



July 17, 2012

Via Electronic Mail:

David A. Stawick
Secretary
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20581

Re: Harmonization of Compliance Obligations and The Jumpstart Our Business Startups Act and CFTC Regulations

Dear Mr. Stawick:

In light of an important recent statutory change, Managed Funds Association¹ (“MFA”) submits this letter to the Commodity Futures Trading Commission (the “Commission” or “CFTC”) to supplement its letter from April 24, 2012 on Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators² (“Harmonization Rulemaking”).³ Title II, Access to Capital for Job Creators, of the recently enacted Jumpstart Our Business Startups Act (the “JOBS Act”) amends the securities laws and regulations by eliminating the prohibition on general solicitation or advertising in connection with the non-public offering of securities under Rule 506 under the Securities Act of 1933 (the “Securities Act”). While the JOBS Act mandates consistent treatment of Regulation D, Rule 506 offerings across the federal securities laws, it does not specifically mandate harmonizing changes to the Commission’s part 4 regulations, which creates an inconsistency between the amended Regulation D and §§ 4.7(b) and 4.13(a)(3). We believe the Commission’s

¹ The Managed Funds Association (MFA) represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA, based in Washington, DC, is an advocacy, education, and communications organization established to enable hedge fund and managed futures firms in the alternative investment industry to participate in public policy discourse, share best practices and learn from peers, and communicate the industry’s contributions to the global economy. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has cultivated a global membership and actively engages with regulators and policy makers in Asia, Europe, North and South America, and all other regions where MFA members are market participants.

² See letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to David A. Stawick, Secretary, CFTC, dated April 24, 2012 regarding Regulation 4.5 Harmonization, *available at*: <http://www.managedfunds.org/wp-content/uploads/2012/04/MFA-harmonization-comments-final-4-24-12.pdf>.

³ 77 FR 11345 (Feb. 24, 2012), proposed rule on “Harmonization of Compliance Obligations for Registered Investment Companies Required to Register as Commodity Pool Operators”.

regulations should be consistent with the JOBS Act and respectfully urge the Commission as part of its Harmonization Rulemaking to amend §§ 4.7(b) and 4.13(a)(3).

In the alternative, MFA respectfully petitions the Commission to amend §§ 4.7(b) and 4.13(a)(3) so that the Commission's regulations are consistent with the JOBS Act and continue to be consistent with non-public offerings of private investment funds under Regulation D. MFA also seeks interim temporary no-action relief for a commodity pool operator ("CPO") relying on the exemption from certain part 4 requirements under § 4.7(b) or from the exemption from registration under § 4.13(a)(3), exempting the CPO from the prohibition against marketing to the public, provided that the interests in the exempt pool are offered and sold pursuant to section 4 of the Securities Act and the regulations thereunder.

I. Background

Hedge funds, including commodity pools, generally rely on the safe harbor for private offerings found in Regulation D under the Securities Act. Rule 502(c) of Regulation D precludes an issuer from offering or selling its securities by any form of general solicitation or general advertising. CFTC § 4.7(b) provides an exemption from certain part 4 requirements for CPOs with respect to offerings to qualified eligible persons.⁴ CFTC § 4.13(a)(3) provides an exemption from CPO registration where commodity interest trading is limited and pool participants are sophisticated.⁵ Many hedge funds/commodity pools rely on Rule 506 of Regulation D (which incorporates the requirements of Rule 502) and either § 4.7(b) or § 4.13(a)(3).

When the Commission adopted § 4.7 in 1992 and § 4.13(a)(3) in 2003, it noted that the eligibility requirements for these exemptions were constructed in connection with the offering and operation of a commodity pool that qualifies under Regulation D of the Securities Act for the private placement of securities without registration.⁶ The Commission's 4.7 Adopting Release states that to qualify for relief under Rule 4.7 the offering would "have to be offered in a manner consistent with the initial marketing limitations applicable to a private offering under Section 4(2) of the Securities Act."⁷ The Commission's 2003 final adopting release on § 4.13(a)(3) discusses using terms defined under the federal securities laws and following interpretations issued by the Securities and Exchange Commission ("SEC"), *i.e.*, limiting sales to an "accredited investor".⁸

Both regulations refer to the Securities Act. Under § 4.7(b) relief is available to: (1) "any registered commodity pool operator who offers or sells participations in a pool solely to

⁴ § 4.7, Exemption from certain part 4 requirements for commodity pool operators with respect to offerings to qualified eligible persons and for commodity trading advisors with respect to advising qualified eligible persons.

⁵ *See, e.g.*, 68 FR 47221 (Aug. 8, 2003) at 47224, *hereinafter* "4.13(a)(3) Adopting Release".

⁶ *See* 57 FR 34853 (Aug. 7, 1992), *hereinafter* "4.7 Adopting Release". *See also* 4.13(a)(3) Adopting Release.

⁷ 4.7 Adopting Release.

⁸ *Id.* at 47224.

qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) of that Act”; and (2) “any bank registered as a commodity pool operator . . . without marketing to the public, solely to qualified eligible persons”. § 4.13(a)(3)(i) requires that “interests in the pool for which a CPO is seeking to claim relief thereunder must be exempt from registration under the “33 Act and may not be marketed to the public in the United States”.⁹

In other words, when the Commission adopted §§ 4.7(b) and 4.13(a)(3), it ensured that the rules were consistent with the federal securities laws and regulations. In 2011, the Commission considered rescinding § 4.13(a)(3).¹⁰ Ultimately, the Commission retained the *de minimis* trading exemption under § 4.13(a)(3) and amended it to make it applicable to swaps.¹¹

II. Harmonization with Title II of the JOBS Act, Access to Capital for Job Creators

On April 5, 2012, President Obama signed into law the JOBS Act. Section 201(a)(1) of the JOBS Act instructs the SEC to revise Rule 506 of Regulation D under the Securities Act to eliminate the prohibition against general solicitation or general advertising for offers and sales of securities made pursuant to Rule 506, provided that all purchasers are accredited investors. This amendment constitutes a substantial change to the restrictions on private placements under Regulation D. In addition, Section 201(b) of the JOBS Act amends Section 4 of the Securities Act to provide that offers and sales exempt under revised Rule 506 shall not be deemed public offerings under the federal securities laws as a result of general advertising or solicitation.

MFA believes that the CFTC regulations relating to private offerings should be consistent with Section 4 of the Securities Act and the regulations thereunder, as amended by the JOBS Act. While it is not clear to us that the first prong of § 4.7(b)—the language “offers or sells participations in a pool solely to qualified eligible persons”—prohibits marketing to the public, we would appreciate Commission clarification that an offering consistent with Regulation D would be compliant. We believe that §§ 4.7(b) and 4.13(a)(3)(i) should be consistent with Section 201(b) of the JOBS Act, and not include a provision prohibiting “marketing to the public”.

The Harmonization Rulemaking requests for comment on whether “any provisions of part 4 in addition to those identified in the proposal need to be harmonized?”¹² We believe it is extremely important for the Commission to coordinate §§ 4.7(b) and 4.13(a)(3) with section 201 of the JOBS Act and the related securities laws and regulations. Absent harmonization, the inconsistency in regulations could create a strange dichotomy where:

⁹ 4.13(a)(3) Adopting Release at 47225; and § 4.13(a)(3)(i).

¹⁰ 76 FR 7976 (Feb. 11, 2011).

¹¹ 77 FR 11252 (Feb. 24, 2012).

¹² Harmonization Rulemaking at p. 11348.

- privately-offered investment funds, that exclusively invest in securities and security-based swaps, with an investment adviser registered with the SEC would be able to provide information about their funds to the public;
- but privately-offered commodity pools, including those that trade a *de minimis* amount of commodity interests and are exempt from CPO registration under § 4.13(a)(3), would not be able to provide the same types of information to the public.

We understand that the SEC shortly will be proposing rules amending Regulation D as directed by the JOBS Act.¹³ We recommend that the Commission as part of its Harmonization Rulemaking amend § 4.7(b) by clarifying and striking language that is inconsistent with the JOBS Act as follows:

(b) *Relief available to commodity pool operators.* Upon filing the notice required by paragraph (d) of this section, and subject to compliance with the conditions specified in paragraph (d) of this section, any registered commodity pool operator who ~~offers or~~ sells participations in a pool solely to qualified eligible persons in an offering which qualifies for exemption from the registration requirements of the Securities Act pursuant to section 4(2) of that Act or pursuant to Regulation S, 17 CFR 230.901 *et seq.*, and any bank registered as a commodity pool operator 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 qualified eligible persons, may claim any or all of the following relief with respect to such pool....

We recommend that the Commission as part of its Harmonization Rulemaking amend § 4.13(a)(3)(i) by striking the language that is inconsistent with the JOBS Act or by amending § 4.13(a)(3)(i) as follows:

“Interests in the pool are exempt from registration under the Securities Act of 1933, and such interests are offered and sold *pursuant to section 4 of the Securities Act of 1933 and the regulations thereunder,*”

III. Petition for Rulemaking to Amend §§ 4.7(b) and 4.13(a)(3)(i); and Interim, Temporary No-Action Relief

In the alternative, if the Commission believes that it may not amend §§ 4.7(b) and 4.13(a)(3)(i) as part of its Harmonization Rulemaking, we respectfully petition the Commission

¹³ See SEC Sunshine Act Notice on its August 22, 2012 open meeting to consider rules to eliminate the prohibition against general solicitation and general advertising in securities offerings conducted pursuant to Rule 506 of Regulation D under the Securities Act and Rule 144A under the Securities Act, as mandated by Section 201(a) of the Jumpstart Our Business Startups Act, available at: <http://www.sec.gov/news/openmeetings/2012/ssamtg082212.htm>. See also letter from Stuart J. Kaswell, Executive Vice President & Managing Director, MFA, to Elizabeth Murphy, Secretary, SEC, dated June 26, 2012 on “Request for Comments on Regulatory Initiatives Under the Jumpstart Our Business Startups Act”, available at: <https://www.managedfunds.org/wp-content/uploads/2012/06/MFA-Comments-on-JOBS-Act-6-26-12.pdf>.

under CFTC Regulation 13.2 to amend §§ 4.7(b) and 4.13(a)(3)(i) for the reasons discussed and as recommended above. In addition, we respectfully request that the Commission grant interim temporary no-action relief to a CPO relying on § 4.7(b) or § 4.13(a)(3) from the prohibition on “marketing to the public,” provided that the interests in the exempt pool are offered and sold pursuant to section 4 of the Securities Act and the regulations thereunder.

IV. Conclusion

MFA commends the Commission’s efforts to harmonize regulations between the Commission’s part 4 regulations and those pertaining to investment advisers and investment companies/private investment funds under the securities laws. We believe the JOBS Act introduces a significant disparity between the Commission and the SEC’s regulations and respectfully urge the Commission to harmonize §§ 4.7(b) and 4.13(a)(3)(i) with the JOBS Act, the Securities Act and the regulations thereunder. In the alternative, we respectfully petition the Commission to amend §§ 4.7(b) and 4.13(a)(3)(i) to be consistent with the JOBS Act, the Securities Act and the regulations thereunder; and that the Commission grant interim temporary no-action relief to a CPO relying on § 4.7(b) or § 4.13(a)(3) from the prohibition on marketing to the public. Such a change would be consistent with Congress’s new policy directive and would coordinate the regulatory framework for the Commission and the SEC.

We would be pleased to further discuss the JOBS Act, § 4.7(b), § 4.13(a)(3) and securities regulations applicable to private funds and pools with the Commission or its staff. Please feel free to contact the undersigned or Jennifer Han, Associate General Counsel, at (202) 730-2600 for more information.

Respectfully submitted,

/s/ Stuart J. Kaswell

Stuart J. Kaswell
Executive Vice President & Managing Director,
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Managed Funds Association

Cc:

The Hon. Gary Gensler, Chairman
The Hon. Bart Chilton, Commissioner
The Hon. Jill E. Sommers, Commissioner
The Hon. Scott D. O’Malia, Commissioner
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