter in which it stated that the registered CPO of a Parent Pool that is not registered as an investment company under the Investment Company Act of 1940 and that invests its assets in a Trading Subsidiary does not have to file Form CPO-PQR with respect to the Trading Subsidiary and/or prepare and file an annual report for the Trading Subsidiary, provided that:⁷

- (i) the CPO of the Parent Pool is also the CPO of the Trading Subsidiary;
- (ii) the exposure to the Trading Subsidiary by the participants in the Parent Pool is shared pro rata; and
- (iii) the CPO:
 - a. in the case of Form CPO-PQR, provides a consolidated filing for the Parent Pool that includes the data for the Trading Subsidiary; and
 - b. in the case of an annual financial report, prepares and files an annual report for the Parent Pool that consolidates financial statement amounts attributable to the Trading Subsidiary.⁸

⁶ CFTC Exemption Letter No. 14-115 (Sept. 8, 2014). DSIO also noted that the terms of Form CPO-PQR only require that the form be completed if the CPO operates at least one pool.

⁷ CFTC No-Action Letter No. 14-112 (Sept. 8, 2014). DSIO previously adopted similar relief for a registered investment company and its controlled foreign corporations. See CFTC No-Action Letter No. 13-51 (Sept. 5, 2013).

⁸ Letter 14-112 states that if the Parent Pool and Trading Subsidiary are subject to different annual report requirements, then the consolidated annual report must be prepared in accordance with the more stringent annual report requirement.

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Any CPO relying on Letter 14-112 must file a notice with DSIO.⁹

Additional Third-Party Recordkeeping Relief

CFTC Rules 4.7 and 4.23 require a CPO to maintain certain books and records related to the CPO and each pool that it operates. Previously, such books and records had to be maintained at the CPO's main business office. In 2013, however, the CFTC amended Rules 4.7 and 4.23 to permit these records to be maintained 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 (the "enumerated third-parties").¹⁰

DSIO recently granted exemptive relief that expands the universe of permitted third-party recordkeepers.¹¹ Under this relief, a CPO is permitted to maintain its and each of its pool's books and records with any third-party recordkeeper, not just the enumerated third-parties. This relief is conditioned upon the CPO having timely access to such books and records and remaining ultimately responsible for compliance with the recordkeeping rules. Although the use of a non-enumerated third-party does not require any additional notice filing, a CPO seeking to rely on this relief must still file the statements required by CFTC Rules 4.7 and 4.23.

If you have any questions concerning the foregoing or would like additional information, please contact Rita M. Molesworth (212-728-8727, rmolesworth@willkie.com), Deborah A. Tuchman (212-728-8491, dtuchman@willkie.com), Lisa J. Eskenazi (212-728-8509, leskenazi@willkie.com), Jonathan C. Burwick (212-728-8108, jburwick@willkie.com), James E. Lippert (212-728-8945, jlippert@willkie.com) or the Willkie attorney with whom you regularly work.

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⁹ This relief does not affect the ability of a CPO to rely on the financial statement relief provided with respect to master funds in CFTC Rule 4.22(c)(8).

¹⁰ [Harmonization of Compliance Obligations for Registered Investment Companies Required To Register as Commodity Pool Operators](#), 78 Fed. Reg. 52308 (Aug. 22, 2013) ("Harmonization Release"). For more information on the Harmonization Release, please see our client memorandum entitled [CFTC Adopts Harmonization Rules Applicable to Registered Investment Companies That Do Not Rely on CFTC Rule 4.5](#), dated Aug. 28, 2013.

¹¹ CFTC Exemption Letter No. 14-114 (Sept. 8, 2014).