

September 29, 2014



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CFTC Grants Relief to Fund Managers in Connection With Rule 506(C) General Solicitation Offerings

On September 9, 2014, the Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission (“CFTC”) granted temporary exemptive relief to dually regulated fund managers permitting such managers that rely on the commodity pool operator (“CPO”) exemptions under Regulations 4.7(b) or 4.13(a)(3) to engage in general solicitations in certain circumstances.¹

As we previously discussed in our Investment Management Alert dated August 1, 2013², the Securities and Exchange Commission (“SEC”) was directed under the Jumpstart Our Business Startups Act to amend Rule 506 of Regulation D (“Rule 506(c)”) to eliminate the prohibition against “general solicitation” and “general advertising” for offerings made under Rule 506, subject to certain conditions being met.³ The SEC adopted the prescribed rules on July 10, 2013. To date, however, fund managers that advise commodity pools have been unable to conduct general solicitation offerings due to the lack of harmonization between the CFTC exemptions under Regulations 4.7(b) and 4.13(a)(3) (collectively, the “CPO Exemptions”) on the one hand, and Rule 506(c) on the other hand.

Background on CPO Exemptions

The CPO Exemptions typically relied upon by private fund managers that invest in commodity interests prohibit participation in offerings to the general public. Those exemptions are as follows:

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- 1 See CFTC Letter No. 14-116, available at <http://www.cftc.gov/ucm/groups/public/@llettergeneral/documents/letter/14-116.pdf>.
 - 2 Available at <http://shipmangoodwin.com/sec-adopts-final-rules-on-amendments-to-rule-506-private-placement-exemption>.
 - 3 An issuer may engage in a general solicitation under Rule 506(c) if it meets certain conditions, including: (1) all purchasers are accredited investors; and (2) the issuer takes reasonable steps to verify that the purchasers are accredited investors.

Regulation 4.7(b) provides a registration exemption for CPOs from certain disclosure, periodic and annual reporting and recordkeeping requirements in Part 4 of the CFTC’s regulations. To qualify for relief, a fund manager that is a CPO must offer or sell participations in a pool solely to qualified eligible persons in an offering that qualifies for exemption from the registration requirements of the Securities Act of 1933, as amended (“Securities Act”), pursuant to Section 4(a)(2). To qualify for an exemption under Section 4(a)(2), an offering must not be a public offering.

Regulation 4.13(a)(3) requires that interests in each pool for which the CPO claims the exemption be exempt from registration under the Securities Act and offered and sold without marketing to the public within the United States. The exemption requires that at all times such pool must not exceed certain de minimis investment thresholds regarding its commodity interest positions.

Requirements for CFTC Exemptive Relief

The Exemptive Relief is only available to Funds that rely on Rule 506(c). Only CPOs that rely on Rule 506(c) may rely on the exemptive relief provided by the Division, and consequently, only these CPOs are allowed to generally solicit or advertise to the public. This is important to note because fund managers would need to comply with all Rule 506(c) requirements, including any future amendments or restrictions. The SEC has in fact proposed further rulemaking that may impact Rule 506(c), including, among other things, a requirement that Rule 506(c) issuers file general solicitation materials with the SEC. There is currently some uncertainty as to the status of such proposed rules and the adoption of such rules could materially impact the offering process for fund managers in the future. As a result, we do not expect that many fund managers will utilize the exemptive relief provided by the Division until the proposed rules are in final form.

Filing a Notice of Claim; Exemptive Relief is not Self-Executing. The Division will require basic information on the entities claiming relief in order to verify compliance. In addition, fund managers will need to file a notice with the Division which will be effective upon filing so long as the notice is materially complete and accurate. The notice must specify whether the CPO intends to rely on the exemptive relief pursuant to Regulation 4.7(b) or 4.13(a)(3) and make certain representations related to the applicable CPO Exemption. The exemptive



relief is effective until the effective date of any final CFTC action and thus may be subject to change at the discretion of the Division.

Other Considerations

Fund managers that are registered investment advisers will still be subject to the antifraud and advertisement rules under the Investment Advisers Act of 1940, as amended, and should carefully examine any general solicitation materials to ensure compliance with such rules. The SEC has also indicated that general solicitation activities may result in greater risk of examination and scrutiny by the SEC. Further, fund managers that intend to utilize this relief in connection with pools they advise should amend their Form D filed with the SEC to report such pools are relying on Rule 506(c).

Questions or Assistance:

If you would like to discuss the foregoing in further detail, please contact Peter Bilfield at (203) 324-8151, or pbilfield@goodwin.com, or Michael Cummings at (203) 324-8173, or mcummings@goodwin.com.

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