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Division of Swap Dealer and
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Division of Swap Dealer and Intermediary Oversight

RE: Exemptive Relief from Provisions in Regulations 4.7(b) and 4.13(a)(3) Consistent with JOBS Act Amendments to Regulation D and Rule 144A

The Division of Swap Dealer and Intermediary Oversight (“DSIO” or “Division”) of the Commodity Futures Trading Commission (“Commission”) intends to provide relief from certain provisions in Regulations 4.7(b) and 4.13(a)(3), which provide exemptive relief from specific compliance obligations in Part 4 of the Commission’s regulations and from commodity pool operator (“CPO”) registration, respectively.¹ Such exemptive relief is being issued in response to amendments made by the Securities and Exchange Commission (“SEC”), pursuant to recent legislative directives, which add a new registration exemption to Rule 506 of Regulation D² (“Reg D”) and amend Rule 144A.³

The Jumpstart Our Business Startups Act of 2012

On April 5, 2012, the Jumpstart Our Business Startups Act (“JOBS Act”) was enacted for the stated purpose of “increas[ing] American job creation and economic growth by improving access to the public capital markets for emerging growth companies.”⁴ Among other things, the JOBS Act amended various sections of the Securities Act of 1933 (“33 Act”) and required the SEC to amend its rules to implement certain of the JOBS Act provisions.

Section 5 of the 33 Act⁵ requires the registration of securities offerings with the SEC and compliance with prospectus delivery requirements, unless an exemption is available. Section 4(a)(2) (formerly Section 4(2)) of the 33 Act⁶ provides a statutory exemption from these registration and prospectus delivery requirements for “transactions by an issuer not involving any

¹ 17 CFR 4.7 and 4.13(a)(3).

² 17 CFR 230.500-506.

³ 17 CFR 230.144A.

⁴ Pub. L. No. 112-106, 126 Stat. 306 (Apr. 5, 2012).

⁵ 15 U.S.C. 77e.

⁶ 15 U.S.C. 77d(a)(2).

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public offering.” Rule 506 of Reg D⁷ (now Rule 506(b)) was originally adopted by the SEC as a non-exclusive safe harbor under the Section 4(a)(2) exemption for securities offerings by an issuer, without regard to dollar amount, to an unlimited number of “accredited investors,” as defined in Rule 501(a) of Reg D, and to no more than 35 non-accredited investors who meet certain sophistication requirements. Offerings under Rule 506(b) are subject to the terms and conditions of Rules 501 and 502 of Reg D,⁸ including Rule 502(c), which states that “neither the issuer nor any person acting on its behalf shall offer or sell the securities by any form of general solicitation or general advertising.”⁹

Section 201(a)(1) of the JOBS Act directed the SEC to amend Rule 506 of Reg D as follows:

Not later than 90 days after the date of the enactment of this Act, the Securities and Exchange Commission shall revise its rules issued in section 230.506 of title 17, Code of Federal Regulations, to provide that the prohibition against general solicitation or general advertising contained in section 230.502(c) of such title shall not apply to offers and sales of securities made pursuant to section 230.506, provided that all purchasers of the securities are accredited investors. Such rules shall require the issuer to take reasonable steps to verify that purchasers are accredited investors using such methods as determined by the Commission. Section 230.506 of title 17, Code of Federal Regulations, as revised pursuant to this section, shall continue to be treated as a regulation issued under section 4[(a)](2) of the Securities Act of 1933 (15 U.S.C. 77d(2)).¹⁰

Pursuant to this legislative directive, the SEC proposed, and in July 2013, adopted, amendments to Rule 506.¹¹

Amendments to Rule 506 in Response to the JOBS Act

⁷ 17 CFR 230.506.

⁸ 17 CFR 230.501 and 230.502.

⁹ 17 CFR 230.502(c).

¹⁰ Pub. L. No. 112-106, sec. 201(a)(1), 126 Stat. 306, 313. Additionally, Section 201(b) of the JOBS Act amends 33 Act Section 4 by adding a paragraph (b) stating, “Offers and sales exempt under [Rule 506 as revised pursuant to JOBS Act Section 201] shall not be deemed public offerings under the Federal securities laws as a result of general advertising or general solicitation.” *Id.* at sec. 201(b).

¹¹ Eliminating the Prohibition Against General Solicitation and General Advertising in Rule 506 and Rule 144A Offerings, 77 Fed. Reg. 54464 (Sept. 5, 2012) (“Proposing Release”), and 78 Fed. Reg. 44771 (Jul. 24, 2013) (“Adopting Release”).

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To implement JOBS Act Section 201(a)(1), the SEC adopted Rule 506(c), which permits an issuer to engage in general solicitation or general advertising in offering and selling securities pursuant to Rule 506. Under Rule 506(c), issuers must meet the following conditions: (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.¹²

In addition, the SEC explained in the Adopting Release that the “mandate [in Section 201(a)(1)] affects only Rule 506, and not Section 4(a)(2) offerings in general, which means that ... an issuer relying on Section 4(a)(2) outside of the Rule 506(c) exemption will be restricted in its ability to make public communications to solicit investors for its offering because public advertising will continue to be incompatible with a claim of exemption under Section 4(a)(2).” Further, the SEC retained the existing Rule 506(b) safe harbor because the SEC believed that preserving existing Rule 506(b) is important “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.”¹³

JOBS Act Section 201(a)(2) and the SEC’s Rule 144A

Rule 144A under the 33 Act¹⁴ is a non-exclusive safe harbor exemption from the registration and prospectus delivery requirements of the 33 Act for resales of certain securities to qualified institutional buyers (“QIBs”), as that term is defined in Rule 144A(a)(1), provided that the conditions of the rule are met.¹⁵ Prior to the SEC’s amendment of Rule 144A pursuant to the JOBS Act, a seller relying on Rule 144A was limited to offering the applicable securities to QIBs, or to prospective investors that the seller or a person acting on the seller’s behalf reasonably believed were QIBs.

¹² 17 CFR 230.506(c)(1)-(2). Rule 506(c) also includes a “non-exclusive list of specific verification methods for natural persons that may be relied upon by those issuers seeking greater certainty that they satisfy the rule’s [accredited investor] verification requirement.” Adopting Release, 78 Fed. Reg. at 44780. In the Adopting Release, the SEC also noted that “because the issuer has the burden of demonstrating that its offering is entitled to an exemption from the registration requirements of [the 33 Act], it will be important for issuers and their verification service providers to retain adequate records regarding the steps taken to verify that a purchaser was an accredited investor.” Adopting Release, 78 Fed. Reg. at 44779.

¹³ *Id.* at 44776.

¹⁴ 17 CFR 230.144A.

¹⁵ In the case of persons other than issuers or dealers, resales of securities under Rule 144A are exempt pursuant to Section 4(a)(1) (formerly Section 4(1)) of the 1933 Act, 15 U.S.C. 77d(a)(1), which is the statutory exemption for “transactions by any person other than an issuer, underwriter, or dealer.” In the case of dealers, resales of securities under Rule 144A are exempt pursuant to Section 4(a)(3) (formerly Section 4(3)) of the 1933 Act, 15 U.S.C. 77d(a)(3), which generally exempts “transactions by a dealer” except for certain transactions.

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Section 201(a)(2) of the JOBS Act directed the SEC to amend Rule 144A as follows:

Not later than 90 days after the date of enactment of this Act, the Securities and Exchange Commission shall revise subsection (d)(1) of section 230.144A of title 17, Code of Federal Regulations, to provide that securities sold under such revised exemption may be offered to persons other than qualified institutional buyers, including by means of general solicitation or general advertising, provided that securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer.

In response to this legislative directive, the SEC amended Rule 144A(d)(1) by eliminating references to “offer” and “offeree,” such that the provision only requires that “securities be sold to a QIB or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a QIB.”¹⁶ In the Adopting Release, the SEC explained that “[u]nder this amendment, resales of securities pursuant to Rule 144A can be conducted using general solicitation, so long as the purchasers are limited in this manner.”¹⁷

Commission Regulations 4.7(b) and 4.13(a)(3)

Under certain circumstances, entities relying on Rule 506(c) or employing resellers relying on Rule 144A may also be CPOs subject to Commission regulation. The recent amendments adding Rule 506(c) to Reg D and revising Rule 144A(d)(1) as described above create a situation in which such dually-regulated CPOs may not now rely upon certain exemptive relief provided by Commission regulations and generally available to all CPOs who meet certain conditions because the conditions of such relief include, among other things, prohibitions against marketing to the public.

Regulation 4.7 provides relief from certain of the disclosure, periodic and annual reporting, and recordkeeping requirements in Part 4 of the Commission’s regulations to CPOs who claim the relief pursuant to Regulation 4.7(d). Regulation 4.7(b) describes two situations in which a CPO may claim exemptive relief thereunder: (1) a registered CPO who *offers* or sells participations in a pool *solely* to qualified eligible persons (“QEPs”)¹⁸ in an offering which

¹⁶ Adopting Release, 78 Fed. Reg. at 44786. The condition in Rule 144A(d)(1), as amended, now states in relevant part, “The securities are sold only to a qualified institutional buyer or to a purchaser that the seller and any person acting on behalf of the seller reasonably believe is a qualified institutional buyer.”

¹⁷ *Id.*

¹⁸ The term “Qualified eligible person” is defined in Regulations 4.7(a)(2) and (3). 17 CFR 4.7(a)(2) and (3).

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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) of that Act or pursuant to Regulation S; or (2) any bank registered as a CPO in connection with a pool that is a collective trust fund whose securities are exempt from registration under the Securities Act pursuant to section 3(a)(2) of that Act and are *offered* or sold, *without marketing to the public, solely* to QEPs.¹⁹

Furthermore, the exemption provided by Rule 506(c) is not an exemption “pursuant to section 4[(a)](2)”²⁰ of the Securities Act because the JOBS Act amendments only affect Rule 506, and “public advertising will continue to be incompatible with a claim of exemption under [33 Act] Section 4(a)(2).”²¹ Therefore, any issuers relying on the 33 Act exemption pursuant to Rule 506(c) (“506(c) Issuers”) would be unable to meet that condition and would be prevented from receiving any exemptive relief provided to CPOs by Regulations 4.7(b)(1)-(4). Additionally, any CPO relying on Regulation 4.7 is restricted to offering its participations solely to QEPs. Accordingly, with the amendments of Rule 506(c) and Rule 144A, Regulation 4.7(b) is no longer compatible with those rules in the manner intended.

In addition, Regulation 4.13(a)(3) provides a registration exemption for CPOs who operate pools meeting the conditions enumerated in the regulation. One of those conditions, Regulation 4.13(a)(3)(i), requires that interests in each pool for which the CPO claims the exemption be exempt from registration under the 33 Act and “offered and sold without marketing to the public in the United States.”²² Regulation 4.13(a)(3)(ii) requires that at all times, each such pool must meet one of two tests regarding its commodity interest positions.²³ Regulation 4.13(a)(3)(iii) requires that the CPO reasonably believes at the time of investment that each person who participates in such pool is, among other things, an accredited investor or a QEP.²⁴ Finally, Regulation 4.13(a)(3)(iv) requires that participations in the pool are not marketed as or in a vehicle for trading in the commodity futures or commodity options markets.²⁵

¹⁹ 17 CFR 4.7(b) (emphasis added to indicate the marketing restrictions in this provision).

²⁰ 17 CFR 4.7(b).

²¹ Adopting Release, 78 Fed. Reg. at 44774.

²² 17 CFR 4.13(a)(3)(i).

²³ 17 CFR 4.13(a)(3)(ii).

²⁴ 17 CFR 4.13(a)(3)(iii).

²⁵ 17 CFR 4.13(a)(3)(iv). This marketing prong focuses on whether the participations in a pool are marketed specifically for their exposure to commodity interests regulated by the Commission. The relief granted by this letter pertains to the general prohibition against marketing in Regulation 4.13(a)(3)(i) because the JOBS Act focused on discontinuing the applicability of a prohibition against general solicitation and general advertising to certain securities issuers. For instance, a 506(c) Issuer who nevertheless violates Regulation 4.13(a)(3)(iv) would not be entitled to the exemptive relief provided by Regulation 4.13(a)(3), notwithstanding the SEC’s amendments to Reg D in response to JOBS Act Section 201(a)(1).

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Generally, all CPOs of pools relying on exemptions under 33 Act Section 4(a)(2), including Rule 506(b) of Reg D, remain subject to the prohibition against general solicitation or general advertising, and may continue to claim relief under Regulation 4.7(b) or 4.13(a)(3). As described in the preceding section hereof, however, 506(c) Issuers are not subject to the prohibition against “any form of general solicitation or general advertising” in Reg D’s Rule 502, and are also not exempt pursuant to 33 Act Section 4(a)(2).²⁶ With regard to the conditions of relief enumerated in Regulation 4.7(b), if a 506(c) Issuer is also subject to regulation by the Commission as a CPO and it wishes to rely on the exemptive relief provided therein, then (1) the 506(c) Issuer would be unable to meet the requirement that its offering be exempt pursuant to section 4(a)(2) of the 33 Act; and (2) any general solicitation or general advertising for its exempt offering pursuant to Rule 506(c) would violate the provision requiring that the securities be “offered” solely to QEPs. With regard to Regulation 4.13(a)(3), 506(c) Issuers also subject to regulation by the Commission as CPOs could not qualify for the exemption from registration as provided thereunder because the general solicitation and general advertising permissible under Rule 506(c) would violate the requirement in Regulation 4.13(a)(3)(i) that such securities be “offered and sold without marketing to the public.”

Similarly, as described in the preceding section of this letter, entities reselling securities in reliance on an exemption under Rule 144A (“144A Resellers”) are now permitted to engage in general solicitation, provided that the securities are only resold to QIBs or persons reasonably believed to be QIBs. Absent the relief granted herein, a CPO operating a pool the interests of which are sold by a Rule 144A Reseller would be precluded from receiving exemptive relief under either Regulation 4.7(b) or Regulation 4.13(a)(3), if the Rule 144A Reseller uses general solicitation or general advertising.

Based on the foregoing, the Division believes it is appropriate to address the issues described above by granting exemptive relief from the Regulation 4.7(b) requirements that an offering be exempt pursuant to section 4(a)(2) of the 33 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 below. The Division believes that granting such exemptive relief is neither contrary to the purposes of Regulations 4.7(b) and 4.13(a)(3), nor to the public interest.

Accordingly, pursuant to the Commission’s exemptive authority under Regulation 4.12(a), as delegated to the Division by Regulation 140.93, the Division grants exemptive relief from the requirements in Regulations 4.7(b) and 4.13(a)(3)(i) enumerated above to CPOs meeting the following conditions:

²⁶ 17 CFR 230.506(c)(1); 17 CFR 230.502(c).

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Conditions of Relief from Provisions in Regulations 4.7(b) and 4.13(a)(3)

1. *The exemptive relief granted by this letter is strictly limited to CPOs who are 506(c) Issuers or CPOs using 144A Resellers.* The Division believes this limitation is appropriate. Only CPOs who are relying on the exemption provided by Reg D's Rule 506(c) are unable to meet the requirement in Regulation 4.7(b) that their offerings be exempt pursuant to 33 Act Section 4(a)(2). Additionally, only CPOs who are relying on the exemption provided by Rule 506(c), or CPOs who are using entities reselling securities pursuant to Rule 144A, are allowed to generally solicit or advertise their offerings, and therefore are impacted by the discrepancy between marketing restrictions in current Commission regulations and Reg D and Rule 144A, as amended pursuant to the JOBS Act.
2. *This relief is not self-executing. CPOs claiming the exemptive relief herein must file a notice with the Division.* In order to verify compliance with the substantive conditions of this relief, the Division will require basic information on the entities that are claiming exemptive relief pursuant to this letter. Additionally, notice filings to claim this relief will provide the Division with a reasonable estimate of how many issuers are affected by the discrepancy between Rule 506(c) and Rule 144A and the Commission's Part 4 regulations, which will assist the Commission if it seeks to address this issue through future rulemaking.

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:

- a. State the name, business address, and main business telephone number of the CPO claiming the relief;
- b. State the name of the pool(s) for which the claim is being filed;
- c. State whether the CPO claiming relief is a 506(c) Issuer or is using one or more 144A Resellers;
- d. 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);
 - i. If relying on Regulation 4.7(b), represent that the CPO meets the conditions of the exemption, other than that provision's requirements that the offering be exempt pursuant to section 4(a)(2) of the 33 Act and be offered solely to QEPs, such that the CPO meets the remaining

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- conditions and is still required to sell the participations of its pool(s) to QEPs;²⁷
- ii. If relying on Regulation 4.13(a)(3), represent that the CPO meets the conditions of the exemption, other than that provision’s prohibition against marketing to the public;²⁸
 - e. Be signed by the CPO; and
 - f. Be filed with the Division via email using the email address *dsionoaction@cftc.gov* and stating “JOBS Act Marketing Relief” in the subject line of such email.

The exemptive relief in this letter shall remain effective until the effective date of any final Commission action in consideration of the JOBS Act and the SEC’s regulatory amendments cited herein.

In granting a specific subset of CPOs the relief in this letter, the Division seeks to strike the appropriate balance between the Commission’s regulatory objectives and resolving discrepancies between exemptive relief provisions from two regulatory regimes—those of the Commission and the SEC—which may be simultaneously applicable to the 506(c) Issuers and CPOs using 144A Resellers.

Any new, different, or changed material facts or circumstances could change the Division’s position and render this letter void. The relief issued by this letter does not excuse the 506(c) Issuers or CPOs using 144A Resellers from compliance with any other applicable requirements contained in the Commodity Exchange Act or in the Commission’s regulations issued thereunder. For example, 506(c) Issuers and CPOs using 144A Resellers remain subject to all antifraud provisions of the Act. The Division retains the authority to further condition, modify, suspend, terminate or otherwise restrict the relief in its discretion.

²⁷ See 17 CFR 4.7(b) (requiring that CPOs relying on the exemption offer and sell their participations only to QEPs and also prohibiting “marketing to the public” generally).

²⁸ See 17 CFR 4.13(a)(3)(i). Such representations make clear that existing limitations on relief in Regulations 4.7(b) and 4.13(a)(3) to CPOs of pools with QEP and/or accredited investor participants are applicable to CPOs claiming relief pursuant to this letter, and are equivalent to the limited availability of Rule 506(c) to securities offerings with solely accredited investor purchasers and Rule 144A’s limitation of resales to QIBs.

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If you have any questions regarding this letter, please contact Amanda Olear, Associate Director, at 202-418-5283 or aolear@cftc.gov, or Elizabeth Groover, Special Counsel, at 202-418-5985 or egroover@cftc.gov.

Very truly yours,

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