

## Investment Management Alert

September 11, 2014

### CFTC Publishes Long-Awaited JOBS Act Relief

The staff of the Commodity Futures Trading Commission (CFTC) published a no-action letter on September 9, 2014 (available [here](#)) that permits certain commodity pool operators (CPOs) to conduct general solicitation in private offerings of pool interests under the Rule 506(c) regime or amended Rule 144A under the Securities Act of 1933, as adopted by the Securities and Exchange Commission (SEC) pursuant to the Jumpstart Our Business Startups (JOBS) Act. The letter provides exemptive relief to CPOs that are exempt from registration under CFTC Regulation 4.13(a)(3)<sup>1</sup> or are registered but exempt from certain disclosure, reporting and record keeping requirements under CFTC Regulation 4.7<sup>2</sup> so long as the CPOs comply with the following conditions of the letter:

- the CPOs rely on Rule 506(c) or are “using entities reselling under Rule 144A.”
- the CPOs claiming relief file<sup>3</sup> a notice by email with the CFTC’s Division of Swap Dealer and Intermediary Oversight that:
  - provides basic identifying information regarding the CPO and the pool for which Rule 506(c) or 144A will be used
  - indicates the exemption under the Securities Act of 1933 to be used
  - sets forth a representation that the CPO will comply with all other requirements of the applicable exemptive regulation.

Uncertainties still apply, however, in the SEC’s general solicitation regulatory regime. There are a number of amendments to SEC rules relating to general solicitation offerings that have been proposed but not yet adopted, such as the requirement to pre-file general solicitation materials. In addition, the SEC has indicated that the use of general solicitation by fund managers will likely increase the risk of examination of registered investment advisers by the staff of the Office of Compliance Inspections and Examinations since any funds managed by those advisers would have to amend their Form Ds to report that they are

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<sup>1</sup> CFTC Regulation 4.13(a)(3) requires interests in the pool for which a commodity pool operator exemption is claimed to be “offered and sold without marketing to the public in the United States.”

<sup>2</sup> CFTC Regulation 4.7 permits commodity pool operators who “offer or sell” interests in their commodity pools only to persons who satisfy the criteria of “qualified eligible persons” in an offering that qualifies for the Section 4(a)(2) exemption from registration or Regulation S to have reduced disclosure, reporting and recordkeeping requirements. General solicitation, without this relief, would have been deemed an offering to everyone.

<sup>3</sup> The notice should be emailed to [dsionoaction@cftc.gov](mailto:dsionoaction@cftc.gov) and include “JOBS Act Marketing Relief” in the title of the email. Note that persons using Rule 506(c) also must have amended their Form D filings to check that they are using Rule 506(c) prior to engaging in any general solicitation in addition to adopting policies and procedures reasonably designed to verify the “accredited investor” status of all investors.

relying on Rule 506(c). In light of these further uncertainties, many advisers to private funds may hesitate to start general solicitation offerings under Rule 506(c) even after this letter. However the CFTC no-action letter removes an important barrier to the use of general solicitation by funds. For a link to our original alert relating to the SEC's final JOBS Act rules and proposed amendments, click [here](#).

## Contact Information

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