

CLIENT UPDATE

CFTC OPENS DOOR FOR USE OF JOBS ACT GENERAL SOLICITATIONS

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In a September 9 letter (“Letter”),¹ the Division of Swap Dealer and Intermediary Oversight (“DSIO”) of the Commodity Futures Trading Commission (“CFTC”) granted exemptive relief permitting general solicitation under certain circumstances by commodity pool operators (“CPOs”) that rely on CFTC Regulation 4.7(b) and 4.13(a)(3). The exemptive relief was issued in response to amendments made by the Securities and Exchange Commission (“SEC”) pursuant to the Jumpstart Our Business Startups Act (“JOBS Act”) to permit general solicitation in certain unregistered securities offerings. The exemptive relief will facilitate the use of Rules 506(c) and 144A(d)(1) by a large number of CPOs, including private fund and securitization sponsors. However, as discussed below, a private fund sponsor should consider other issues before relying on the exemptive relief.

REGULATORY BACKGROUND

Pursuant to the JOBS Act, which was enacted on April 5, 2012, the SEC adopted Rule 506(c) under the Securities Act of 1933 (“Securities Act”).² Rule 506(c) permits issuers (“506(c) Issuers”) to engage in general solicitation or general advertising in offering and selling

¹ Available at <http://www.cftc.gov/ucm/groups/public/@lrllettergeneral/documents/letter/14-116.pdf>

² The SEC retained the existing Rule 506(b) safe harbor for those issuers that either do not wish to engage in general solicitation in their Rule 506 offerings or wish to sell privately to non-accredited investors who meet Rule 506(b)'s sophistication requirements.

securities if the following conditions are met: (1) the terms and conditions of Rule 501 and Rules 502(a) and (d) must be satisfied; (2) all purchasers of the securities must be accredited investors; and (3) the issuer must take reasonable steps to verify that the purchasers are accredited investors.

The SEC also amended Rule 144A(d)(1), which permits resales of securities pursuant to Rule 144A using general solicitation so long as securities are sold to a qualified institutional buyer (“QIB”) or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB (such sellers, “144A Resellers”).

One of the roadblocks to use of the Rule 506(c) provisions by certain CPOs (such as private fund and securitization sponsors) has been that certain provisions of the Commodity Exchange Act contain limitations on offerings and marketing that are inconsistent with general solicitation. For example, under CFTC Regulation 4.7 (which provides relief from certain of the disclosure, reporting and recordkeeping requirements applicable to registered CPOs), CFTC Regulation 4.7(b) requires in part that a pool be *offered* and sold *solely* to QEPs, in an offering that qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) (now section 4(a)(2), as amended by the JOBS Act) or pursuant to Regulation S of the Securities Act. In addition, under CFTC Regulation 4.13(a)(3) (which provides a registration exemption for CPOs who operate pools meeting certain enumerated “de minimis” requirements), CFTC Regulation 4.13(a)(3)(i) requires that 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 in the United States.” As a result, certain CPOs that might otherwise rely on Rule 506(c) or employ 144A Resellers were caught in a conflict with the more permissive SEC amendments.

HARMONIZATION

The Letter harmonizes SEC and CFTC regulations by granting exemptive relief from the Regulation 4.7(b) requirements that an offering be exempt pursuant to section 4(a)(2) of the Securities Act and be offered *solely* to QEPs, and from the requirement in Regulation 4.13(a)(3)(i) that securities be “offered and sold without marketing to the public,” subject to the conditions described below. Thus, CPOs (including those that are private fund and securitization sponsors) may engage in general solicitations as contemplated by Rule 506(C) or 144A.

The relief does not excuse 506(c) Issuers or CPOs using 144A Resellers from compliance with any other applicable requirements contained in the Commodity Exchange Act or in the CFTC's regulations issued thereunder, including all antifraud provisions. The exemptive relief will remain effective until the effective date of any final CFTC action in consideration of the JOBS Act and the SEC's regulatory amendments.

CONDITIONS TO RELIEF AND NOTICE FILING

The exemptive relief granted by the Letter is limited to CPOs who are relying on the exemption provided by Rule 506(c) or who are using 144A Resellers. CPOs claiming the exemptive relief must file a notice with the DSIO. A claim submitted by a CPO will be effective upon filing, so long as the claim is materially complete and accurate. The claim of exemptive relief must contain basic identification information concerning the CPO and pool for which the claim is being filed, specify whether the CPO intends to rely on the exemptive relief pursuant to Regulation 4.7(b) or 4.13(a)(3), with respect to the listed pool(s) and contain certain other information about the CPO's compliance with Regulation 4.7(b) or Regulation 4.13(a)(3) as applicable. The notice must be filed by email and include "JOBS Act Marketing Relief" in the subject line.

ADDITIONAL CONSIDERATIONS

The exemptive relief eliminates a substantial barrier to the use of Rule 506(c) or 144A by private fund, securitization and other collective investment vehicle sponsors. However, those sponsors should consider other issues before engaging in a general solicitation. First, such sponsor should confirm that a general solicitation will not raise issues about the status of the offering in non-U.S. jurisdictions. Second, the sponsor should confirm that it has implemented policies and procedures to meet all other requirements under Rule 506(c) or 144A, including the verification of the status of a purchaser as accredited investor or QIB.³ In addition, such sponsor should keep in mind that when the SEC adopted Rule 506(c) it also proposed amendments that would, if adopted, impose significant additional burdens on Rule 506(c) offerings. While these amendments have not yet been adopted, a sponsor should consider their implications if it wants to pursue a general solicitation in offering its funds.

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Please do not hesitate to contact us with any questions.

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³ Available at <http://www.debevoise.com/clientupdate20130717a/>