

CFTC Issues Exemptive Relief to Harmonize with JOBS Act Amendments to Regulation D and Rule 144A

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The U.S. Commodity Futures Trading Commission (“CFTC”) issued an Exemptive Letter on September 8, 2014 (“Exemptive Letter”) providing that an issuer relying on Rule 506(c) of Regulation D and resellers relying on Rule 144A, permitting general solicitation or general advertising, may still rely on the exemptions for commodity pool operators (“CPOs”) set forth in Regulation 4.7 (the so-called registration lite regime) and Regulation 4.13(a)(3) (the de minimus exemption). The Exemptive Letter seeks to resolve discrepancies between the permission to engage in *general solicitations* under Rule 506(c) and Rule 144A provided that purchasers in such transactions meet certain criteria, and the provisions of Regulations 4.7(b) and 4.13(a)(3), which would prohibit general solicitations as a condition to qualifying for the exemptions.

To implement the Jumpstart Our Business Startups Act (“JOBS Act”), the Securities and Exchange Commission (“SEC”) adopted Rule 506(c), allowing issuers to engage in *general solicitation or general advertising in offering and selling* securities provided that (i) all purchasers of the securities are accredited investors and (ii) the issuer take reasonable steps to verify that the purchasers are accredited investors. In addition, the SEC also amended Rule 144A to allow *general solicitation*, provided the actual purchasers are investors the seller reasonably believes are qualified institutional buyers under Rule 144A. Regulation 4.7 requires that an offering (i) be exempt pursuant to Section 4(a)(2) of the Securities Act of 1933 (which does not include Rule 506(c) offerings) and (ii) be *offered* and sold solely to qualified eligible persons, as defined in Regulation 4.7. Regulation 4.13(a)(3) requires that the securities be “offered and sold without marketing to the public.” Therefore, absent the relief granted by the Exemptive Letter, a CPO relying on the exemptions allowing general solicitation under Rules 506(c) and 144A would be unable to receive exemptive relief under Regulations 4.7 and 4.13(a)(3).

The CFTC’s relief outlined in the Exemptive Letter is not self-executing. CPOs relying on the exemptions allowing general solicitation under Rule 506(c) and/or 144A must file a notice with the CFTC’s Division of Swap Dealer and Intermediary Oversight in the event that they intend to rely on Regulation 4.7 and/or 4.13(a)(3).

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