

CLIENT UPDATE

CFTC ISSUES NO-ACTION RELIEF REGARDING INVESTMENTS IN SECURITIZATION VEHICLES AND PENDING REGISTRATION APPLICATIONS

NEW YORK

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In two no-action letters dated December 21, 2012, the Division of Swap Dealer and Intermediary Oversight (“Division”) of the Commodity Futures Trading Commission (“CFTC”) provides no action relief to (i) investment pools that invested in certain securitization vehicles formed prior to October 12, 2012 (the “Securitization Letter”),¹ and (ii) certain commodity pool operators (“CPOs”), commodity trading advisors (“CTAs”), or principals or associated persons (“AP”) thereof whose registration application with the National Futures Association (“NFA”) is pending (the “Pending Registration Letter”).²

SECURITIZATION LETTER

In the Securitization Letter, the Division provides no-action relief for investment pools that invested in certain securitization vehicles formed before October 12, 2012 that have received no-action relief from registration as a CPO pursuant to CFTC Staff Letter 12-45 (“Letter 12-45”).³ Letter 12-45 states that the Division will not recommend enforcement action against any operator of a

¹ Available at <http://cftc.gov/PressRoom/PressReleases/pr6484-12>

² Available at <http://cftc.gov/PressRoom/PressReleases/pr6485-12>

³ Additional detail regarding Letter 12-45 is available in our Client Update, *CFTC Issues Interpretive Guidance and Registration Relief to Securitization Vehicles, mREITs, and BDCs*, available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=5cb66373-3d61-4581-8d32-167fd13c260a>

securitization vehicle (“legacy securitization vehicle”) for failing to register as a CPO if the following criteria are and remain satisfied:

- The issuer has issued fixed income securities before October 12, 2012 that are backed by and structured to be paid from payments on or proceeds received in respect of, and whose creditworthiness primarily depends upon, cash or synthetic assets owned by the issuer;
- The issuer has not and will not issue new securities on or after October 12, 2012; and
- The issuer shall promptly, upon request of the CFTC or any division or office thereof, and in any event within five business days of such request, provide to such requester an electronic copy of the following: (i) the most recent disclosure document used in connection with the offering of the related securities, (ii) all amendments to the principal documents since issue, (iii) the most recent distribution statement to investors, and (iv) if the issuer’s securities were offered relying on Rule 144A under the Securities Act of 1933, a copy of the information that would be provided to prospective investors to satisfy Rule 144A(d)(4); *provided that*, if the issuer does not provide the required information, it must demonstrate that it cannot obtain the required documents through reasonable commercial efforts.

In the Securitization Letter, the Division states that the operator of a fund that invests in a legacy securitization vehicle that satisfies the above criteria should be entitled to relief comparable to that of the underlying legacy securitization vehicle. Accordingly, the Division will not recommend that the CFTC take enforcement action for failure to register as a CPO against the operator of a fund:

- that invests in a legacy securitization vehicle whose operator is entitled to no-action relief under the terms of Letter 12-45, and
- who otherwise would not be required to register as a commodity pool operator.

Relief under the Securitization Letter is self-effectuating and does not require any notice or filing with the CFTC.

PENDING REGISTRATION LETTER

In the Pending Registration Letter, the Division provides temporary no-action relief to certain CPOs, CTAs, and the principals and APs thereof whose registration application with the NFA is pending.

The Division acknowledges that, pursuant to the repeal of section 4.13(a)(4) and the amendments to section 4.5,⁴ a large number of persons will no longer be able to rely on a previously operative exclusion or exemption, and will therefore be required to register with the CFTC by December 31, 2012. The Division also acknowledges that the NFA may be unable to timely process such registration filings, potentially impairing the ability of such applicants to conduct commodity interest transactions and, absent relief, disrupting their businesses.

To avoid such disruptions, the Division will not recommend enforcement action against CPOs, CTAs, and the principals and APs thereof, who are required to register as a result of the recent amendment to section 4.5 or the rescission of section 4.13(a)(4), for engaging in activities as such or operating in such capacities, as applicable, prior to a registration as such being granted or denied by the NFA, provided that such persons comply with the following requirements:

- On or before December 31, 2012, the person completes and files with the NFA a registration application, including, as appropriate, Forms 7-R and 8-R, as well as any required fingerprint card for each of its principals and APs; and
- Subject to the foregoing, on and after January 1, 2013, the person shall be subject to, and shall comply with, the Commodity Exchange Act and the CFTC's regulations applicable to its activities as a CPO or CTA, or principal or AP thereof, as if the person were in fact registered or approved in such capacity.

Such relief will terminate (i) on the date on which the NFA provides notice that the person is registered as a CPO, CTA or principal or AP thereof,⁵ (ii) five days after service by the NFA of a notice on such person that the person may be disqualified from registration or

⁴ Additional detail regarding the amendments to part 4 of the CFTC Regulations are available in our Client Update, *Amendments to CFTC Part 4 Regulations Regarding Commodity Pool Operators and Commodity Trading Advisors*, available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=e42014f7-c21f-4106-8932-383132e8b16a>

Unless otherwise indicated, all section references are to the CFTC Regulations.

⁵ In accordance with section 3.2(c), "Registration processing by the National Futures Association; notification and duration of registration."

principal status,⁶ or (iii) such time as the NFA provides notice that such person's application for registration has otherwise been denied.

Relief under the Pending Registration Letter is self-effectuating and does not require any notice or filing with the CFTC.

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Please do not hesitate to contact us with any questions.

December 28, 2012

⁶ In accordance with Commodity Exchange Act section 8a, "Registration of commodity dealers and associated persons; regulation of registered entities" and NFA Rule 504.