

CLIENT UPDATE

CFTC ISSUES TIME-LIMITED NO-ACTION RELIEF FOR CPOs OF SECURITIZATION VEHICLES

NEW YORK

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The Division of Swap Dealer and Intermediary Oversight (the “Division”) of the Commodity Futures Trading Commission the (“CFTC”) released a letter on March 29, 2013 (“Letter 13-07”) providing time-limited no-action relief until June 30, 2013 to commodity pool operators (“CPOs”) of certain securitization vehicles.

Letter 13-07, which follows a number of recent releases regarding securitization vehicles,¹ explains that the Division is continuing to

¹ CFTC Letter 12-14 provides that certain securitization vehicles that are operated consistent with Regulation AB or Rule 3a-7 under the Investment Company Act and comply with enumerated requirements are considered by the CFTC to be outside the definition of commodity pool under the Commodity Exchange Act; see our Client Update, *CFTC Issues Interpretative Guidance to Equity REITs and Certain Securitization Vehicles*, available at: <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=e9067a99-e5c2-4346-9c58-9603c80df2f1>

CFTC Letter 12-45 provides (i) guidance on securitization vehicles that would not be included within the definition of “commodity pool,” (ii) no-action relief for certain securitization vehicles formed before October 12, 2012, and (iii) temporary relief from registration as a CPO to operators of securitization vehicles until March 31, 2013; see 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>

CFTC Letter 12-67 provides registration relief to CPOs of securitization vehicles formed before October 12, 2012 that satisfy the no-action relief available under CFTC Letter 12-45; see our Client Update, *CFTC Issues No-Action Relief Regarding Investments in Securitization Vehicles and Pending Registration Applications*, available at <http://www.debevoise.com/newseventspubs/publications/detail.aspx?id=7d89b655-08ae-41ff-9fee-00758f2ca03c>

discuss issues related to compliance with Part 4 of the CFTC's regulations² by the securitization industry, including what relief, if any, should be provided to CPOs of securitization vehicles. Therefore, the Division will not recommend enforcement action against a CPO of a securitization vehicle for failure to fully comply with Part 4 with respect to such vehicle until June 30, 2013, subject certain requirements.

The temporary no-action relief is available to securitization vehicle CPOs who (i) initiated registration as a CPO by March 31, 2013; (ii) file notice with the Division via email to dsionoaction@cftc.gov under the subject line "Securitization Compliance No-Action"; and (iii) comply during the no-action period with all provisions of Part 4, subject to, in the case of the operated securitization vehicle only, the following terms and conditions:

- The CPO of a securitization vehicle comprised of a static pool of assets that does not have either an equity tranche or debt issuances rated lower than BB will not be required to comply with Section 4.25 performance disclosures with respect to that securitization vehicle;
- When calculating net asset value with respect to the securitization vehicle, fixed income securities rated BB and higher should be treated as debt and all other fixed income securities and equity tranches should be treated as equity;
- With respect to the Section 4.13(a)(3) "de minimis test," the CPO of a securitization vehicle that did not or does not pay any initial margin with respect to the vehicle's swaps positions must determine its exemption eligibility by complying with the second leg of the de minimis test – that is, by ensuring the commodity pool's aggregate net notional value attributable to commodity interests, determined at the time the most recent commodity interest is established, does not exceed 100 percent of the liquidation value of the pool's portfolio (after taking into account unrealized profits and losses on any such positions);
- In lieu of the financial statement requirements under the Section 4.22 "reporting to pool participants" provision, the CPO of the securitization vehicle provides basic, material information concerning the structure of the securities and distributions thereon, the nature, performance and servicing of the assets supporting the securities, and any swaps held in that securitization vehicle's portfolio, including a discussion of that vehicle's counterparties;

² Unless otherwise indicated, all references are to the CFTC Regulations.

- The CPO of a securitization vehicle need not comply with (i) the disclosure document acknowledgement under Section 4.21(b); (ii) the requirement that books and records be maintained at the main business office with respect to the operated securitization vehicle under Section 4.23; (iii) the cover statement legend under Section 4.24(a); and (iv) the disclosures related to the inception of trading under Section 4.24(s);
- The CPO of a securitization vehicle with an amortizing pool of assets need not comply with the capsule performance information requirements under Section 4.25(a)(1)(F)³ and (G)⁴ with respect to the operated securitization vehicle; and
- With respect to the requirement under Section 4.24(h) that the CPO of a securitization vehicle disclose the percentage of that securitization vehicle's assets used to trade commodity interests, the CPO of that securitization vehicle that holds static swap positions must provide full and complete disclosure regarding the swaps positions and their functions within that securitization vehicle in addition to a percentage.

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Please do not hesitate to contact us with any questions.

April 4, 2013

³ The largest monthly draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool's net asset value and indicating the month and year of the draw-down.

⁴ The worst peak-to-valley draw-down during the most recent five calendar years and year-to-date, expressed as a percentage of the pool's net asset value and indicating the months and year of the draw-down.