



October 17, 2012

Mr. David Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

Re: Harmonizing Certain Exemptions Relating to Commodity Pool Operators and Commodity Trading Advisors with Proposed Amendments Implementing the Jumpstart Our Business Startups Act (the "JOBS Act")

The Securities Industry and Financial Markets Association ("SIFMA")¹ and The Financial Services Roundtable² respectfully request that the Commodity Futures Trading Commission (the "Commission" or "CFTC") provide interpretive guidance to harmonize its "private offering" requirements in CFTC Rules 4.7 and 4.13(a)(3) with the broadened scope of solicitation permitted by the Securities and Exchange Commission's (the "SEC") proposed amendments³ to Rule 506 of Regulation D and Rule 144A under the Securities Act of 1933 (the "Securities Act") implementing Title II of the JOBS Act.⁴ Such action is necessary on the part of the Commission in order to ensure that private funds, which serve an integral role in small business capital formation and financing activities, receive the full benefits Congress intended under the JOBS Act. Failure by the Commission to act in this area may hinder the goals of job creation and economic growth that lie at the heart of the JOBS Act.

I. BACKGROUND ON PROPOSED AMENDMENTS TO RULES 506 AND 144A

Title II of the JOBS Act directs the SEC to liberalize the permitted scope of general solicitation and general advertising in private placements of securities pursuant to Rule 506 under Regulation D⁵ and Rule 144A.⁶ As

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. For more information, visit www.sifma.org.

² The Financial Services Roundtable represents 100 of the largest integrated financial services companies providing banking, insurance and investment products and services to the American consumer. Member companies participate through the Chief Executive Officer and other senior executives nominated by the CEO. Roundtable member companies provide fuel for America's economic engine, accounting directly for \$92.7 trillion in managed assets, \$1.2 trillion in revenue and 2.3 million jobs.

³ Release No. 33-9354 (August 29, 2012), 77 FR 54464.

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

⁵ Rule 506, part of Regulation D, is a safe harbor for issuer private placements: it provides that offers and sales by an issuer that meet certain conditions are exempt from registration under Section 4(a)(2) of the Securities Act. One of the conditions is that neither the issuer nor any person acting on its behalf may offer or sell the securities by any form of general solicitation or general advertising. Rule 506 currently permits offers and sales to an unlimited number of "accredited investors" and up to 35 other investors. The term "accredited investor" is defined in Rule

a result, the SEC has proposed to amend Rule 506 to “provide that the prohibition against general solicitation and general advertising contained in Rule 502(c) of Regulation D would not apply to offers and sales of securities made pursuant to Rule 506, provided that all purchasers of the securities are accredited investors.”⁷ The SEC has also proposed to amend Rule 144A(d)(1) to “provide that securities may be offered pursuant to Rule 144A to persons other than qualified institutional buyers, provided that the securities are sold only to persons that the seller and any person acting on behalf of the seller reasonably believe are qualified institutional buyers.”⁸

II. POTENTIAL CONFLICT WITH THE COMMISSION’S APPLICATION OF PRIVATE OFFERING RULES IN EXISTING CFTC EXEMPTIONS FOR COMMODITY POOL OPERATORS

The JOBS Act and the SEC’s proposed rules clearly amend the federal securities laws to permit general solicitation and general advertising under certain circumstances. The JOBS Act, however, does not apply to CFTC rules. Nevertheless, the Commission typically has looked to the SEC’s rules interpreting the permissible limits of private, unregistered offerings to inform the Commission’s own private offering exemptions. The Commission should confirm that its application of its “private offering” rules will be harmonized with the broadened scope of solicitation permitted under the JOBS Act and SEC Rules 506 and 144A. Failure by the Commission to provide such guidance will introduce needless uncertainty for managers of private funds that rely upon exemptions from commodity pool operator (“CPO”) regulations under CFTC Rules 4.7 and 4.13(a)(3), and the similar *de minimis* exemption for commodity trading advisors under CFTC Rule 4.14(a)(10), and who seek to avail themselves of the private placement regime under the JOBS Act.

Managers of private funds that trade in commodities and CFTC-regulated derivatives widely rely on two principal exemptions from certain substantive regulations otherwise applicable to CPOs: CFTC Rule 4.7⁹ and CFTC Rule 4.13(a)(3).¹⁰ CFTC Rule 4.7 provides relief from certain disclosure, reporting and recordkeeping requirements for registered CPOs in connection with the offering and operation of commodity pools that limit participation to certain sophisticated investors.¹¹ CFTC Rule 4.13(a)(3) provides an exemption from CPO registration for the managers of funds that, among other things, engage in a *de minimis* level of trading in commodity interests.¹²

501 to mean a person who comes within any of eight specified categories, or who the issuer reasonably believes comes within any of the categories, at the time of the sale of the securities to that person.

⁶ Rule 144A is a safe harbor that permits a person other than the issuer to resell securities without registration if the transaction meets specified requirements, including a requirement that the securities be offered and sold only to persons the seller and any person acting on the seller’s behalf reasonably believe are “qualified institutional buyers” as defined in Rule 144A. Because Rule 144A requires that there be no offers to anyone other than those reasonably believed to be qualified institutional buyers, it effectively prohibits general solicitation and general advertising.

⁷ Release No. 33-9354 (September 5, 2012), 77 FR 54464 (the “Proposing Release”).

⁸ *Id.*

⁹ 17 CFR 4.7.

¹⁰ 17 CFR 4.13(a)(3).

¹¹ *See* 17 CFR 4.7(b).

¹² *See* 17 CFR 4.13(a)(3).

The relief provided in both CFTC Rules 4.7 and 4.13(a)(3) is limited to the managers of privately offered funds. For non-bank registered CPOs, CFTC Rule 4.7 defines “privately offered” to mean that interests in the fund must be offered or sold in an “offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section [4(a)(2)] of that Securities Act or pursuant to Regulation S.”¹³ For banks registered as CPOs, CFTC Rule 4.7 defines “privately offered” to mean that interests in the relevant pool “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.”¹⁴ With respect to CFTC Rule 4.13(a)(3), “privately offered” means that interests in the fund “are exempt from registration under the [Securities Act], and such interests are offered and sold without marketing to the public in the United States.”¹⁵

III. CFTC HISTORY OF FOLLOWING SEC PRIVATE OFFERING PRECEDENTS

Notwithstanding the slightly different wordings of the “private offering” requirements in CFTC Rules 4.7 and 4.13(a)(3), the Commission traditionally has looked to the SEC’s “private offering” standards in interpreting these requirements, and has taken sensible steps to conform its practice to SEC practice.

3.1 CFTC Rules Incorporate SEC Private Offering Standards

The wording of CFTC Rules 4.7 and 4.13(a)(3) reflects the Commission’s history of following the SEC’s private offering standards. The text of CFTC Rule 4.7 expressly looks to the Section 4(a)(2) offering standards,¹⁶ and, in the adopting release for the final rule (the “Rule 4.7 Release”), the Commission described having modified the proposed version of CFTC Rule 4.7 in order to facilitate multi-jurisdictional offerings pursuant to Regulation S under the Securities Act.¹⁷ The Commission further described having based the “qualified eligible person” standard on similar standards in the securities laws “in order to facilitate concurrent use of an exemption from registration under the Securities Act pursuant to section [4(a)(2)] of that Securities Act and of the Rule 4.7 exemption.”¹⁸ CFTC Rule 4.13(a)(3) similarly is premised on the relevant fund being exempt from registration under the Securities Act.¹⁹ Moreover, the Commission has read CFTC Rule 4.13(a)(3) to allow offshore offerings to non-eligible investors in order to conform with SEC practice under mixed Regulation S/Rule 144A/Section 3(c)(7) offerings.²⁰

3.2 Actions to Conform CFTC Practice with SEC Practice

In the past, where the Commission’s practice has deviated from SEC practice, the Commission has taken reasonable steps to conform the agencies’ regulations. For example, when CFTC Rule 4.7 was proposed,

¹³ 17 CFR 4.7(b).

¹⁴ *Id.*

¹⁵ 17 CFR 4.13(a)(3)(i).

¹⁶ 17 CFR 4.7(b).

¹⁷ 57 FR 34853 (August 7, 1992).

¹⁸ 57 FR 34853, 34855.

¹⁹ 17 CFR 4.13(a)(3).

²⁰ *See, e.g.*, CFTC Interpretative Letter No. 04-13, Comm. Fut. L. Rep. (CCH) ¶29,753 (Apr. 14, 2004) (permitting 4.13(a)(3) exempt pool to be marketed to offshore non-accredited investors).

certain funds qualified for SEC Rule 506, but not CFTC Rule 4.7, and thus did not receive relief from certain disclosure obligations under applicable CFTC rules. These funds raised concerns that Regulation D offerings could be delayed due to the requirement in CFTC Rule 4.26 that commodity pools file a disclosure document no less than twenty-one calendar days prior to the date the CPO intends to deliver the disclosure document to a prospective participant in the pool.²¹ The Commission accordingly adopted CFTC Rule 4.8 to “address the potential for delay caused by the twenty-one day filing requirement.”²²

More recently, when the Commission enacted rules that have the effect of requiring the managers of registered investment companies to register with the CFTC as CPOs, the Commission proposed certain exemptive relief meant to reconcile the compliance regimes of both agencies.²³ Although the rules have not been finalized, such action shows continued efforts by the Commission to harmonize its regulations with respect to CPOs with those of the SEC.

3.3 Incorporation of SEC Standards in Commission Regulations

Other examples demonstrate the Commission’s incorporation of SEC standards with respect to similar matters. For example, CFTC Rule 4.7 provides that both “qualified purchasers” as defined in section 2(a)(51)(A) of the Investment Company Act of 1940 (the “Investment Company Act”)²⁴ and “knowledgeable employees” as defined in Rule 3c-5 under the Investment Company Act²⁵, fall within the definition of “qualified eligible person” for purposes of CFTC Rule 4.7. In the final rule release expanding the definition of qualified eligible person to include qualified purchasers and knowledgeable employees, the Commission wrote: “the Commission intends to follow interpretations issued by the SEC and its staff on the [qualified purchaser] and knowledgeable employee definitions. The Commission has the right further to interpret or to amend Rule 4.7 to exclude from the [qualified eligible person definition] any person that the SEC or its staff found to be a [qualified purchaser] or knowledgeable employee . . . [but] expects that it would exercise this right infrequently.”²⁶

In addition, both CFTC Rules 4.7 and 4.13(a)(3) incorporate the accredited investor standard from Rule 501 under Regulation D.²⁷ When the Commission incorporated the accredited investor standard into CFTC Rule 4.7 in February 2012, the Commission agreed with one commenter that this would “facilitate consistency amongst federal standards for financial sophistication and reduce investor confusion.”²⁸

IV. COMMISSION INACTION WILL UNDULY LIMIT THE JOBS ACT

The JOBS Act permits broader solicitation under the Securities Act and the Investment Company Act. In order to provide market certainty, the Commission should align its private offering standards by providing

²¹ 4.7 Release at 34859.

²² *Id.*

²³ *See* 77 FR 11345 (February 24, 2012).

²⁴ *See* 17 CFR 4.7(a)(2)(vi).

²⁵ *See* 17 CFR 4.7(a)(2)(vii).

²⁶ 65 FR 47848, 47852 (August 4, 2000).

²⁷ 17 CFR 4.13(a)(3)(iii)(A).

²⁸ 77 FR 11252, 11261 (February 24, 2012).

interpretive guidance to allow private funds relying on the exemptions under CFTC Rules 4.7 and 4.13(a)(3) to benefit from the expanded scope of permitted solicitation provided in the SEC's proposed amendments to Rules 506 and 144A.

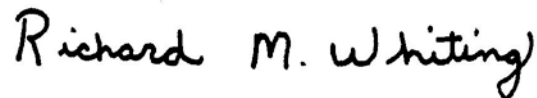
The need for such guidance is particularly great given the recent expansion of the scope of traded instruments that may cause an entity to be treated as a "commodity pool".²⁹ With commodity pools including funds that trade swaps, more and more managers of private funds may find themselves subject to CPO-related regulations, absent an alternative exemption. Currently, private funds that rely on the "private offering" exemptions under the federal securities laws and regulations can make use of the CFTC Rule 4.7 and 4.13(a)(3) exemptions from regulation. Funds should not be forced by uncertainty as to the Commission's views to forego the relief provided under the JOBS Act or to limit their activities. The Commission should confirm that the Commission's private offering exemptions will be applied in a manner that affords funds the full benefit of the SEC's rules under the JOBS Act.

We appreciate the opportunity to submit this request.

Sincerely,



Sean C. Davy
Managing Director, Capital Markets
Securities Industry and Financial Markets Association



Richard M. Whiting
Executive Director and General Counsel
The Financial Services Roundtable

cc: The Honorable Gary Gensler, Chairman, Commodity Futures Trading Commission
The Honorable Bart Chilton, Commissioner, Commodity Futures Trading Commission
The Honorable Scott D. O'Malia, Commissioner, Commodity Futures Trading Commission
The Honorable Jill E. Sommers, Commissioner, Commodity Futures Trading Commission
The Honorable Mark P. Wetjen, Commissioner, Commodity Futures Trading Commission
The Honorable Mary L. Schapiro, Chairman, Securities and Exchange Commission
The Honorable Luis A. Aguilar, Commissioner, Securities and Exchange Commission
The Honorable Daniel M. Gallagher, Commissioner, Securities and Exchange Commission
The Honorable Troy A. Paredes, Commissioner, Securities and Exchange Commission
The Honorable Elisse B. Walter, Commissioner, Securities and Exchange Commission

²⁹ *Id.* See also Section 721(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111-203, 124 Stat. 1376 (2010).